THE INTERFACE BETWEEN THE CONSUMER PROTECTION ACT, 2019 AND THE COMPETITION ACT, 2002

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Abstract

The Competition Act, 2002 was enacted to promote and sustain competition amongst business entities yielding enhanced products and services for the consumers while regulating practices that would have an adverse effect on the competition. In comparison, the Consumer Protection Act, 2019 protects the interests of the consumers and provides for the settlement of consumers' disputes against exploitative practices of the traders. It is thus evident that both the laws are directed towards protection of interest of consumers either directly or indirectly. Exploring and examining the interface of the two legislations becomes necessary in order to identify the respective approaches towards such a mandate. The present work aims to explore the interface between the Consumer Protection Act, 2019 (CPA) and the Competition Act, 2002 (CA) particularly in the backdrop of the recent amendments to the Acts and ever-evolving nature of markets. The article, hence, will cover objectives of both the laws, draw parallels between them along with the discussion on recent developments important in this regard.

Introduction

An apt statement for understanding the interface between the Consumer Protection Act, 2019 and the Competition Act, 2002 (amended by the Competition Amendment Act, 2023) was made by Ron Bannerman. He said, "Consumers not only benefit from competition, they activate it, and one of the purposes of consumer

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protection law is to ensure they are in position to do so."[1] This statement depicts the existing complementarity between the competition and consumer laws.

The Competition Act, 2002 (CA, 2002 hereinafter) as per its preamble regulates competition and prevents practices having adverse effect on competition, promote and sustain competition in markets, protect interest of consumers and ensure freedom of trade in markets. In realizing the goals, the Act relies on the widely accepted consumer welfare standard while analyzing the plausible impact of any alleged practices. Thus, it can be said that the CA, 2002 does not provide any substantive remedy directly in the hands of the consumers but indirectly yields to protection to consumers by regulating deals within Business-to-Business Markets.

Ensuring consumers' welfare and protecting their interests, on the other hand, is a direct goal of the Consumer Protection Act, 2019 (CPA, 2019 hereinafter) and it also provides for adequate remedies in the hand of the consumers against any unethical, unfair or fraudulent practices of the business enterprises. The users of the goods and services can approach the consumer commissions and seek redressal against the traders. The Act, however, does not include goods purchased and services used for 'commercial purposes' which fall within the ambit of the CA, 2002.[2] Under the CA, 2002, the definition of the term 'consumer' includes a person who buys goods and services irrespective of resale, personal use, or commercial purpose which makes it possible for the traders engaged in production, supply, distribution, storage, etc. to approach the Competition Commission of India (CCI hereinafter) and seek redressal for anti-competitive practices of other traders having potential of distorting the competition.[3]

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1 R Bannerman, Trade Practices Commission, Annual Report 1983 - 1984, AGPS, Canberra, at 184 (1984)

2 Consumer Protection Act, 2019, S 2(7) No. 35 Acts of Parliament, 2019 (India)

3 The Competition Act, 2002 S. 2(f) No. 12 of 2003 Acts of Parliament, 2002 (India)

Brief background of enactment of CPA, 2019 (CPA, 1986) and CA, 2002[4]

Before the enactment of CPA, 2019 (erstwhile CPA,1986) and CA, 2002, both competition and consumer protection were covered by a single legislation known as Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, 1969). MRTP Act, 1969 was enacted primarily to counter the rise of monopolies, restrict the growing concentration of economic power in the hands of a few. It also was aimed at prohibiting Restrictive Trade Practices (RTPs hereinafter) and Unfair Trade Practices (UTPs hereinafter) which were considered per se illegal by the Act.[5] The Act provided for the establishment of MRTP Commission. Later it was decided to enact a separate legislation for consumer protection and a new legislation known as Consumer Protection Act, 1986 was enacted and RTPs and UTPs were subsequently included in the Act.

