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Ex-ante Regulation in Digital Markets in India: Some Practical Considerations

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Abstract

Countries around the world have been perturbed by the business practices of big-tech firms, notably GAFA. Concerns have been raised about (i) fairness, (ii) contestability, (iii) innovation and (iv) transparency. Several countries have felt that they could no longer rely on standard usage of competition law which acts ex-post. They have felt the need to implement some form of ex-ante regulation to procatively address these concerns. Practices that have come under the radar include (i) self-preferencing, (ii) tying and bundling and (iii) Most Favoured Nation (MFN) clauses and across-platform parity agreements. There are also prescriptions on data portability, access and interoperatibility. India has a somewhat chequered experience with ex-ante regulation is areas such as securities, telecom, electricity and ports. Regulatory bodies have been disadvantaged by proscribed powers and capacity. They have had to work under the shadow of lack of legitimacy and have had to deal with the judicial system. These issues cloud the prospects for an ex-ante regulator in digital markets in India. The paper suggests that legislating laws on some of these issues may be a better approach.

Keywords: regulation, digital, platform, capacity, design

Draft. Do not quote.

1 Introduction

India has joined the clamour for ex-ante regulation around the world. The former chairperson of the Competition Commission of India (CCI), Ashok Kumar Gupta, announced the establishment of a Digital Markets and Data unit within the CCI, along the lines of the Digital Markets Unit (DMU) within the Competition and Markets (CMA) authority in the UK, though at this point in time there is no evidence of its existence. The Standing Committee on Finance in the Indian parliament along with the Ministry of Corporate Affairs has come out with a report on anti-competitive practices in digital markets and the Government of India has appointed a committee to submit a report on this issue. Presumably, it will decide on the course of action after reading the report. There is a fair amount of discussion on this matter in the popular press[1] and in legal circles.[2] Some have warned against setting up a new regulatory authority in haste. As a government report advises, "Setting up a new regulatory organization should not be a knee-jerk response to a specific situation or context, but a well thought-out disengagement plan of the Ministry or Department concerned to move away from writing out and implementing regulations."[3]

2 History of ex ante regulation in India

Strangely, there has been complete silence on the matter among sectoral regulators, former or present. There are several regulators who operate in diverse sectors in India. Some, like the Securities and Exchange Board of India (SEBI) and the Telecom Regulatory Authority of India (TRAI) are more often in the limelight than others. They usually engage in price regulation and deal with technical issues. There is a central electricity regulator (CCEA) with each state having its own electricity regulator. The state electricity commissions have not been very successful, given that power remains a contentious political issue. Other regulators like the Tariff Authority of Major Ports (TAMP) and the Insurance Regulatory and Development Authority of India (IRDAI) are seldom in the news. SEBI has been in the news of late because of the problems of the Adani group. This raises issues of judicial intervention in the regulatory process, an issue we will discuss later.

India has a long history of regulation but not with independent regulatory authorities (IRA). If we consider any form of interference with the market mechanism to constitute regulation then, since independence in 1947, India has been heavily regulated. The state nationalized the so called "commanding heights of the economy". These included industries like steel, railways, telecommunications, electricity, airlines, and banking. Other sectors that were not nationalized were heavily regulated. Licenses were required for entering particular industries, for expansion, for using foreign exchange. There were myriad other regulations involving labor and other inputs. Several of them still exist. Most of the regulation was carried out by bureaucrats that served under different ministries. There was also the Monopolies and Restrictive Trade Practices Act (MRTP) in 1969 which, as its name suggests, was designed to reduce

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[1] Centre sets up committee to prepare draft digital competition law, The Indian Express, February 7, 2023. Protecting Competitors: Don't impose ex-ante rules on digital platforms, The Hindu Business Line, November 4, 2022

[2] Big Tech regulation: Blanket emulation of EU law may harm India's start-ups. Policy Circle, Feb 27, 2023. https://www.policycircle.org/industry/big-tech-regulation-india-eu/

[3] Committee for Reforming the Regulatory Environment for Doing Business in India, Ministry of Corporate Affairs, Government of India, https://www.mca.gov.in/Ministry/annual_reports/DamodaranCommitteeReport.pdf

concentration of economic power among a few individuals. The task was delegated to an MRTP commission. It could be thought of as an old avatar of a modern competition authority though its practices were much more intrusive. It could also be considered as a version of an IRA. India has had other IRAs, notably the Reserve Bank of India which looked after currency matters and banking. It has existed since 1935 but was nationalized in 1949 and has since operated as the central bank.

India's experimentation with IRAs began with the liberalization program that started in the 1990s and is still work in progress. The limitations of the government-controlled economy were already apparent to many commentators. Limited efforts to liberalize were made in the 1980s but the process was much more comprehensive in the 1990s. The state faced a severe balance of payments crisis and sought a bail out from the International Monetary Fund (IMF). This came with the usual structural adjustment programs aiming to create more of a market driven economy. The "license raj", the plethora of rules binding businesses were mostly dismantled. Tariff rates were lowered, and private firms were allowed to enter into areas reserved for state owned enterprises (SOE). There was even talk of privatizing these, but, progress has been very slow. As part of the deregulation process a need for independent regulators was felt. These would, in theory, be independent from the bureaucracy and the politicians and would therefor take decisions that were economically and technically sound.

The first true IRA, that was the product of the liberalization process, was the SEBI set up in the 1992. Another was the TRAI, set up in 1997, along with the TAMP. The Central Electricity Regulatory Commission (CERC) was set up in 1998 and the IRDAI in 1999. Other IRAs such as Competition Commission of India (CCI) and the Airports Economic Regulatory Authority (AERA) were set up in the 2000s. This probably reflects the priorities of the government at that time. The latest IRA that has been proposed is the Higher Education Commission of India. An interesting facet is that SEBI, TAMP and IRDA are the only regulatory agencies located outside Delhi, the capital.

It is interesting to note the travails of these regulatory agencies as they found their feet. We will use TRAI as an example. When it was first set up the situation in the telecom sector was abysmal. Telephones were seen as a luxury and the government paid scant attention to its development. Services were offered by the Department of Telecommunications (DOT), an SOE. It was the regulator and service provider. Local call prices were kept artificially low and were cross subsidised by costly long distance and international calls. The waiting period for a connection could be as long as seven years. The government first attempted to partially liberalize the sector by separating the provision of service into three different entities: Bharat Sanchar Nigam Limited (BSNL), Mahanagar Telephone Nigam Limited (MTNL) and Videsh Sanchar Nigam Limited (VSNL). MTNL provided telecommunications services to the cities of Mumbai and Delhi, the two largest cities in India and important commercially. BSNL provided services to the rest of the country and VSNL provided international calling. They were converted into corporate bodies but were controlled by the DOT. The situation on the ground did not improve much.

The real impetus came when the government wanted to expand the network by inviting private firms to offer local services and with the arrival of mobile telecommunications. Private operators would find it difficult to compete with BSNL and MTNL since they kept prices of local calls low through cross subsidization. The suggestion was to rationalize local call prices so that they reflected the cost of service, but private operators would not trust the DOT to get the prices right. Thus, a telecom regulator was proposed to set prices. Initially, the DOT proposed that the regulator be a part of DOT but the government went ahead and instituted the TRAI Act. Mobile communications provided a different set of challenges. The government was loath to award the provision of mobile services to BSNL. It wanted private operators to come in, but the issue of prices again came up and a regulator was mooted.

