CPI Columns
South Asia

July 2024

Big Tech and Competition – The Future for Sustainable Regulations and Policies

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"Intelligence and creativity, it would appear, are not a human monopoly"
- Alvin Toffler

I. Introduction

The power of imagination is what separates the new and old economies!

In his 1970 book "*Future Shock*," author Alvin Toffler said – "*A strange new society is apparently erupting in our midst. Is there a way to understand it, to shape its development? Much that now strikes us as incomprehensible would be far less so if we took a fresh look at the racing rate of change that makes reality seem, sometimes, like a kaleidoscope run wild.*"

Today, as predicted by Toffler, policymakers and regulatory authorities are increasingly unable to manage an explosion of new technology-based business models across sectors. Discussions over clichéd statements like "data is the new oil" may lead to socio-political or geo-political divisions. Ambiguous privacy rights, overlapping regulatory roles and conflicting approaches have led to uncertain rules. As a result, both local and global regulators are shifting their stance, from a light-touch, hands-off approach to breaking up companies and tightly regulating the content and services offered by Big Tech giants due to potential harms from the unregulated use of powerful AI technologies.

No wonder, there are legal uncertainties surrounding Big Tech, which is thriving despite their volatility, uncertainty, complexity, and ambiguity ("VUCA"). To ensure a level playing field and fair market conduct, antitrust authorities must resolve this new challenge – how to make the "invisible hand" theory adapt to a new "digital hand." Proposals to rein in Big Tech have been presented based on unclear terms such as "gatekeepers," "bottleneck power," "platform power," "intermediation power" and "strategic market status," among others. However, the link between these concepts and market power is not always clear, and certainly not always explicit.

In this era of dynamic tech capabilities, are the regulators ready to understand the strategic wisdom and the principles that cause the differentiation of business models? As we are at the cusp of antitrust expansion, we need extensions of old doctrines to fit new realities, and new business models. Without a regulatory impact analysis with empirical evidence, there is no basis to believe that *ex ante* legislation will result in social/consumer welfare.

In this paper, we propose *a new regulatory framework based on mandatory Techno-legal obligations* to develop trust, and to reduce the time and cost of investigation. A Technology cum Regulatory ("Tech-Reg") approach allows for pro-innovation technology design that follows a principle-based "Governance Framework" to complement evidence based *ex post* regulation. The techno-legal approach allows for a regulatory framework that works in tandem with technology to foster a vibrant AI economy. Unlike conventional approaches that focus solely on regulating AI/ML/NE powered digital platforms, this approach concentrates on setting mandatory obligations to maintain standards, facilitating compliance and governance measures, as well as proactive reporting. This helps remove hurdles for innovators, ensuring models are reliable, accessible, and harmless. This approach aims to create a benign environment through a combination of technology and legal principles, guided by a special unit that can be styled as a Digital Stakeholders Governance Unit ("DGU"), to support safe and secure deployment of

[1] Technology and Competition Lawyer. The author would like to thank the research team at TechBridge. This article is not written for any particular party - The opinions expressed in this article are the author's own and do not necessarily reflect the views of any Organization. The author has not received any funding for the research and writing of this article.

algorithms or AI models and encourage participation for value realization in the ecosystem.

II. Understanding Digital Markets - Platforms and Ecosystems

Competition in markets has moved on from "products" or "services" to ecosystems, and there is a need to build antitrust jurisprudence that distinguishes Schumpeterian dynamic competition taking place at the level of the entire technology ecosystem – leading to vigorous competition between ecosystems *for the market*.

When we question "are markets contestable?" a related question would be "how do they create value?" Another would be "how can regulatory measures foster competition to divide that value, so that other partners in the ecosystem get a greater share of it?"

The nature of "co-opetition" among digital platforms, reflects how innovation led platforms compete "for the market" and intermediary platforms compete for complementarities of services offered downstream. As noted by Jacobides (2020), when platforms are multi-actor or multi-product ecosystems, they are not a hierarchical supply chain model but an ecosystem with open innovation that brings together a network of partners, customers and complementors, surrounding a product or technology. Various multi-market actors or market sides can build upon the platform to create new products/services or transactions. The more innovation & transactions, the more *valuable* the platform ("NE"). This kind of value creation phenomenon (in Windows or DOS or Google Android or Apple iOS) that allows other firms to build complementary innovations is distinct from product or service platforms - that serve as intermediaries for direct exchange, facilitating B2B/B2C transactions (as in Uber, Airbnb, Linkedin, Facebook, Amazon).

The concern of proponents of *ex ante* rules, which is the basis for the DMA and DCB, currently focused on discouraging structural bigness or bottleneck power of giant platforms, like Apple, Google/Alphabet, Facebook/Meta, Amazon, Microsoft ("GAFAM/MAMAA"), is that the enforcement does not move fast enough to remedy unanticipated consequences. Such protective frameworks do not fundamentally challenge the core issues of the platform economy – a regulatory gap that cannot be filled by Competition Authorities alone.