In 1991, when India opened its economy by removing controls through economic reforms ensuring the liberalization, privatization and globalization, it created an atmosphere of internal and external competition. With such economic reforms, it was felt that the MRTP Act, 1969 only controlled monopolies but was not sufficient to regulate competition in the market. Therefore, in order to promote fair competition in the market and bringing a legislation that better caters to the dynamism of the better competitive Indian economy, the CA, 2002 was brought in. As stated above, the CA, 2002 seeks to ensure fair competition by prohibiting trade practices restrictive of competition and aims at curbing anti-competitive conduct through establishment of Competition Commission of India.

Both the CPA, 2019 and CA, 2002 have their own regulatory authorities, enforcement functions as well as rules and regulations.

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4 First special law enforced for consumer protection in India was Consumer Protection Act, 1986 which was replaced by Consumer Protection Act, 2019

5 UTPs were added in the MRTP Act in 1984 on the recommendation of the Sachar Committee

Debates on relationship between Competition and Consumer Policies

It is believed that consumer sovereignty is what appears to bind the competition and consumer policies as both are aimed at ensuring that consumers' interests are safeguarded. Consumer sovereignty is ensured when the following conditions are met:

a) consumers are able to exercise the right to choose from a range of choices, and

b) the right to choose is exercised effectively.

In achieving this, competition law also has a crucial role to play as it ensures competitiveness which triggers the enterprise to be efficient and compete rigorously, all ultimately for the benefits of the consumers.[6]

With the aim of furthering the consumers' welfare, competition policy and consumer protection policy appear to mutually reinforce each other. Consumer protection primarily attempts to cater to the needs of users of developing countries which are understood to have information asymmetry pertaining to the pricing, quality and safety of the product or services being offered by the traders. In addition, it also works to protect the users from misleading or fraudulent depiction or advertisement of any product and service. It, hence, covers within its ambit an elaborate redressal mechanism ensuring that users are compensated for the loss caused to them.[7] In this direction, achieving the protection of consumers, it is the force of competition which ensures that producers, manufactures, distributors or retailers have a continuous incentive to innovate and introduce products or services which not only

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6 Neil W. Averitt and Robert H. Lande, *Consumer Sovereignty: A Unified Theory,* 65 ANTITRUST L.J. 713, 1(2008)

7 Louise Sylvan, The Interface between Consumer Policy and Competition Policy, 2006 Consumer Affairs Victoria Lecture in the honour of Professor Maureen Brunt AO (March 15, 2006) in THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION SPEECHES, March 2006, at 6

complies with the market efficiency but also translates into benefits for consumers in the form of better choices, pricing and technology, etc. Therefore, the force of competition amongst the enterprises yields to consumers' welfare while producing a competitive discipline over the business enterprises.[8]

By the nature of objectives and operations, consumer protection policy's ambit appears much wide covering varied aspects of protecting consumers' rights and more diverse than competition policy. The focus lies on remedying the harm caused or suffered from any defective good, charging exorbitantly higher than the quoted or agreed prices, unfair trade practices of the trader, and if services rendered were deficient. The competition policy on the contrary, regulates conduct of the enterprises comprising of restrictive trade practices (RTPs) and unfair trade practices (UTPs those undertaken by a dominant entity) that would have an adverse effect on the existing or potential competition.

Additionally, competition related policy is mostly market driven and part of overall economic policy with one regulator, while consumer policy involves coordination of multiple ministries in making it and multiple fora are established for providing remedies through different tools. Even though proximate enough, both are distinct areas of law with different underlying theories of harm and objectives.[9] The determination of harm caused to consumers and harm to competition, however, always remain a pivotal consideration and the question about priority between consumer interest and business interest is required to be ascertained.