TRAI came under fire almost immediately from two sources. The TRAI Act stipulated that matters of policy were outside the ambit of the regulator and since prices were a subject of policy the TRAI could not regulate it. This is a unique situation where one arm of the government, the DOT, sued another arm of the government, the regulator. The other issue is trickier. The question was how the government could hive off some of its sovereign functions to an independent body. This raises issues of legitimacy and accountability. The regulator is unelected, at least in India, and though technically it reports to the parliament, scrutiny is minimal. Another issue was that the regulator combined both administrative and judicial functions. It would make its own laws and then implement and adjudicate on them. Judges felt that this went against the principle of separation of powers which is a part of the constitution. It was felt that the chairperson of the regulatory body should be a judicial person, preferably a retired judge. The resolution to this impasse came through the constitution of the Telecom Dispute Settlement Appellate Tribunal (TDSAT) to which decisions of the TRAI could be appealed to, which would be headed by a retired judge. In fact, the first chairperson was Justice S. S. Sondhi, a retired high court judge.

The telecommunications sector has grown by leaps and bounds. Over the years coverage has increased dramatically, even though rural coverage lags. Prices for mobile calls were, at one time, the lowest among the world. However, the sector has seen turbulent phases. At the very start mobile phone services firms bid high amounts overestimating the size of the market. Soon they all faced default as they couldn't pay their license fees. It seemed that the cellular mobile services industry would be stillborn. The government rushed to the rescue and allowed firms to pay their license fees over time as a share of their revenues. Another such phase occurred with the termination of all 2G licenses by the Supreme Court citing irregularities in their award. Thus, both the government and the judiciary have been quite ready to involve themselves in the telecom sector to its benefit or detriment.

The government has also kept the TRAI's powers quite minimum. It can only regulate prices and interconnection rates. It has over the years practiced forbearance in terms of prices of mobile services. How it will act now that there are virtually only two operators in the mobile services sector will have to be seen. It has no powers over licensing, which is done by the DOT, and over spectrum allocation, which is done by the Wireless Planning and Coordination Wing (WPC), a part of the DOT. In some matters, such as reserve prices for spectrum auctions it can make recommendations, which the DOT may accept. Thus, most of its regulatory activity is about technical matters. It has, in the past, gotten into a fracas with the CCI over anti-competitive clauses in its regulations. The CCI felt that it was encroaching into its turf. This might serve as a foreboding of the problems an ex-ante regulator for digital markets might face.

2.1 Regulators and the government

As we have noted in the case of the TRAI its powers were limited. Governments have been reluctant to cede too much power to IRAs. This may be due to misgivings about the creation of regulatory institutions that would subtract from the powers of ministers. Alternatively, it could be the result of bureaucrats trying to protect their kingdoms. Either way, Indian regulators have not been very independent, deliberately, through the design of these institutions or because of their dependence on the government for meeting their expenses.

The following excerpt is from Section 25 of the TRAI Act (1997). Other such acts also have similar provisions.

> *25. Power of Central Government to Issue Directions:*
> *(1) The Central Government may, from to time to time, issue to the Authority such directions as it may think necessary in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.*
> *(2) Without prejudice to the foregoing provisions, the Authority shall, in exercise of its powers or the performance of its functions, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:*
> *Provided that the Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.*
> *(3) The decision of the Central Government whether a question is one of policy or not shall be final.*

Since the terms public order, decency or morality are open to interpretation the government can invoke Section 25 to overturn any decision of the TRAI. An even stronger problem is that in matters of policy it can issue any directions it likes. If the government did not like any of the regulations passed by the TRAI, it could simply overturn it by saying it is a matter of policy. The Electricity Act (2003) suffers from the same infirmity. It says:

> *Section 75. (Directions by Central Government to Authority):*
> *(1) In the discharge of its functions, the Authority shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing.*
> *(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.*

In electricity there are state regulators but the situation in most states is dire. In theory the regulator can set the prices at which the state supplier (the state electricity board) buys electricity from electricity generators, but governments often mandate free power for farmers which complicates their enforcement powers. Thus, political imperatives can stand in the way of regulators fulfilling their mandates. This serves as a precautionary example for expecting too much from a regulator. They are never insulated from political compulsions whatever their powers may be under the law.

Another issue is that the leadership, typically a chairperson and some members, are retired government administrators. Most of them would have been working in Delhi for a significant portion of their career. After retirement many of them would have to move back to their hometowns or move out of Delhi. Government officers are provided subsidized housing in central areas and other amenities, which they would not receive after retirement. Appointment to a regulatory commission can extend their tenure in Delhi by a few years. It is also accompanied by a handsome salary and other benefits and provides access to the corridors of power. It is also the case that it is difficult to find suitable candidates from the private sector. Consequently, in the TRAI and other regulators there is a tendency to hire senior administrators from the government including the BSNL or the DOT. So, we may be faced with a situation where a TRAI chairperson has to deal with his old firm and colleagues. This is not to suggest that retired bureaucrats cannot be independent or lack the expertise. They will have reached their positions in the government through competitive examinations and possess years of administrative experience. However, they may suffer from a bureaucratic mentality and may not fully understand how the private sector functions.

A different problem arises for the rest of the staff. They are mostly sent on deputation from other parts of the government and are required to return to their original organizations after their tenure is over. So, they may have poor incentives for building expertise since it may not serve any purpose. Even if they do put in the necessary effort the organization loses their expertise when they go back. So most regulatory bodies must constantly rejuvenate themselves. They must run very hard to stay at the same place. Another problem is that some of the staff whose training is valued by the private sector find jobs there after their tenure. This is true of the CCI. In this case the state contributes to their human capital and the private sector benefits.

2.2 Regulators and the judiciary

Regulatory decisions are open to scrutiny by the judiciary. In fact, at their inception the judiciary were against regulatory agencies being headed by non-judicial persons. It felt that since regulators were performing judicial functions, evaluating evidence, and rendering judgments and possibly even punishing people, these bodies should be headed by a someone with a background in law, possibly a retired judge. This issue was ultimately solved by establishing an appellate body in the form of a tribunal for several regulatory agencies. Thus, the orders of regulatory agencies could be appealed before these tribunals before reaching the high court or possibly the supreme court. So the wheels of regulatory action can grind very slowly. Recently, the government has abolished all sectoral tribunals and concentrated them into a single tribunal, the National Company Law Tribunal (NCLT), slowing down the process even more.

There seem to be two problems with the judicial process. The first is that some of the issues that lawyers and judges have to deal with can be technically complex. There should be lawyers well versed in regulatory matters and benches of the appropriate court that have the required expertise. This will be especially true for litigation regarding digital markets which will inevitably find its way to the courts. The second issue has to do with a lack of a proper administrative law. Unlike the USA there is no administrative procedures act. Several commentators have argued that regulatory agencies are better suited for countries that follow administrative law rather than countries that follow common law. Be that as it may the problem is that there are no standard processes that regulatory agencies are required to follow to bestow legitimacy to their decisions. Some indulge in public consultations while others do not. Some even provide detailed explanations and allow aggrieved entities to a hearing. Consequently, issues often end up in courts, which adjudicate based on constitutional rights. There, the issue of whether a decision was technically correct is often sidestepped. Given the contentious issues an ex-ante regulator of digital markets may be faced with they will likely meet with the same fate.

3 CCI's cases with digital markets

The CCI has evaluated cases involving players in the digital markets. Digital markets can be broadly defined and thereby encompass many types of activities. We restrict our analysis to two digital markets that are (a) highly visible in India, (b) affect large populations of digitally enabled consumers and producers, and (c) have attracted scrutiny from the CCI on multiple occasions. The two digital markets – or even more broadly, spheres of digital economic activity – that we look at are ecommerce marketplaces, and mobile operating systems & related services.