At this stage, as the future implications of digital ecosystems are not clear, it would be safer to set governance standards instead of designing rigid rules. This leads us to the important question: what is the right time to introduce regulatory measures for new-age technologies?

According to OECD Chair Frederic Jenny, e*x ante* regulations can end up being anti-competitive or anti-economic in itself. The first challenge is to better understand the relationship between competition and innovation to assess competition among platforms. The second challenge is to adapt the traditional competition tool to the specificities of the digital sector. And the third challenge is to resist political pressure to intervene at all costs.

Younger Competition Authorities ("CAs") like India's can have the best of both worlds - learn from the experience of developed jurisprudence in the EU/UK /U.S. and evolve jurisprudence that works best for the domestic market and avoid Type I over-enforcement) or Type II (under-enforcement) errors in implementing regulations.

III. From an Indian Perspective, How Can a Fresh Look Help to Bridge the Technology - Regulatory Mindset Gap

India is set to regulate Big Tech or digital platforms of a prescribed size on an *ex ante* basis, following global trends. The decision to move ahead as proposed in the new Digital Competition Bill ("DCB") or to wait and see the outcome of the Digital Markets Act ("DMA") enforced by the EU is at the heart of the debate in India during the open consultation process that ended on May 15, 2024. The Indian start-up ecosystem eagerly awaits favourable changes.

The Bill outlines quantitative and qualitative criteria for identifying Systemically Significant Digital Enterprises ("SSDEs") and their Associate Digital Enterprises ("ADEs"). Enterprises exceeding the specified turnover and user base will be subject to the scrutiny of the Competition Commission of India ("CCI"). The SSDEs are mandated to adhere to stringent obligations that restrict their business models from engaging in ten anti-competitive practices ("ACPs") identified by the committee (e.g. self-preferencing, restricting third-party apps, imposing anti-steering policies, misusing the data of business users, bundling products and services). However, the causal link between these anti-competitive practices and the theory of harm is not clear. Before blindly following any approach, should the Indian stakeholders not be involved in the impact cum gap analysis of the competition regulatory approach so far? The designation process that focuses on the structure of enterprises as opposed to market distortion challenges the paradigm where competition law protects competitive processes in markets, not competitors. Market distortions can be corrected by removing behavioural artificial barriers created dynamically, not by obligating permanent structural changes.

Without a statement of purpose - some obvious questions that remain unanswered in the Report of the Committee for Digital Competition Law ("CDCL") are:

A. How will e*x ante* rules be a viable value proposition which has measurable benefits with efficient enforcement or systemic change creating a level playing field for all stakeholders?

B. How do the rules incentivize competitive conduct along with innovation and compliance, especially by the entities impacted? And,

C. Without a clear theory of harm, will the new rules accelerate enforcement? can the recently amended Competition Act not serve the purpose?

D. Are there regulatory barriers due to restrictive frameworks that may result in serious harm to an emerging competitive market of enterprises creating value for customers

In the context of platforms (ecosystems), status quo style of policymaking, would be disastrous to competition and market management. The challenges are amplified due to the lack of regulatory capacity burdening all stakeholders, chilling ideas, innovation, and free expression. We believe a collaborative Tech-Reg strategy may help address some of the major issues of data / platform dominance.

IV. Challenges And Opportunities – What Are The Related Risks?

Although enforcement is equally important in both developed and more recent jurisdictions, it plays a special role in emerging economies like India where dominant companies are either state-owned incumbents or newly formed privatized entities. The Indian digital market has distinct challenges - regulatory frameworks that work in developed jurisdictions cannot be expected to work here. Firstly, the internet penetration is still low, particularly in rural areas. Secondly, the technology start-up industry is fragmented, focused on building new business models, buying/building technology-based solutions, getting funding is a priority compared to worrying about/managing compliances with complex laws and regulations. While the advocacy efforts by CCI are creating awareness in a wider spectrum of industries, the enforcement of antitrust is also increasing, albeit without consistent jurisprudence with very few cases decided in Supreme Court.

In such an evolving market, the technology makers can tap this great opportunity to reduce regulatory intervention, avoid knee jerk policy changes by proactively developing transparent and fair governance standards to develop upon a principle-based framework. This will enable companies to play a key role in shaping the law in places where it is ambiguous, setting a path-breaking example of "*legal endogeneity*," whereby the subjects of the law help to shape its meaning. Failing to adopt a proactive tech-reg strategy means risking harder regulations eventually, as in the present scenario.

Some of the regulatory hurdles to overcome would be:

A. The harms from data or platform strategies for customer acquisition are still abstract and indirect, blurring the value that algorithms give.

