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A competition law that clicks for all

Different laws for rapidly changing technology-enabled markets are neither feasible nor warranted

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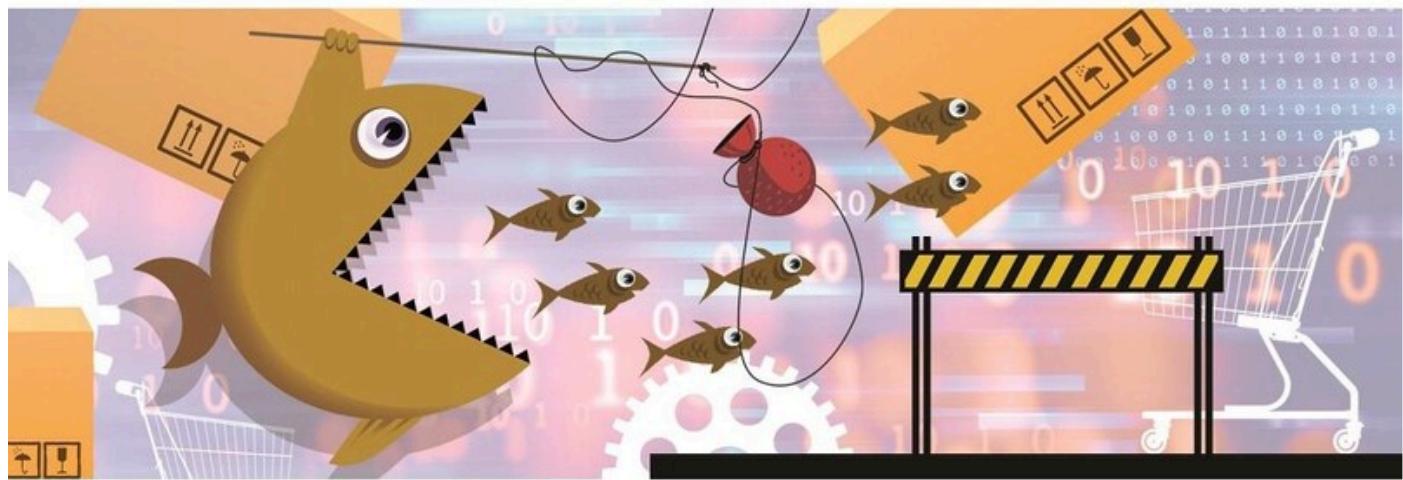


Illustration: Binay Sinha

In November 2022, the European Union enacted the Digital Markets Act, which will become effective in May 2023, to ensure fair and open digital markets. In December 2022, the Standing Committee on Finance recommended the Digital Competition Bill to ensure a fair, transparent, and contestable digital ecosystem for India. The government constituted a committee in February 2023 to examine the need for a separate law on competition in digital markets. It is really a fast catch-up.

The proponents of a separate competition law for digital markets (SCLDM) argue that entities in digital markets enjoy increasing returns to scale, and have a wealth of data, either as a product or a by-product of their operations. This enables them to achieve a dominant/monopoly position quickly, giving them the power to resort to abusive practices such as denial of markets and creation of entry barriers. Hence the proposal is to have an SCLDM that relies on *ex-ante* regulations and subjects systemically important digital intermediaries (SIDIs) to special obligations. However, the premise and the proposed remedy may not be very appealing.

First, market failure typically arises from distortions in the choices made by producers and consumers. The distortion occurs when an economic activity is placed on a different level than others. Resource allocation laws provide a level playing field to all entities/sectors in the marketplace. For example, an insurance company and a steel company have the same dispensation for making an initial public offer. A pharmaceutical company and a telecommunications company have the same dispensation for insolvency resolution. However, different dispensations for physical markets and digital markets would distort the level playing field and thereby contribute to market failure, which the competition law aims to address. Second, digital markets are not different from physical markets in terms of competition. The sources of dominance, such as increasing returns to scale and data repositories, are not unique to digital markets. Similarly, abuses like denial of markets and entry barriers are equally prevalent in physical and digital markets. The remedies, namely, *ex-ante* regulations and obligations on large enterprises, are equally relevant in both physical and digital markets. A digital product/transaction often has one foot in the physical markets and the other in digital markets. It is, therefore, difficult to define digital markets and distinguish them from physical markets to ensure that SCLDM can be applied to neatly demarcated markets.

Third, newer kinds of markets keep emerging with time and technological advancements. While one may opt for SCLDM for digital markets because they are somewhat different from physical markets, one would need a separate competition law for metaverse markets, which are apparently different from digital markets. A separate law may justify a separate competition authority, and further a separate trademark law, contract law, securities law, insolvency law, telecom law, etc for digital markets. It would be never-ending as law-making cannot (and there is no need for it) match the speed of technological changes.

One is familiar with physical stock exchanges, which went digital three decades ago. A stock exchange may deny access to the market by denying listing to a company or giving precedence to its own securities. Regulations do not allow it to do so by obliging it to list a company if it meets the pre-specified norms and prohibiting it from listing its own securities. Liquidity begets liquidity whereby an exchange may emerge dominant and, consequently, abuse its dominance. There are governance norms that disincentivise it from abusing its dominance. An exchange is a huge repository of data that it may use to its advantage. However, it cannot do so as it does not own the data, it holds them in trust. Thus, concerns, which are broadly similar in digital markets as in physical markets, are being

addressed, as they emerge, without having a separate securities law, contract law, or competition law.

Fourth, the case for SCLDM rests on the sole plank that an entity in digital markets becomes dominant/monopolist faster. However, this is irrelevant as dominance ceased to be a concern two decades ago with the repeal of the Monopolies and Restrictive Trade Practices Act, 1969. Instead of prohibiting dominance, the competition law prohibits abuse of dominance. If an entity in the digital market abuses its position, competition law should enable the competition authority to notice such abuses and deal with them expeditiously.

The Competition Act, 2002, prohibits the abuse of dominance by a dominant enterprise, and defines who is “dominant” and what is “abusive”. These definitions can be modified to include any form of dominance in markets, whether as a SIDI, SIFI (systemically important financial institution), or otherwise, and any abusive practice like self-preferencing. However, such definitions could be obsolete as market structure changes or new markets emerge. Some abusive practices may disappear or get modified, and new abusive practices may appear, requiring amendments to the statute. To avoid frequent amendments, which is time-consuming, the modern practice is to specify parameters or principles of dominance and abuse in the statute, preferably with examples, and enable the regulator to list specific forms of dominance and prohibit specific abuses through subordinate legislation. Specific obligations can even be imposed on dominant enterprises.

This is similar to the prohibition of fraudulent and unfair trade practices (PFUTP) in the securities markets. In addition to a blanket ban on such practices, the regulations have listed about 20 categories of conduct considered to be FUTP. The market knows upfront which conduct/practice is permissible and which is not. The competition law could adopt a broadly similar approach, where the regulator facilitates building capacity in the ecosystem to ensure compliance with the regulations, and provides informal guidance when someone wishes to check if an act it wishes to do is abusive.

While considering the need for a competition law for digital markets, it is also important to consider “Digital Competition Law” that digitalises the processes relating to compliance, monitoring, surveillance, investigation, enforcement, and appeals under the competition law. Technology should empower the administration of competition law to enable the competition authority to stay ahead of adventurers operating in technology-powered markets, as with others.

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