The distinction between the two policies becomes apparent in the way they approach the market while trying to achieve their respective goals. Competition works to ensure innovation and efficiency that would ultimately benefit the consumers in the form

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8 The Organisation for Economic Co-operation and Development, Proceedings of Roundtable on n the Interface between Competition and Consumer Policies DAF/COMP/GF(2008)10, at 136 (2008)

9 Nathani, S and Akman, P "The interplay between consumer protection and competition law in India" Journal of Antitrust Enforcement 5 (2) 2017: 197-215

of enhanced quality and low prices. It is opined that by established scholars that "the only legitimate goal of antitrust is the maximization of consumer welfare."[10] Thus, competition law approaches the market from the supply side. It is understood that competition is said to effectively work when the consumers' welfare is maximized. The assessment of enhanced consumer welfare is based on how efficiently the allocation of economic resources takes place throughout the economy amongst the different market participants. The overall efficiency of the economy is understood as a combination of productive and allocative efficiency. While productive efficiency ensures that a higher output is produced against a low cost of production, allocative component on the other hand, ensures an efficient and optimized distribution of desired goods or services. Hence, the operation of competition law, as evident from other prominent jurisdictions including EU and the US are directed towards economic prosperity which indirectly yields overall welfare.[11] The operation of competition law in any economy, hence, serves a much broader role in furthering the interests of the market participants while also balancing it with consumers' interests. Being an indirect tool, it can be concluded that it is not fit to provide holistic remedies for the protection of all the aspects of consumer interests.[12]

The consumer policy, on the other hand, works to ensure that consumers' interests are protected, which primarily include health, safety, and economic interests. It also ensures that consumers can effectively exercise their right to make a choice, thus approaching the market from the demand side.[13] Consumer policy is also focused to empower the end users by keeping consumers apprised of their right to information, education and seek redressal either individually

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10 Brietzke, P and Bork, R., "The Antitrust Paradox: A Policy at War with Itself" Valparaiso University Law *Review* 13 1979: 403

11 FREEDOM TO COMPETE OR CONSUMER WELFARE: THE GOAL OF COMPETITION LAW ACCORDING TO CONSTITUTIONAL LAW IN THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES (Zach R. and Kunzler A., 2010)

12 COMPETITION LAW TODAY CONCEPTS, ISSUES, AND THE LAW IN PRACTICE (Dhall V., 2019)

13 OECD, Supra note 5

or through formation of organizations. In addition, it caters to properly attending to the structural soundness of the market.[14]

Parallels between the two laws

Both Competition law and Consumer Protection law deal with distortions in the marketplace supposed to be driven by interaction between demand and supply. The CA, 2002 deals with horizontal relationships between manufacturers and producers as well as vertical relationships in supply chain whereas CPA, 2019 deals with vertical relationship between manufactures or service providers and consumers.[15]

While erstwhile CPA, 1986 was enacted, unfair trade practices were brought in the Act upon recommendation of the Raghavan Committee, since a need was felt to provide protection to the consumers from deceptive and fraudulent practices of the traders. Presently Unfair trade practices are defined in s. 2(47) of the Consumer Protection Act, 2019. However, s. 4 of the CA, 2002 includes unfair practices undertaken by a dominant entity in the form of prices or conditions imposed. Realising the importance of the opportunities created by opening of the economy and trade, the Competition Act was specifically directed towards an open market policy from a previously command and control focus under the MRTP Act which was enacted to exercise control over monopolies and had the mandate of preventing growing economic concentration. Therefore, under the Competition Act, 'monopoly' itself is not bad per se but its 'abuse' is. It should also be mentioned here that identification of Abuse of Dominance (AOD) becomes a challenge for competition agencies. The US Supreme Court observed in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP that "the opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place, it induces risk-taking that produces innovation and economic growth." Hence, while assessing UTPs resorted by any dominant entity, a careful balance is required to be struck in

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14 Sylvan, Supra note 6

15 The Competition Act, 2002 S. 2(f) No. 12 of 2003 Acts of Parliament, 2002 (India)

identifying legitimate practices leading to dominance and using the position unfairly thus negatively impacting market competition.