B. Shared experiences in the context of value for customers and related issues are different for different users / communities.

C. The technology and human choices architecture (relevant market analysis) required for different business models is an open question which needs a better understanding of the platform ecosystem.

Thus, there is an opportunity to foster a sophisticated market ecosystem with the support of a Digital Stakeholders Governance Unit that works like a sandbox for Tech-Reg gap analysis to build – balanced regulation – that is a win-win for all, identifying concerns of stakeholders – the government as well as digital market players, taking care of people's total welfare.

V. Tech-Reg Gap Analysis

A regulatory gap concerns tipped markets and emerging business models – an exhaustive list of nine core services presently does not cover new disruptive tech models like GenAI, and ChatGPT is conspicuously missing in the regulatory discourse in the report.

Key areas of gap analysis are mentioned briefly -

A. Categorizing Digital Markets

A point of confusion is whether to define such markets based on functionality, technology, or business models. Some industries compete not only on price but also on offering the most innovative products. Much like the pharmaceutical and automobile sectors, market dominance can be reflected in their established innovative capabilities as much as in their pricing. Thus, how can the existing provisions capture all the "factors" that cover the scope of market power when defining the market, not just network effects and data advantages?

The rules must distinguish between factors like investment in R&D, tech innovation, product/service differentiation (that are competitive) from artificial barriers (exclusionary behaviour that are anticompetitive).

B. Defining the Theory of Harm

The Economics of Online Markets continues to puzzle the CCI even as their market study findings concerning the E-commerce sector in India was published on January 8, 2020. The report was followed by an investigation order against Amazon and Flipkart, which revealed a clear shift in focus in several competition concerns like platform neutrality, price parity, deep discounts and exclusive agreements. The Competition authorities around the world have published market studies indicating the market harm theory in their jurisdiction. A comparative chart of digital market studies is available in the CDCL report.

In CCI's market study findings, a theory of harm that has a causal link with the Indian market needs further consideration – A regulatory gap analysis of investigations done so far is needed.

C. A Fair Process Is Key

According to the first principles of administrative law, a fair process is crucial for justice and is the cornerstone of the democratic edifice. The initial decisions of the CCI were challenged in court for not following due process, requiring tremendous efforts over a decade for the CCI to pass reasoned orders. Thus, setting balanced legal principles that inspire compliance would work better than the anti-circumvention provision (Section 5 of DCB).

In such an emerging landscape, how can we overcome regulatory blindness? The antitrust decisions display this in their significant divergence gaps from established principles of evidence, rule of reason and standard of proof?

D. Anti-Competitive Practices – The Risks and Rewards

The ten loosely defined ACPs target product design and consumer experiences that are meant to fiercely compete in a dynamic market

- with both price and non-price benefits. Applying a “rule of reason” test, they can arguably be “competition on merits.” When pro-competitive business justifications are supported with ample evidence as in these cases (MMT, Swiggy), why are these enterprises seen as harmful? Do dominant businesses not have a right to promote their own products and services? What is the test of harm to distinguish the anti-competitive (preferring to drive out rivals) from the benign (promoting products based on consumer preferences)? To codify a law that applies to all business practices would result in a presumptuous and flawed regulatory approach. For instance, can a finding against Amazon for not sharing data with rival sellers on its platform to drive competitors out be a reason to restrict all platforms from using algorithmic visibility and promotional campaigns?

Even in the case of Amazon there is no conclusive finding, since the European Commission resolved the matter by accepting commitments that expire in a few years. Such amnesty schemes are positively fast-tracked, although they create a cliff-hanger, with no jurisprudence on exclusionary conduct. It is also possible that at a later stage, CAs may require commitments that do not expire. Can the regulators second-guess the business strategies of entities and provide mandatory obligations to change business structures, pandering to the requests of the rivals (and thereby protecting competitors, not market competition)?

Regulatory and policy approaches that fear the intent of AI-enabled apps are usually not evidence-based, contributing to ambiguity around rules around various digital platforms. For instance, can market regulators identify and regulate real harms to the competitive process and separate those due to unethical and unfair practices, and which are not antitrust issues per se? Far from solutions, blanket rules will only burden all stakeholders, chilling ideas, innovation and freedom of expression.

E. Obligations For Contestability And Fairness

The first significant step is to understand the boundaries of the relevant market of the particular product/service/ecosystem. Second, only in the context of the market and substitutable choices, can the concentration level or “contestability” be tested. Third, “fairness” is not directly related to dominance but is an important factor to assess harms other than harm to market competition. Understanding “fairness” is more complex in the information age of dynamic competition than ever before. The elements of fairness would vary for different stakeholders.

What is needed now is to design policies by separating the wheat of pro-competitive outcomes from the chaff of anti-competitive situations. This principle would guide policymakers to the north star that authorities need to follow when considering a new policy, and answer the question – “who are we going to protect?”