3.1 Ecommerce

Historically, retail trade in India has been unorganized. Millions of small businesses operating out of small, crowded, dusty premises have served the retail needs of India's vast population. These small enterprises have largely operated in the informal sector, keeping scant records, and serving retail markets at the neighborhood scale. There was organized retail, in malls and stand-alone showrooms, but this was restricted to large urban centers (e.g., Mumbai, Delhi), and specific goods (e.g., branded fashion, electronics, and white goods). Organized retail comprised a small percentage of the total Indian retail market.

When Flipkart started in 2007[4], this was the retail milieu that it faced. It was an Amazon clone for the Indian market, starting operations – like Amazon in the US – in online book delivery. Also, like Amazon, it soon pivoted to an ecommerce marketplace model. An early competitor, Snapdeal, was established in 2010[5], and Amazon itself entered India in 2013[6]. These companies were well-funded, whether through investors (e.g., Flipkart, Snapdeal) or from internal sources (e.g., Amazon). They were important players in a larger narrative about India as a destination for foreign investment in digital markets. They were highly visible because of advertising and marketing, as well as reams of media coverage. They were locked in fierce competition – with each other and other retailers – and sought to increase market share and consumer acceptance through deep discounting and other business practices that would come under scrutiny by the CCI in the future.

Existing players, consumers, and regulators watched the rise of ecommerce in India – with Flipkart and Amazon at the forefront – with interest. Existing retailers – organized or not – were aware of the wrenching reorganization that ecommerce had wrought, as well as the unparalleled commercial opportunities it provided, in other geographies. Digitally savvy consumers were enthralled by the convenience of ecommerce, but the more percipient among them were aware of arguments against its unparalleled growth because of damage to small business and the changing geography of retail. Regulators, including the CCI as we shall see below, were willing to adopt a wait-and-watch approach.

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[4] Yourstory.com (2023, May 17). *Flipkart*. Retrieved from yourstory.com: https://yourstory.com/companies/flipkart

[5] Snapdeal.com. (2023, May 17). *About Us.* Retrieved from Snapdeal.com: https://www.snapdeal.com/page/about-us

[6] ICMR. (2015). *Amazon's foray into India: Competing in an emerging market.* Hyderabad, India: IBS Center for Management Research.

3.1.1 Mohit Manglani vs M/s Flipkart India Private Limited & Others, 2015

It did not take long for cases against ecommerce marketplaces to find their way to the CCI. In 2014, a case was brought against Flipkart, Snapdeal, Amazon, and other ecommerce portals[7]. Using the CCI's terminology, Manglani was the Informant and Flipkart et al the Opposite Parties ("OPs"). This was scarcely a year after Amazon entered India. The allegations concerned:

1. Exclusive agreements between the ecommerce marketplaces and sellers of goods and services
2. Hoarding (i.e., creation of artificial scarcity) with the intent to create product hype
3. Restraint of trade, whereby consumers cannot negotiate pricing, delivery, and other aspects of an online sale

It was common practice at the time for ecommerce marketplaces to sign deals with manufacturers of popular goods – smartphones being a prominent example – that would grant exclusivity in online sales. The Informant, Mohit Manglani, for example, refers to a deal between Flipkart and Rupa Publications, whereby Flipkart would be the only online seller of *Half Girlfriend*, the much-anticipated new book by Chetan Bhagat, an Indian writer of popular fiction. The Informant further proposed a relevant market definition at the level of an individual product – whereby Half Girlfriend would comprise its own market. This meant that Flipkart would have a monopoly on online sales of Half Girlfriend and thereby be in a dominant position.

The OPs refuted the allegations, noting *inter alia* that substitutability is typically a consideration in defining relevant markets: other books would be substitutes to Half Girlfriend based on genre, language, or other classifications. They contended that online and offline sales were not separate relevant markets and observed that online retail was less than one percent of total retail in India. Finally, they noted that exclusivity was only restricted to online sales: consumers could always purchase the goods in question in brick-and-mortar outlet. On all these grounds, exclusivity agreements could not have an Appreciable Adverse Effect on Competition ("AAEC").

While disagreeing with the OPs' position that the exclusivity agreements were not in fact exclusive, the CCI identified the crux of the matter: Vertical agreements of the type between Flipkart and Rupa Publishers were not illegal per se. It remained to be demonstrated, therefore, that such agreements had an AAEC. This would require assessment of entry and exit barriers, exclusion or restraint of competitors, consumer harm, and other factors.

On consideration of these factors, the CCI concluded that such vertical exclusivity agreements did not constitute an AAEC. They disagreed with the Informant's position that relevant markets be defined at the product-level. They did not find the OPs to be dominant and therefore concluded that there was no contravention of The Competition Act.

The ecommerce marketplaces were thus able to see off an early legal challenge to their business practices. It should be noted, however, that this was not a sophisticated challenge, based on

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[7] Case No. 80 of 2014 - Mohit Manglani vs M/s Flipkart India Private Limited & Others, (Competition Commission of India April 23, 2015)

sharp understanding of industrial organization theory, or a deep understanding of the business model of ecommerce marketplaces.

3.1.2 All India Online Vendors Association vs Flipkart India Private Limited & Others, 2018

A couple of years after successfully seeing off one legal challenge[8], Flipkart found itself in front of the CCI again[9]. This time, the Informant was the All India Online Vendors Association ("AIOVA"), an umbrella body of third party sellers on ecommerce marketplaces. Flipkart India Private Limited ("Flipkart India") and Flipkart Internet Private Limited ("Flipkart Internet") were the OPs. Flipkart India was a wholesaler. Flipkart Internet operated the ecommerce marketplace and collected platform fees from sellers.

AIOVA's concerns revolved around restraint of trade arising from arrangements between the Flipkart entities and firms like WS Retail Services Private Limited ("WS Retail"). As per the allegations, Flipkart India sold goods to firms like WS Retail at a discounted price, which allowed such firms to sell cheaply on the ecommerce platform owned by Flipkart Internet. This was supposedly predatory and only possible because of funding from investors. Further, some of the discounted goods were supposedly private labels owned by Flipkart. In concert, these practices allegedly foreclosed the relevant market to third party suppliers on the Flipkart marketplace. AIOVA proposed the relevant market as services provided by online marketplaces for selling goods in India.

The OPs refuted the allegations. They submitted that they were engaged in two distinct businesses with different markets, end-consumers, and characteristics. As a wholesaler, the relevant market for Flipkart India would be the business-to-business ("B2B") market. The relevant market for Flipkart Internet was proposed as the online + offline retail market, i.e., wider than proposed by the Informant.

The CCI's own market definition mirrored the Informant's: the relevant market was "services provided by online marketplace platforms for selling goods in India". Within this market, the CCI found that Flipkart – with a 40% market share – was not dominant. Therefore, the question of abuse of dominance did not arise and neither did any contravention of The Competition Act. In concluding its judgment, the CCI made comments that illuminate its thinking at the time.

1. It noted that the ecommerce marketplace model was nascent in India. It therefore bore watching, but any intervention could stifle innovation.
2. Its decision – that the commercial arrangements identified by the Informant did not constitute abuse of dominance – equally applied to Amazon.
3. The role of WS Retail was moot since it did not sell on Flipkart as of the date of the CCI's decision.
4. Finally, the CCI recognized Flipkart's submission that it does not impose restraints on resellers like WS Retail: these entities were free to source from non-Flipkart entities and were free to sell through non-Flipkart channels. Further, any trader had the option of sourcing from Flipkart India.