The erstwhile Competition Appellate Tribunal (COMPAT) in the Schott Glass while deciding on the imposition of unfair and discriminatory price or conditions held that "In the absence of any effect on the market or on consumers, the imposition of terms by a dominant entity could not be held to be unfair under the Competition Act."[16] The Competition Commission of India in the past has declined to intervene in many matters stating that Consumer Protection Act provides a better and rather a direct remedy to the issue. The Competition Act deals with cases with its primary focus on ensuring a competitive market only but a direct redressal mechanism for consumers falls within the ambit of Consumer Protection Act.[17] Moreover, it is the Consumer Protection Act that explicitly deals with "restrictive trade practice" as defined under the CPA, 2019 in s. 2(41) and 'unfair contract' under s. 2(46).

The offenses under both the legislations are analysed in economic terms. Price fixing and exclusionary practices distort supply side (restricted supply and increased prices) whereas deceptive advertising (misleading or partial disclosures) distort demand side (creation of false impression about value of a product).

The standard of proof adopted under the Acts also draws attention. The prohibited conducts under the CA, 2002 are assessed through 'per se' or 'rule of reason' tests. Prima facie, horizontal agreements restrictive of competition and having adverse effect on competition are assessed through a 'per se' rule wherein the CCI determines whether the conduct has occurred or not. On the other hand, 'rule of reason' provides a test for assessing the vertical agreements that are likely to have an appreciable adverse effect on competition thus, making relevant the assessment of the effect produced on the market. Under 'rule of reason', the Commission is required to weigh the negative impact against any possible pro-

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16 M/s. Schott Glass India Pvt. Ltd. v. Competition Commission of India & Ors. Appeal No. 91 & 92 of 2012 COMPAT

17 Sanjeev Pandey v Mahendra & Mahendra & Ors Case No. 17/2012; Subhash Yadav v. Force Motor Ltd and Ors. Case No. 32/2012

competitive effect. In comparison, under consumer protection, a practice is deemed defective if it misleads reasonable consumers and is likely to affect their purchasing decision. Therefore, it relates to the conduct but not the resulting market effects arising from the harm.

New Age Market and its Challenges:

The rise and rapid expansion of e-commerce and new age markets have altered consumers' preferences making them more reliant on the technology and has also made them equally receptive to diverse risks and harms that were not apparent earlier, for e.g. use of personal data, etc. A new category of consumer harms has come to the forefront with new business models. It is a well-accepted fact that new age markets have disrupted existing markets and taken both the enforcement agencies and consumers by surprise.

The accumulation of user bases over such markets coupled with easy accessibility has provided the business entities with the incentive to consistently incorporate and respond to the dynamism with little or no additional costs. The unique features of digital markets have led to an increase in the competitive intensity in such markets as compared to traditional brick and mortar markets. Such markets provide the users and the business entities with the opportunity to interact and use multiple platforms simultaneously or multi-home. It has also infused information symmetry around the prices and features across the multiple sides of the markets. While it certainly has brought innovative products and services to the market, benefiting the users, factors such as high concentration, access, and use of personal data, creating restriction upon switching or multi-homing and access to finance and intangible capital amongst others, have created new challenges from both the consumer protection and competition law perspective.[18] Some of the important features of new age online markets which distinguish them from the traditional brick and mortar are as under:

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[18] GOVERNMENT OF UK, UK Digital Competition Expert Panel Report 'Unlocking Digital Competition' at 32 (2019)

A. Multi-sidedness:

The online platform market is either two sided or multi-sided i.e., it connects two different groups, for example, Amazon connects buyers and sellers, Google connects advertisers with consumers, Facebook connects different people, it also helps small businesses to reach more people. Due to the presence of these characteristics, an increase on one side of the platform automatically increases the traffic on the other side of the platform. The dependency on the platform is an incessant loop which helps a firm to achieve a critical mass of users and eventually a position of dominance.

B. Network effects:

It is understood that the value of a particular network increases or decreases with addition or subtraction of each unit. Due to the presence of network effects, it becomes easy for the platforms to attain the position of dominance with a critical mass of users, bringing it closer to the tipping point. The tipping point once reached carries the potential to lock-in the users making it difficult for them to make rational choices. Indirect network effects contribute majorly to expansion of an enterprise's network.