Therefore, the need of the hour is to design a principles framework with regulatory threshold - does only size matter (quantitative factors) and/or behavioural factors (qualitative) be considered?.

Finally, it is important to design a regulatory strategy to bridge the technical knowledge gap and build institutional capacity.

VI. Techno-Legal Governance Framework

To bridge the gap between the clashing goals of technology companies and Antitrust, digital market players need to urgently discuss how to avoid knee-jerk regulatory changes and co-create techno-legal solutions to develop better governance measures that comply with antitrust rules. The resolution of this regulatory crisis - which is equally in the hands of technology companies - will determine rational policy measures in the present and future as well.

Here, propose a principled techno-legal framework that collaborates with technology developers, so that the parameters for “fairness” and “contestability” can be standardized. The

remaining questions are, what will be the stance of the Tech entrepreneurs and Micro, Small & Medium Enterprises ("MSMEs") who will be impacted if bundled offerings on the platform ecosystems are restricted? And how can the Indian tech entrepreneurs harness the opportunity to meet socio-economic goals, extrapolating consumer welfare?

The concerns of all stakeholders in the supply chain – the government, industry, and consumers - although seemingly conflicting, are equally important. The business, technology, and policy communities need to think of merging their worlds to provide pragmatic approaches to policymakers for broader and deeper perspectives.

A. Multi-Stakeholder Engagement Framework

It's the stakeholders who determine the success or failure of the governance framework. Key role players must meet for consensus building to be facilitated by the Digital Stakeholders Governance Unit ("DGU") for "collaborative" governance:

- Role of the government - To understand business models and identify how Regulations can be an enabler for the vibrant start-up ecosystem The framework to govern digital platforms must have a holistic approach and clarity on regulatory roles of other regulators.
- Role of the Digital Market-players/Businesses - How can they proactively collaborate for effective governance and more - Make competition/legislative compliance a priority in their boardroom discussion; get proactive with best business practices and self-regulation that brings desired clarity and transparency of their operational obligations and strategies; mitigate risk of intervention; develop trust with consumers.
- Role of the investors - How can they mandate governance and risk reporting? Investors need sustainable solutions and policies, to focus on long term holistic growth of the digital ecosystem and not just their own business valuations.
- Role of the consumers/society - How can they make conscious choices, report / speak up for perceived / experienced harm - Transparent user policies that create awareness of how it affects their lives while using a platform, A repository of sorts (not just a complaint cell) can help to get anonymous feedback, where they can articulate their perceived harms.

B. Principles Based Governance Framework - Mandatory Obligations

Principles that incentivize designing algorithms in the best interest of users, influencing a positive and lasting customer relationship, building trust, is not exploitative, can be incorporated as mandatory obligations. Failure on the part of policymakers and other stakeholders to achieve governance standards creates imbalanced regulations around dangers of technology platforms.

Key ethical principles: Obligations for Transparency, Explainability and Fairness can mandate safeguards against practices like anti-steering, rent seeking, partition pricing, algorithmic biases and other anti-competitive practices.

A three-step plan is necessary to lead change by DGU, after there is a "Statement Of Purpose" conceptualized:

- An action plan - what must be done when by whom with what resources
- A plan for collaboration - Who to partner with and obtain the support needed
- And the most important, A plan for one's own learning - To guide the regulators/ policymakers to teach themselves to achieve the required goal.

A win-win solution to co-exist would be key to crafting more effective competition rules, allowing innovation to thrive within flexible and dynamic frameworks. Regulating the new economy of tech entrepreneurship, leaping ahead with breakthrough ideas – it would require more efficient policy planning in a shorter period as compared to the 19th-century rules and institutional design. The need of the hour is to design an aeroplane while it's flying.

Today, technology is the “great engine,” a mighty accelerator, staring global market regulators in their face – and nobody knows where or how to get anywhere. The only apparent fuel for this engine then is, as Toffler says, “knowledge.”

There has been excessive focus on asking “what” is wrong with the present market – too little on “why” we see these unprecedented changes. An important field of inquiry would be the evolution of behavioural scientists directing their efforts to this question. The authorities need to proactively learn how new technology works, and find collaborative ways of understanding the digital market and bridging the gaps between the goals of technology giants and those of policymakers.

VII. Conclusion

“Collaboration” more than “regulation” would be key to entering a win-win scenario to produce real competition heroes in the economy. A change of position can change the way Technology entrepreneurs are perceived i.e. from surveillance capitalists to conscious capitalists. Thus, collaborative and comprehensive policy frameworks could lead to building sustainable win-win policies instead of ambiguous winner-take-all jurisprudence. As demonstrated earlier, a holistic competition culture cannot be built by the CCI alone, it needs a wider stakeholder consultation, to include various perspectives and differing voices that enhance transparency and trust.