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[8] Case No. 80 of 2014 - Mohit Manglani vs M/s Flipkart India Private Limited & Others, (Competition Commission of India April 23, 2015)

[9] Case No. 20 of 2018 - All India Online Vendors Association vs Flipkart India Private Limited & Others, (Competition Commission of India November 06, 2018).

Once again, the CCI sided with the ecommerce marketplaces. This time, it provided background to its decision. One concern seems to have been that the CCI's decisions should not stifle innovation: a laudable and discerning sentiment from a regulator.

3.1.3 Delhi Vyapar Mahasangh vs Flipkart & Amazon, 2020

Like the AIOVA, the Delhi Vyapar Mahasangh ("DVM") is a traders' association. It brought a case against Flipkart and Amazon in front of the CCI in 2019[10]. DVM was thus the Informant, and Amazon and Flipkart (including all their respective related parties) were the OPs. The substance of the DVM's complaint was similar to that of AIOVA[11]. Perhaps recognizing the result in the former case, the DVM's position was more substantively fleshed out. There were also elements of the complaint in Mohit Manglani vs M/s Flipkart India Private Limited & Others, (2015)[12].

As with AIOVA vs Flipkart (2018), the core issue was the vertical arrangement between ecommerce marketplaces and their preferred sellers, whereby the OPs provided discounted goods and inventory (in the form of private labels) to their preferred sellers for resale on the ecommerce marketplaces at low prices. This vertical arrangement allegedly led to foreclosure of third-party sellers from these marketplaces. The problematic components of the vertical arrangements, as identified by DVM were:

1. Deep discounting (e.g., Flipkart to Omnitech Retail, Amazon to Cloudtail India and Appario Retail).
2. Preferential listing of preferred sellers, whereby their goods show up earlier in search results.
3. Identification of preferred sellers with labels like "Assured Seller" (in case of Flipkart) or "fulfilled" (in case of Amazon).
4. Private labels, which are routed through preferred sellers.
5. Exclusive agreements between the ecommerce marketplaces and sellers of popular goods, like smartphones.

The first four complaints were substantively like those raised in AIOVA vs Flipkart (2018). The last was raised in Manglani vs Flipkart et al (2014). DVM alleged that the practices listed above amounted to abuse of dominance because of the joint market power of Flipkart and Amazon – these marketplaces allegedly had a joint market share of 89 percent. These practices constituted restraint of trade because they prevented competitors from establishing their own marketplaces; and the joint market power made sales through other online distribution channels difficult.

At the outset, the CCI noted that the Competition Act does not provide for investigation into collective or joint dominance. That said, the CCI did find grounds for further investigation of whether Amazon and Flipkart were behaving anti-competitively. The main elements of its reasoning were as follows:

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[10] Case no. 40 of 2019 - Delhi Vyapar Mahasangh vs Flipkart & Amazon, (Competition Commission of India January 13, 2020).
[11] Case No. 20 of 2018 - All India Online Vendors Association vs Flipkart India Private Limited & Others, (Competition Commission of India November 06, 2018).
[12] Case No. 80 of 2014 - Mohit Manglani vs M/s Flipkart India Private Limited & Others, (Competition Commission of India April 23, 2015)

1. Large ecommerce marketplaces benefit from strong network effects. Large numbers of buyers and sellers reinforce each other, leading to market power. New entrants will therefore find it difficult to competitively constrain incumbents.
2. It has been alleged that preferred sellers are extensions of ecommerce marketplaces. They may be third parties with respect to ownership but are locked into the ecommerce business model and effectively serve as "proxies" of the marketplaces.
3. Exclusive tie-ups between phone companies and ecommerce marketplaces are a significant source of business (Flipkart and Amazon had 67 and 45 mobile phone launches respectively in 2018)
4. Funding of deep discounts, often in conjunction with exclusive tie-ups warrants further investigation. Often, online phone launch prices were significantly lower than offline ones.
5. Preferential listing in conjunction with deep discounts and exclusive tie-ups warrant further investigation on grounds of restraint of trade.

Further information on this case is not in the public record. Presumably, it remains under investigation. The anticompetitive concerns were similar to those raised in the earlier cases (see Section 3.1.1 and Section 3.1.2). Those cases were dismissed, but this case has been allowed to proceed. It indicates a shift in the thinking of the CCI about the operations and impacts of ecommerce marketplaces. Of note is the reference to network effects: something that had been missing in the earlier judgments.

3.1.4 Lifestyle Equities & Co. vs Amazon Seller Services Private Limited & Co., 2020

This case is interesting for two reasons. First, it limits the applicability of DVM vs Amazon & Flipkart (2020) as a precedent. Second, this is the first time that we have an ecommerce marketplace case brought before the CCI by non-Indian (Dutch) entities.

Why would Dutch companies pursue a competition case against Amazon in India? This is just speculation, but we note that the CCI is part of a global trend into investigation of digital markets from a competition perspective. Therefore, decisions in India could possibly have ramifications for legal thinking on digital markets in other jurisdictions. More narrowly, a favorable Indian judgment could help similar cases between the two sets of parties in India and other jurisdictions.

Moving onto the particulars of this case[13], the Informants are Lifestyle Equities C.V. ("LECV") and Lifestyle Licensing B.V. ("LLBV"). LLBV owns the Beverly Hills Polo Club ("BHPC") brand of apparel. LECV is an operational entity. It licenses the use of the BHPC brand from LLBV, appoints sub-licensees in various regions, and manufacturers, distributors, and franchisers around the world. The OPs are two Amazon entities – one based in India, the other in the US – and Cloudtail India Private Limited ("Cloudtail"), a preferred seller. The Indian entity ("Amazon India") owns the Indian ecommerce marketplace.

The relevant market is proposed as "online fashion retail in India", within which the Informants allege that Amazon has about 31 percent market share. The allegations brought about by the

[13] Case No. 9 of 2020 - Lifestyle Equities & Co. vs Amazon Seller Services Private Limited & Co., (Competition Commission of India September 11, 2020).

Informants are similar to those in DVM vs Amazon & Flipkart (2020)[14]. A bundle of practices, including preferential listing, deep discounting, private labels, and the appointment of preferred sellers, allegedly erect barriers to entry, leading to restraint of trade and foreclosure of competition. These allegations are supported by a cursory price analysis that shows correlation between the expenditures and revenues of Amazon India. The Informants also made an additional allegation of counterfeiting, i.e., that the OPs offer counterfeits of the BHPC brand at predatory prices. The Informants have not made original BHPC products available on Amazon India.

Demonstration of harm is as follows: because of the alleged conduct of the OPs, online traffic has diverted from legitimate BHPC distribution channels to Amazon. This has led to commercial loss (lost sales) and reputation loss (as customers get fake instead of original apparel). This reputation loss has benefited competitors (e.g., US Polo Association) who distribute through Amazon preferred sellers. These losses are compounded by preferential treatment given to preferred sellers and private labels. Evidence of preferential treatment is that Amazon's private labels have higher rankings and reviews than other apparel brands offered on Amazon.

Drawing on past cases, the CCI defined the relevant market as "market for services provided by online platforms for selling fashion merchandise in India." They noted that online fashion sales are through horizontal platforms like Amazon and Flipkart and vertical platforms like Myntra and Ajio. As per contemporaneous market research, the market share of large horizontal platforms was estimated at 35 percent. Given these numbers, the CCI concluded that Amazon was not a dominant player in the relevant market. The CCI further noted that counterfeiting was outside it's remit since the OPs were not market-dominant. On these grounds, the CCI declined to pursue the matter further.