C. Big data and AI:

Big data and algorithms are the fuels on which virtual markets run. Big data and Artificial Intelligence (AI) collaborate for the functioning of virtual markets. Big data is an unstructured and voluminous amount of information gathered from different sources. Big data is a fuel on which the AI tools work, it leverages AI for improved analysis.

The presence of above characteristics in online markets favour the development of ecosystems that give incumbents a strong competitive advantage. One of the primary concerns highlighted is that once the position of dominance is attained or tipping is achieved, the nature of the digital markets is such that it creates incentives to engage in anti-competitive behaviour and becomes conducive to cause harm to the multiple sides of the markets and

thus, negatively impact the overall competitiveness of the entities. Such markets require vigorous competition policy enforcement and justify adjustments to the way competition law is applied. The challenge before the authorities is to save the consumer not only from such anti-competitive practices but also from online frauds as well as protect the overall industry from dominance of big techs. Experience shows that large incumbent digital players are very difficult to dislodge. It is suggested to have a robust law to achieve this goal and for that a separate digital unit is suggested to be constituted in consumer forum as well as CCI to settle the disputes pertaining to digital markets. It is recommended that such a forum should have technical experts, legal experts, data scientist and data engineers.

New Age Markets and their treatment under CPA, 2019 and CA, 2002

It is necessary to examine how e-commerce and new age markets challenges are dealt by both the laws in order to protect consumers and whether they were already well equipped to pre-empt and deal with such challenges, or any amendments have been undertaken in order to deal with them. Let us look at the relevant provisions of the CPA, 2019 and CA, 2002 to find out whether its provisions are sufficient to take care of above stated challenges:

1. The Consumer Protection Act, 2019: The CPA, 1986 was replaced by the CPA, 2019 in response to the need of making the new law stringent enough to guard the users from unfair trade practices in new markets. The statement of objects and reasons of the CPA, 2019 has stated the reasons for the need for having a new Consumer Protection Law. It states that consumer markets for goods and services have undergone drastic transformation, while the trade reforms brought in many positive changes within economy, benefitted consumers through new and technologically intensive goods and services which are not only convenient to use, easily accessible and cost efficient but have also increased unfair trade practices and unethical business practices such as false or misleading advertisements, multilevel marketing, direct selling, etc.

For ensuring protection against e-commerce and online markets, new definitions like e- commerce and electronic service provider have been introduced.[19] E-commerce Rules, 2020 are also added[20] which have defined e-commerce entity, inventory e-commerce entity, marketplace e-commerce entity and platform.[21] E-commerce entities are prohibited from adopting any unfair trade practice, manipulate prices or discriminate between consumers. It is important to mention here that the E-commerce rules have put several liabilities on both the e-commerce entities and the sellers.[22] However, a careful perusal of the cases before the CCI shows that a conflict is already visible between the entities. Sellers are contending that they are being made obligated to follow unfair and unilaterally decided terms and conditions due to their dependence on such platforms for their business prospects. Therefore, in such a situation, putting stringent liabilities on sellers appear prima facie unreasonable.

2. The Competition Act, 2002: The CA, 2002 was amended by the Competition (Amendment) Act, 2023. A Competition Law Review Committee (CLRC) was constituted in 2019 to suggest if any amendment is required in the Competition Act in view of significant growth of Indian markets and the paradigm shift in the way businesses operate in the last decade with the emergence of new business models.[23] The foremost concern was revamping the competition law and making it fit to deal with the ever-evolving nature of the digital sector that has posed many challenges. It deliberated if regulation of digital markets warrants enacting a new antitrust dispensation like other nations. It was opined that it would be premature to conclude on the need of a legislative intervention and suggested that the periodic review of global emerging trends would be suitable as a starting point. It would also assist in deriving

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19 Consumer Protection Act, 2019, S 2(7) No. 35 Acts of Parliament, 2019 (India)

20 Consumer Protection (E-commerce) Rules, 2020 rules made under Consumer Protection Act, 2019 No. 35 Acts of Parliament, 2019 (India)

21 Consumer Protection (E-commerce) Rules, 2020 R. 3 (b), (f), (g) and (i)

22 Consumer Protection (E-commerce) Rules, 2020 R. 4,5,6 and 7

23 MINISTRY OF HOME AFFAIRS GOVT. OF INDIA, REPORT OF THE COMPETITION LAW REVIEW COMMITTEE at 4 (July 2019)

any potential regulatory action or policy implications for India. The committee gave its recommendations and a few of the important observations of the Committee are discussed below:

A. Definition of 'Price': CLRC looked into the definition of 'price' in the CA, 2002 to see whether the definition is able to cover non-monetary consideration. It has been understood that digital markets that are operating as multi-sided businesses and deals with different user groups on different sides of the market, typically treat one side of the market as profit centre and the other side of the market as loss leaders. This strategy exposes the consumer to a variety of risk in exchange of providing them free of cost services. One of the most significant of such risks has been the rampant collection, use and processing of users' personal data. Therefore, the concerns surrounding personal data has prompted regulatory actions across nations. The committee was of the view that prima facie, the definition of 'price' appears quite inclusive and broad enough to cover every valuable consideration and therefore, even covers non-monetary consideration.

B. Algorithmic Collusion: The Committee considered whether s. 3 is sufficient to handle the concerns arising out of algorithmic collusions? It observed that s. 3 will be sufficient for new age markets after additions proposed in s. 3(3) and S. 3(4). The committee was of the view that there are certain conducts or arrangements that neither fall under horizontal nor under vertical agreements. Therefore, expansion of strict categories under s. 3(3) and s. 3 (4) was suggested by the committee. It suggested inclusion of the provision relating to hub and spoke cartel.

C. Determination of Relevant Geographic market: The definition was reviewed by the committee. It was observed that the nature of market has led to an overhaul of how business operate today through their virtual presence. This requires that the definition under s. 19(6) should be more inclusive and comprehensive. Accordingly, to make it suitable for the new age and digital markets, 'characteristics of goods and services' and 'costs associated with switching supply or demand to other areas' were

recommended as factors for determination of relevant geographic market by the committee.

D. Regarding the online vertical restraints, the committee was of the view that the Most Favoured Nations (MFN) clauses and parity clauses should be tested on rule of reason and effects test under s. 3(4). It suggested for the inclusive list of agreements to be included in s. 3(4).

E. Control over data and assessment of market power:

The CLRC had deliberated if s. 19(4) of the Competition Act, which specifies an inclusive list of factors for evaluating whether an enterprise enjoys a dominant position, should be amended to include 'control over data' or 'network effects' in light of the competitive advantage presented to large digital enterprises by such considerations. The committee came to the view that the existing provision was inclusive and flexible enough to take such novel factors into consideration while assessing dominance under for instance, 'resources of the enterprise' under s. 19(4) (b).

F. Introduction of new thresholds for combinations**:**

The CLRC had recommended for the introduction of new thresholds based on broad parameters of size of the transaction and the deal value for merger notification under the Competition Act. It believed that the acquisition of smaller successful start-ups by dominant firms in the digital space tends to escape regulatory scrutiny having not met the asset and turnover thresholds which triggers notification requirement. It was hence, recommended that deal value thresholds should be introduced to capture transactions which potentially could affect the competitive intensity. Accordingly, the Amendment Act introduced the deal value thresholds of INR 2000 crore under s. 5. The threshold triggers notification requirement if the target or the acquired entity has its 'substantial business operations' in India.