Perhaps cognizant of the scrutiny that this decision would attract, the CCI also explained the differences between this case and DVM vs Amazon & Flipkart (2019), where it had asked for further investigation. These are summarized below:

1. Online marketplaces for fashion and smartphones are different. The former has vertical marketplaces, which constrain the behavior of the large horizontal marketplaces. The latter does not.
2. There were no platform-specific exclusive launches of fashion products, which means that market power concerns because of exclusive tie-ups do not arise.

3.1.5 *Suo Motu* investigation into allegations pertaining to private label brands related to Amazon, 2022

In response to a Reuters report[15], the CCI initiated a *suo motu* investigation into whether Amazon ran "a systematic campaign of creating knockoffs and manipulating search results to

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[14] Case no. 40 of 2019 - Delhi Vyapar Mahasangh vs Flipkart & Amazon, (Competition Commission of India January 13, 2020).
[15] Kalra, A., & Stecklow, S. (2021, October 13). *Special Report: Amazon copied products and rigged search results to promote its own brands, documents show.* Retrieved from Reuters: https://www.reuters.com/legal/litigation/amazon-copied-products-rigged-search-results-promote-its-own-brands-documents-2021-10-13/

boost its own product in India". As part of this investigation, it directed Amazon Seller Services Pvt. Ltd. ("ASSPL") to submit certain documents.

In response, ASSPL stated that the Reuters report was mistaken on multiple counts, including in its understanding of Amazon's India business. In summary:

1. Amazon could not be responsible for creating knockoffs, for example, because Amazon did not manufacture its private label products.
2. Private label products are manufactured by third parties under license from Amazon US entities. These third parties are responsible for product quality, pricing, and after-sales service.
3. ASSPL has no incentive to give preferential treatment to private labels since this works against Amazon's role as an ecommerce marketplace.
4. ASSPL also does not favor private labels in its listings. However, it does offer sponsored links. These are available to all sellers on the Amazon marketplace.
5. Amazon does not use non-public seller-specific data as alleged in the Reuters report. It does use Aggregated Seller data. There were no violations of Amazon's Seller Data Protection Policy

Based on Amazon's submission, the CCI decided not to pursue this investigation further. The CCI specified that this did not preclude future investigation of Amazon. Neither did it have any bearing on ongoing proceedings against ASSPL before the CCI or any other court.

3.1.6 Commentary

The cases described above provide insights into the treatment of ecommerce marketplaces in India from a competition perspective. These include:

1. Ecommerce marketplaces have invited fierce scrutiny and criticism from the outset. This is because of the ramifications for consumers[16] and the retail trade[17]. There have been multiple calls for regulation.
2. The CCI has attempted to keep a hands-off approach because it does not want to stifle innovation with excess regulation. However, its concerns over fair competition in ecommerce marketplaces have grown over time. Pivotally, it has asked for investigation into deep discounting, private labels, exclusive deals, and other behaviors suspected of impeding competition[18].
3. At the same time, the CCI's investigations have retained a narrow focus. The CCI did not, for example, extend its investigation to the online sales in the apparel sector[19].
4. The quality of discourse around the operations and economic ramifications of ecommerce marketplaces has improved over time. In early cases, Informants struggled to articulate why they thought ecommerce marketplaces were susceptible to abuse of

[16] See Case No. 80 of 2014 - Mohit Manglani vs M/s Flipkart India Private Limited & Others, (Competition Commission of India April 23, 2015).

[17] See Case No. 20 of 2018 - All India Online Vendors Association vs Flipkart India Private Limited & Others, (Competition Commission of India November 06, 2018) and Case no. 40 of 2019 - Delhi Vyapar Mahasangh vs Flipkart & Amazon, (Competition Commission of India January 13, 2020).

[18] See Case no. 40 of 2019 - Delhi Vyapar Mahasangh vs Flipkart & Amazon, (Competition Commission of India January 13, 2020)

[19] See Case No. 9 of 2020 - Lifestyle Equities & Co. vs Amazon Seller Services Private Limited & Co., (Competition Commission of India September 11, 2020).

dominance[20]. This was not a problem in later cases[21]. The CCI too only referred to network effects in later judgments[22].

5. The improvement in the quality of discourse mirrors global developments. Theoretical understanding of two-sided markets has lagged the growth in their prevalence and importance.

3.2 Mobile operating systems and related services

Amazon may have avoided penalties in India for abuse of dominance in ecommerce marketplaces. Another large US tech firm, Google, has not been so fortunate. In recent decisions, Google has attracted two large fines from the CCI. One was for abuse of dominance in the market for licensed mobile operating systems and related markets. The other was for abuse of dominance in the markets for app stores and payment processing. Apple, too, was investigated for similar behavior in similar markets. It did not attract a penalty.

Given the ubiquity of smartphones, almost all of which are powered by the Android operating system ("OS") developed by Google, or the iOS developed by Apple, the allegations of market dominance considered in the CCI's decisions have also been given voice in other jurisdictions. Indeed, in their facts and circumstances, these cases bear similarities to Epic Games, Inc., vs Apple, Inc.[23], which recently went through appeal in the United States Court of Appeals for the Ninth Circuit Court for the Northern District of California, and the European Commission ("EC") judgment on abuse of dominance by Google in the mobile Android ecosystem[24]. The US case went largely in Apple's favor. The EC, on the other hand, fined Google EUR 4.34 billion for tying behavior.

We discuss the three Indian cases concerning mobile phone ecosystems below.

3.2.1 Umar Javeed & Others vs Google LLC & Google India Private Limited, 2022

Umar Javeed and two other individuals brought a case against Google before the CCI in 2018. They accused Google of using its dominance in certain markets in the smartphone and online consumer ecosystems to foreclose or restrain competitors and thereby reinforce its dominance. The tools used to assert and maintain its dominance were a set of licensing agreements that all smartphone manufacturers (hereafter, original equipment manufacturers or "OEMs") had to sign with Google if they wished to install Android OS and / or popular Google apps (e.g., Gmail, Youtube, Google Maps) on the smartphones and tablets that they were manufacturing. The licensing agreements, taken in their entirety, effectively prevented the OEMs from having commercial relationships with potential competitors to Google in the OS, App store, general search, and online video hosting markets. The licensing agreements allowed Google to impose

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[20] E.g., Case No. 80 of 2014 - Mohit Manglani vs M/s Flipkart India Private Limited & Others, (Competition Commission of India April 23, 2015) or Case No. 20 of 2018 - All India Online Vendors Association vs Flipkart India Private Limited & Others, (Competition Commission of India November 06, 2018).

[21] See Case No. 9 of 2020 - Lifestyle Equities & Co. vs Amazon Seller Services Private Limited & Co., (Competition Commission of India September 11, 2020).

[22] E.g., Case no. 40 of 2019 - Delhi Vyapar Mahasangh vs Flipkart & Amazon, (Competition Commission of India January 13, 2020)

[23] Cases No. 21-16506 & No. 21-16695 - Epic Games, Inc., vs Apple, Inc., (United States Court of Appeals for the Ninth Circuit April 23, 2023).

[24] Case AT.40099 - Google Android Antitrust Procedure under Council Regulation (EC) 1/2003, (European Commission July 18, 2018).

penalties on OEMs for breach-of-contract. These consisted – in some form or another – of a withdrawal of permission to use any Google products. Given the wide use and consumer acceptance of these products, such a withdrawal of permission could destroy an OEM's smartphone and tablet manufacturing business. The licensing agreements – in effect – enforced a tying arrangement, whereby if an OEM wished to use a specific Google product, they were forced to use other Google products as well. They also restrained trade and commerce, because the OEMs were prevented – through threat of penalty – from having commercial relationships with potential competitors to Google.