Following the recommendations of the CLRC committee, few important amendments were brought into force by the Competition (Amendment) Act, 2023 which are given below:

a. In the backdrop of the need to regulate the digital markets, it was suggested that scope of s. 3 is further widened to comprehensively include all types of anti-competitive restraints and agreements within the sector. Its recommendation to include 'other agreements' under Section 3(4) of the Competition Act in order to enlarge its scope was accepted and implemented through the Competition (Amendment) Act, 2023.

b. The amendment introduced a deal value threshold of INR 2,000 crore for notifying a transaction to the CCI if the entity being acquired has 'substantial business operations' in India.

c. In addition, the amendment has also expanded the scope of 'relevant market' under sections 19(6) and 19(7) of the Act by specifying factors such as the nature of services and costs associated with switching demand or supply.

National e-commerce policy: It is also important to mention the developments relating to e-commerce policy here. The policy is being formulated and is expected to be released by the government after few rounds of consultations. Previous drafts of the policy of 2019 focused on six major issues namely, "data, infrastructure development, e-commerce marketplaces, regulatory issues, stimulating domestic digital economy and export promotion." The Department for Promotion of Industry and Internal Trade (DPIIT) is of the view that the policy aims to work along with the consumer protection rules on the issue of the unfair trade practices. The policy appears crucial as it aims to regulate the e-commerce sector through a well-devised framework. The focus would be on ensuring that the customers' right to make a free choice is kept intact without any algorithmic manipulations. The focus is also on curbing certain practices adopted by e-commerce entities such as directing the end user to a certain set of sellers (the ones who pay high commission). The policy given its mandate would not only be crucial for

consumers' protection but would have an impact over the existing competitive intensity with new obligations being imposed on the digital market players in their interaction with the users and the business entities on the two sides of the platforms.

New developments:

The author would like to briefly include the information on new developments in the competition law which has relevance for the interface discussion:

a. Abuse of superior bargaining position (ASBP):

A new type of abuse by dominant players in platform markets known as 'superior bargaining position' has been observed. Such an imbalance of bargaining powers has attracted a lot of attention across jurisdictions specifically in the context of platform markets and its relationship with Business enterprises (P2B) and Consumers or end-user (P2C). It has been acknowledged that there exists an inherent imbalance of bargaining power between the platforms and business entities and consumers on the other hand. In recent developments, Australia and Canada have enacted bargaining codes under their respective laws for regulating the bargaining between the platforms and news media agencies. In order to ensure co-existence of collective bargaining with competition law, the Journalism Competition and Preservation Act of the United States of America was amended, exempting the entities engaging in collective bargaining from liabilities under competition law.

In January 2022, CCI framed its prima facie opinion in a case filed by Digital News Publishers Association (DNPA) against Google over the allegation of abuse of dominance. The disputes primarily revolve around the unfair terms and conditions being imposed on the news publishers, unfair distribution of revenue by Google, non-disclosure of the actual revenue earned by Google through the advertisements shown on publishers' websites. The prima facie opinion took note of the developments in other jurisdictions like Australia, France, Germany where agencies are actively regulating the imbalance in the bargaining power between the platform and

businesses. While a few nations have come up with new legislations like Australia and Canada others have resorted to interim measures or commitments like France and Germany.

Emerging out of the case is the idea of the approach of the CCI and the goal of competition law. The evidence from other nations suggest that the regulators have eventually begun to more closely regulate the contractual or commercial relations between the entities. With concepts like ASBP and its regulation, the line between consumer protection and the protection of existence competition seems to get blurred and appears to have tilted towards the latter.

b. Issue relating to Consumer Privacy:

As discussed above, consumers can seek redressal for unfair trade practices under the Consumer Protection Act. The question of whether privacy concerns of the consumer can be dealt with under the Consumer Protection Act has invited varied opinions. It is argued that 'services' generally do not include the use of information. The claim under CPA, 2019 based on privacy can only be made only if the services provided by the provider were contrary to how they were agreed in the beginning. Moreover, if the use of information is fundamental of the services being offered, the complaint may sustain. On the other hand, it is suggested that since privacy claim does not relate to the quality per se, the complaint will not be maintainable. It was proposed to address the issue through specific privacy legislation and policy. It has also been argued that instead of enacting a specific legislation, the complaints can be well addressed by the consumer courts construing widely the meaning of consumer welfare and protection. However, the Digital Data Protection Bill, 2023 was recently passed to streamline the regulatory framework and introduced enforcement strategies around use and processing of data within or outside India if related to goods or services offered in India for any lawful purpose or legitimate use as enlisted in s. 7, rights and obligations of the users and data fiduciaries under s.18 and moderating data localization requirements, etc.

c. Report on 'Anti-Competitive Practices by Big Tech Companies': The Parliamentary Standing Committee on Finance submitted its 53rd Report in Dec, 2022 on Anti -competitive practices by Big Tech companies. It recommended identifying such large incumbents as 'Systemically Important Digital Intermediaries' ("SIDIs") on the basis of revenue, market capitalization, and number of active business and end users, implementation of a 'Digital Competition Act' to ensure contestability in digital markets and establishment of a 'Digital Markets Unit' within the CCI to closely monitor SIDIs and provide recommendations to the Ministry of Corporate Affairs on their designation.[24]

d. The Committee on Digital Competition Law (CDCL): A Committee on Digital Competition Law was set up in 2023 to review broadly whether existing provisions in the Competition Act and the rules and regulations framed thereunder are sufficient to deal with the challenges that have emerged from the digital economy and examine the need for an ex-ante regulatory mechanism for digital markets through a separate legislation.[25] The committee recommended introduction of a Digital Competition Act with ex-ante measures. Draft Digital Competition Bill will be applicable to a pre-identified list of Core Digital Services that are susceptible to concentration. Such list will be drawn up by the CCI's enforcement experience, market studies, and emerging global practices. It is suggested that the Bill should regulate enterprises which have a 'significant presence' in the provision of a Core Digital Service in India and the ability to influence the Indian digital market. The Committee recommends designating such enterprises as "Systemically Significant Digital Enterprises" (SSDEs). A twin test demonstrating 'significant presence' has been proposed by the committee. The Bill has proposed that ex ante obligations, exemptions and enforcement etc. will be prepared by CCI.

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24 MINISTRY OF CORPORATE AFFAIRS, GOVT. OF INDIA, STANDING COMMITTEE OF FINANCE, 'ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES 53rd Report at 47 (December 2022)

25 MCA, Supra Note 22

Conclusions and way forward:

The gradual progression of the Indian economy towards open, dynamic, and interconnected markets including the unprecedented growth of the digital sector has led to an acknowledgment of the need to revamp the existing legislative and regulatory framework. In this regard, as discussed, several amendments have been brought into account for the plausible risks and harms to the market participants and in particular, the end users. An overview of the developments leads us to conclude that the Competition (Amendment) Act was centred around strengthening the procedural aspects of the existing law including modulation of the definitions making them wider in context. It can also be noted that it did not add anything substantial from the perspective of the regulations of digital markets that is why it would be crucial to assess and deliberate upon the upcoming Digital Competition Bill. There have not been any additions from the market study on e-commerce as well. On the e-commerce front, however, the Consumer Protection Act, 2019 and the 2020 rules have attempted to regulate the dealings including the use of data and its protection amongst the e-commerce entities, sellers, and end-users. Moreover, in the backdrop of rapid advancements of markets, it also seems quintessential that the changes brought by the Consumer Protection Act, 2019 after a lapse of considerable period of time (preferably 5 years) be put to test and assessed for their effectiveness and for undertaking necessary reforms, if any. Thus, the two laws seem to carefully evolve while responding to the challenges and in addition, seem complementary to each other in terms of the respective goals. However, while responding to the novel challenges, the two laws do seem to intersect such as regulation of bargaining power, consumers' data privacy wherein actual stance of the competition authorities still requires deliberations. Thus, it has now become extremely crucial to demarcate the role and goals of the two laws clearly and consider how the two should co-exist especially when the question pertains to the regulation of technologically driven markets where the distinction is much difficult to dissect.

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