The web of licensing arrangements was uncovered by the CCI during their investigation. The commercial relationship between an OEM and Google began with the OEM's decision to use the Android OS on their devices. If an OEM decided to use Android, they had two options. They could either use Android with Google Mobile Services ("GMS") or Android without GMS. GMS is a bundle of Google apps and Application Program Interfaces ("APIs"). APIs allow apps (by Google or otherwise) to communicate with each other and with the Android OS.

If an OEM decides to use Android without GMS, they receive a barebones implementation of Android. They also cannot install any products included in the GMS product bundle. Neither can they use the Android name or logo, which are the property of Google LLC, one of the OPs in this case. An OEM using Android without GMS therefore cannot install Gmail or the Google Play app store or the Google Search app. They cannot even mention that their device is powered by Android OS. As OEMs and other mobile OS developers, including Microsoft and Amazon, have recognized, consumers today only purchase iOS or Android devices. If they do not buy an Apple product, consumers today expect Android devices with the common Google products. Therefore, OEMs tend not to use Android without GMS. No access to popular GMS products would likely lead to commercial failure.

If an OEM decides to use Android with GMS, then they must sign additional licensing agreements, including the Mobile Application Distribution Agreement ("MADA"), the Anti-Fragmentation Agreement ("AFA"), the Android Compatibility Commitment Agreement ("ACC"), and the Revenue Sharing Agreement ("RSA"). It is this set of agreements that the Informants allege enable anti-competitive behavior by Google.

The core requirement of MADA is that the OEM must install GMS as a bundle. In other words, if it wants to install one GMS app (e.g., Gmail), it must install all GMS apps. MADA then specifies the placement of Google apps on the device's screen. The Google search widget, the Google Play app store, and folder labelled "Google" and carrying GMS apps must, for example, be installed on the home screen. MADA is important because it provides access to the GMS. MADA be terminated if the OEM is found to breach other agreements it has signed with Google, such as the AFA / ACC. OEMs such as Xiaomi have noted that MADA effectively prevents them from installing third-party app stores on their devices.

Google introduced the AFA in 2008-09 and the ACC in 2017. Since the two agreements overlap in terms and conditions, they are typically read together. Google's rationale for the AFA / ACC is that it defines a baseline implementation of Android that is compatible with third party apps. Key terms of the AFA / ACC are not in the public domain and have indeed been redacted from the public version of the CCI's decision on this case. It can be pieced together however, from publicly available information, that what the AFA / ACC does is prevent OEMs from manufacturing devices that are not Android compatible. *Inter alia*, OEMs are restrained from manufacturing devices based on Android forks, which are modified versions of the open source, barebones version of Android.

Since the validity of MADA is tied to the validity of AFA / ACC, this means that OEMs that manufacture devices based on Android forks cannot install any GMS apps. This is a wide-ranging condition. Suppose an OEM that manufactures devices with Android with GMS decides to manufacture devices with Android forks. This OEM will have violated AFA / ACC, making MADA invalid. Therefore, the OEM would then have to stop installing GMS on all its devices! Even the ones built on the Google-approved version of Android! In effect, all OEMs are given a choice: either use Android with GMS or Android forks without GMS. One cannot do both. If an OEM uses an Android fork on one device, it cannot use GMS on any device in its portfolio. OEMs respond by using Android with GMS on all their devices.

The restrictions on the adoption of Android forks – implemented through AFA / ACC – have had real world consequences. A prominent example was the Fire OS, which was an Android fork developed by Amazon. The AFA made it commercially unviable for established OEMs like Samsung from exploring the production of devices based on Fire OS. Without widespread adoption by OEMs, Amazon was unable to convince app developers to develop apps specifically for the Fire OS (since this was an Android fork, the Google Play app store could not be installed on Fire OS devices). Without a well-stocked app store, consumers did not want to purchase Fire OS devices. In the end, Amazon failed to make inroads into the mobile OS space.

The RSA plays a similar role to AFA /ACC, but for a different set of Google products. While the AFA / ACC forecloses Android forks like the Fire OS, the RSA prevents OEMs from installing third-party products that compete with Google Search and Google Assistant. If OEMs install such products, then they lose revenue share payments for all "Android with GMS" phones in their portfolio. Although not publicly shared, these payments are expected to be substantial. The RSA is important for Google because it ringfences its mobile search business, which is a significant revenue stream.

None of Google's actions would be anticompetitive if it were not dominant in its markets. If the relevant markets were contestable, then OEMs could respond to the strenuous conditions in Google's licensing agreements by working with Google's competitors. The CCI therefore began by defining the relevant markets and assessing Google's dominance in these. The CCI defined five relevant markets.

1. Market for licensable OS for smart mobile devices in India
2. Market for app stores for Android mobile devices in India
3. Market for general web search services in India
4. Market for non-OS specific mobile web browsers in India
5. Market for online video hosting platforms ("OVHPs") in India

They found Google to be dominant in each of these markets through market share analysis. In each of these markets Google products (respectively, Android OS, Google Play, Google Search, Chrome, Youtube) were found to have overwhelming market shares. Further, Apple products were not found to constrain their Google counterparts. Consider the iOS, which is non-licensable. The CCI determined that iOS could not constrain Android in India because of its low market share and pricing strategy. High-priced iPhones were not substitutes for Android phones, especially in the much lower-priced mass market.

Once Google was found to be dominant in the relevant markets, the CCI proceeded to determine whether Google was indeed abusing its dominance in these markets as alleged by the informants. Summarizing, the CCI found that:

1. MADA ensured prominence and salience for the Google search app and the Chrome browser. Given patterns of consumer behavior, which are characterized by inertia and familiarity, this ensured the dominance of Google's search services. MADA also ensured prominence and salience for YouTube. This ensured Google's dominance in the OVHP market. Both products are major sources of revenue for Google
2. Mandatory preinstallation of GMS under MADA was an unfair condition imposed on OEMs.
3. AFA / ACC eliminated distribution channels for competitors to Android OS by reducing the incentives of OEMs to consider Android forks.
4. As if MADA were not enough, RSA further ensured the dominance of Google's search services by preventing the preinstallation of competing search engines.
5. Google used its agreements and its dominant position in the relevant markets to perpetuate its dominance within and across these markets. Dominance in the app store market, for example, helped protect Google's dominance in the mobile web browser market.

These were clear instances of abuse of dominance because of which the CCI imposed a fine and required that Google implement specific remedies. The fine was set at 10 percent of average relevant turnover over three financial years (FY2018-19 – FY2020-21) and came to INR 1337.76 crores (approx. USD 162 million). The remedies included:

- Unbundling: OEMs should be allowed to pick and choose the GMS apps they want to install
- Removal of restraints: Google shall not impose anti-fragmentation obligations on OEMs, who will be free to manufacture / develop Android forks
- Removal of restraints: Consumers shall be allowed to install their default search engine during initial device setup
- Removal of exclusion: Google shall not deny access to Play Service APIs to ensure interoperability with Android forks
- Removal of ties: Licensing of the Play Store shall not be linked to pre-installation of Chrome, Google Search, and other Google products

3.2.2 XYZ (Confidential) vs Google LLC & 4 more OPs, 2022 and two more cases

In a judgment where three cases were tried together (XYZ (Confidential) vs Google LLC & 4 more OPs, 2022; Match Group, Inc. vs Google LLC & 4 more OPs, 2022; Alliance of Digital India Foundation vs Google LLC & 4 more OPs, 2022), the CCI considered allegations of anticompetitive behavior by Google in the operation of Google Play (its Android App store) in India. Each case had the same five OPs: Alphabet, Inc., Google LLC, Google Ireland Limited, Google India Private Limited, and Google India Digital Services Private Limited. The OPs are group companies of Google and thus related to each other.

Like in Umar Javeed & Others vs Google LLC & Google India Private Limited (2022) – see Section 3.2.1 for details – the allegations concern tying behavior and restraint of trade. However, the milieu is different as are the affected parties. Whereas in the former case, there was concern about policies surrounding the installation of Android OS and GMS, in this set of cases, concerns were raised about Google Play app store policies. As far as affected parties go, in the former case, the OEMs were restrained, whereas here, it is app developers, who sell their apps through Google Play who were allegedly restrained.

App stores like Google Play are essential avenues for distribution by app developers to end users. The app store that a developer selects depends on the OS. iOS developers use the Apple app store and Android developers use Google Play. As the CCI determined, Google Play is by far the main distribution channel for Android apps.

To distribute an app through Google Play, app developers must follow Play store policies. One requirement is that app developers exclusively and compulsorily use Google Play's Billing System ("GPBS"). This requirement holds not only for initial purchase of the app, but also for future in-app payments. Consider gamers, who not only purchase games through an app store, but also conduct microtransactions within a game. They may, for example, purchase special powers or avatars or other goods that improve their in-game experience. Microtransactions are often a significant source of revenue for app developers. Under Google's Play store policy, a percentage of revenue from every microtransaction goes to Google (the developer keeps the rest).

The GPBS restrictions do not end here. In addition, there are anti-steering provisions, whereby app developers are not allowed to inform their customers of other payment methods beyond GPBS. App developers cannot, for example, direct their customers to an external website that could handle in-app payments outside the ambit of GPBS. Therefore, a game developer cannot give its customers a choice of payment processors (in the Indian context, say BillPay vs RazorPay vs Google Pay).

If an app developer does not use the GPBS as directed by Google, their app will be delisted from the Play store. Delisting would result in loss of access to the vast market of Android users and potentially lead to significantly lower sales for the app developer.

In India, a significant percentage on online payments happen on the United Payments Interface ("UPI") network, a public utility developed by the Government of India. This holds for purchases in the Google Play app store and through GPBS as well. Many private players have developed apps that provide end users access to this network. Google is one such private player. Its UPI payment app, Google Pay, is among the most popular of the UPI apps. Another allegation levied against the OPs is that they have integrated Google Play seamlessly into the GPBS workflow but have not extended this privilege to other UPI apps. As a result, convenience and transaction success rates are higher when using Google Pay within the Google Play app store, than when using other UPI apps.

Given the factual background and allegations described above, the CCI defined the relevant markets as:

1. Market for licensable mobile OS for smart mobile devices in India
2. Market for app stores for android OS in India
3. Market for apps facilitating payments through UPI in India

It further determined that Google was dominant in the first two relevant markets. This is consistent with the decision in Javeed & Others vs Google LLC & Other (2022), which came to the same conclusion. In assessing whether Google abused its dominance in the first two relevant markets, the CCI concluded that:

1. Tying access to the Google Play app store to mandatory use of GPBS and the anti-steering provisions constituted restraint of trade.
2. By not requiring the use of GPBS for YouTube, Google favored its own product and discriminated against competitors: a further restraint of trade.
3. Mandatory imposition of GPBS is tantamount to foreclosing the market for in-app payment processing services to competitors. This has the potential to stifle innovation in this market.
4. Mandatory imposition of GPBS creates a barrier to entry for payment aggregators.
5. Different rules for integrating Google Pay and other UPI payment apps into GBPS is anticompetitive.

These were clear instances of abuse of dominance because of which the CCI imposed a fine and required that Google implement specific remedies. The fine was set at seven percent of average relevant turnover over three financial years (FY2018-19 – FY2020-21) and came to INR 936.44 crores (approx. USD 113.6 million). The remedies included:

1. Removal of ties: Access to the Google Play app store has been untied from the requirement to use GBPS. Further, the anti-steering provision has been removed.
2. Removal of market barriers: Google shall not discriminate against other UPI payment apps.
3. Transparency: Google shall be transparent in its communications with app developers, especially with respect to services provided and fees charged.
4. Data access: Google shall provide app developers with access to data generated by their apps (subject to necessary safeguards). It will also clearly communicate its data use policy.

3.2.3 Together We Fight Society vs Apple Inc. & Apple Distribution International Limited (2021)

The allegations in this case are similar to those levied against Google in XYZ (Confidential) vs Google LLC & 4 more OPs (2022) and those levied against Apple in Epic Games, Inc., vs Apple, Inc. (2023). In summary, the allegations are as follows:

1. App store review guidelines: The OPs present these guidelines to app developers as take-it-or-leave-it contracts. Further, these guidelines are applied arbitrarily and in an unpredictable, discriminatory fashion.
2. Tying payments with App store access: Apple owns a payment processor called In-App Purchase ("IAP"). Apple mandates that all payments within its App store, whether for app purchases or purchases of in-app content, be processed by IAP.
3. High commissions: Purchases through IAP typically attract a commission of 30 percent, although this might fall to 15 percent in some cases.
4. Anti-steering: Apple uses anti-steering provisions to prevent app developers from directing their customers to payment processing options outside the control of Apple.

In response to the allegations, Apple has responded that the relevant market is that of smartphones, within which, it only has a 0-5 percent market share. Therefore, it is not dominant in India, and therefore cannot be abusing its dominance. Further, its business model is that of providing a walled garden to its customers, within which its customers access a functional, aesthetically pleasing combination of hardware and software in an integrated ecosystem. It is responsible for all experiences within this Apple ecosystem, and this extends to the App Store. Therefore, given its business model, it is obligated to operate the App store as it does. Apple also defends its commission: not only is it necessary for maintenance of its walled garden, but also that most developers using the App store pay no commission, and most of those that do pay a commission of 15 percent. Finally, Apple directs the CCI to Epic Games, Inc., vs Apple, Inc., (2023), which covers the same ground and was decided in favor of Apple (with the exception of the anti-steering clause).

In its preliminary analysis, the CCI defined the relevant market as the *market for app stores for iOS in India*. It noted that this was consistent with its decisions in the two Google-related cases described above (see Sections 3.2.1 and 3.2.2). In making this determination, it rejected Apple's contention that the relevant market was that of all smartphones. It reasoned that iOS app developers have no alternatives, but to distribute through the Apple App store. Because of this, not only is the relevant market the *market for app stores for iOS in India*, but Apple holds a monopoly in this market.

Within this relevant market, the CCI found *prima facie* evidence of anticompetitive conduct. These were evident in the anti-steering provisions, as well as in the tying of App store access to the use of the IAP. Further, the lack of competitive constraint in the distribution of mobile apps was likely to affect the tenor of negotiation between Apple and app developers. The CCI also noted that some app categories – such as e-reader apps and multiplatform services – are allowed to use purchase apps that are not the IAP, which raises the question of discriminatory behavior.

All told, the CCI has found sufficient prima facie evidence for anticompetitive behavior by Apple to warrant further investigation. As per the public record, this investigation is ongoing.

3.2.4 Comments

Based on our discussion above and our background knowledge of the Indian smartphone market, we make the following observations:

1. The CCI is concerned about market concentration – and the possible abuse of dominance that this might engender – in the markets surrounding mobile phone ecosystems in India.
2. The CCI's investigations into abuse of dominance in mobile phone ecosystems are contemporaneous with similar investigations in other jurisdictions[25].
3. The CCI's position on abuse of dominance appears to be closer to the EC position than the US position. Like the EC, the CCI has perceived abuse of dominance and penalized it.
4. Apple has rapidly gained market share in the premium smartphone segment in India in the last couple of years. Different estimates put its market share over the last couple of

[25] See Cases No. 21-16506 & No. 21-16695 - Epic Games, Inc., vs Apple, Inc., (United States Court of Appeals for the Ninth Circuit April 23, 2023) and Case AT.40099 - Google Android Antitrust Procedure under Council Regulation (EC) 1/2003, (European Commission July 18, 2018).

years at 44[26] – 60[27] percent. We may infer that Apple is getting increasingly dominant in this market. The CCI's eventual decision in Together We Fight vs Apple[28] will therefore be increasingly important for the Indian smartphone ecosystem.

4 Structure and functions of the ex-ante regulator

There is a fair amount of literature on ex-ante regulation in digital markets. It is not our intention to cover this ground again exhaustively, but summarize the main points so that we can discuss structure and functions. We shall rely on OECD 2021 for our discussion. Other useful contributions include Dunne (2022), Kramer and Schnurr (2021) and the many references provided in OECD 2021. Lambert (2022) also provides a discussion about the institutional structure issues that we ponder upon in this paper.

If we ask what ex-ante regulations seek to achieve the answers seem to be (i) fairness, (ii) contestability, (iii) innovation and (iv) transparency. All of these sound like creditable concerns, but are nonetheless problematic. People can quibble about the definition of fairness and how to put into practice. Contestability suggests the freedom to compete but that too depends on circumstances. Not everybody has the resources to compete in some markets. The relationship between innovation and market structure is inconclusive and transparency suffers the same problems of lack of clarity.

We are on surer grounds when we discusses practices that are likely to be frowned upon. First, it is clear that the focus of regulation is going to be gatekeepers or gateways. The practices that are proscribed are (i) self-preferencing, (ii) tying and bundling and (iii) Most Favoured Nation (MFN) clauses and across-platform parity agreements. There are prescriptions on data portability, access and interoperability. Transparency is to be achieved by offering more information. There are three structures that have been proposed. The first envisages giving more powers to the competition authority to regulate digital markets. The second suggests setting up a separate authority as a regulator as in EU under the Digital Markets Act (DMA). The final approach is hybrid one followed by the British where a separate, independent unit is set up within the competition authority. It is difficult to pass judgment on any of these structures without looking at the specific jurisdictions they are meant to serve.

In terms of specific issues that are relevant to India we will rely on a market study (CCI 2022) on e-commerce conducted by the CCI. The issues highlighted are (i) platform neutrality and transparency, (ii) platform to business contract terms, (iii) platform parity clauses, (iv) exclusive agreements and (v) deep discounts. The first issue is common to most jurisdictions and have to do with the practice of self-preferencing and lack of information about rules and practices. Platform parity clauses have also been highlighted in OECD 2021. However, the other issues would not be typically considered to be in the domain of antitrust issues. For instance the situation where sellers have to provide deep discounts if they wish to have a presence on a platform is certainly onerous on sellers. However, if we adhere to the consumer welfare standard in antitrust enforcement we may choose to not address this as an issue.

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[26] Candytech. (2023, May 19). *Smartphone market share in India (2022) - Report (Xiaomi declines, Samsung gains).* Retrieved from candytech.in: https://candytech.in/smartphone-market-share-india/
[27] Kandhari, R. (2023, May 19). *Apple stores and the Indian faithful.* Retrieved from The Ken: https://the-ken.com/incitingincident/apple-stores-and-the-indian-faithful/
[28] Together We Fight Society vs Apple Inc. & Apple Distribution International Limited, Case No. 24 of 2021 (Competition Commission of India December 31, 2021).

Another document that addresses Indian concerns is the report by the standing committee on Finance on Anti-Competitive Practices by Big Tech companies. It shares the usual concerns that OECD 2021 raises. The additional features are that it proposes is a digital competition act and revamping CCI. There is no indication what direction that both of these actions should take.

We have seen that there are many problems with ex-ante regulation in India. Even though the digital world seems seamless in practice it is less so due to the divisions in the offline world. Taxi aggregators are present in many countries. Uber has a presence in 71 countries. However, the nature of the competition differs across markets. It is dominant in the US, but has been banned in certain European countries. It exited Southeast Asia since it couldn't compete with Grab. In India it faces competition from Ola. There are niche operators like Meru and new entrants such as Drife enter the market quite frequently. In the state of Goa taxi aggregators are not allowed and other cities have the familiar black and yellow taxis. There are also autorickshaws and buses and subway and rail services. So there are a lot of substitutes and strong competition and the nature of the competition varies across the country. Thus digital markets in India can be different from their counterparts in the advanced world. Of course GAFAM still rules in India as well but the dominance they enjoy can be of a different kind. For example Amazon faces some competition from Flipkart and has a very weak presence in the online grocery market. So, the kind of ex-ante regulation that we have should be sensitive to local conditions.

Two of the issues that ex-ante regulation is concerned with are fairness in general and self-referencing in particular. The latter is also a problem in India and Amazon has been accused of practicing it. Google has been accused of manipulating search results[29]. Fairness is a very emotive issue in India, where inequalities exist across income categories, class, gender and regional lines. As an example consider health, access to which, varies enormously. There are health aggregators who offer services like minor surgeries at lower rates than private hospitals. Presumably, these should also be regulated by the digital regulator. However, such regulation may affect the quality of these services. The regulator might find it drawn into a realm that is fractious and beyond its expertise. This underlines the need to clearly demarcate what is the subject matter of regulation.

One of the other issues that often arises in discussions of anti-competitive behaviour in digital markets is the possibility of buying up budding rivals or if that is not possible then extinguishing them. Of course this behaviour will be condemned. However, we are not sure about how many firms originating in India have suffered that fate. So worrying about that might be premature.

As we have seen that Indian regulators have suffered both from possible interference from the government and turf wars. If the powers of the regulator is not tightly defined then it is very likely to face government interference. The spectre of turf wars with the CCI also looms large. In effect the regulator will be operating in the same area as the CCI. For example a situation may arise that the CCI may want to investigate the behaviour of some firms whom the ex-ante regulator has not been bothered about. Can these firms use that as a claim to innocence? We will have to be clear which law overwrites which one.

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[29] Google manipulated search results to capture market, MapmyIndia tells Supreme Court. https://www.thehindubusinessline.com/info-tech/google-manipulated-search-results-to-capture-market-mapmyindia-tells-supreme-court/article66385883.ece

Finally, we will have to worry about regulatory capacity. The regulator will need to be appropriately funded and staffed. We have seen how regulators suffer from adverse incentives and inadequate staffing.

So at present the only issues that seem to be problematic is self-preferencing and fairness along with transperancy. We are not sure about how much harm self-preferencing does. If there were disclosure laws whereby gatekeepers would have to disclose any commercial interest in any search engine result that should suffice for the discerning consumer. Laws regarding transparency for consumers and input providers can also be enacted. The issue of mistreatment of sellers on platforms will take us away from standard application of Competition law and is best avoided at this time.

5 Conclusion

We have discussed the desirability of ex-ante regulation in India and concluded that it is better avoided at this juncture. Our conclusion is derived from the suboptimal functioning of other regulatory agencies and the possibility of disagreement between the CCI and the ex-ante regulator. Going ahead we would investigate how other jurisdictions such as South Africa and Brazil have dealt with this issue. We will also explore whether we can use the economic theories of delegation and organizational design to comment on the matter.

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