

# Gatekeepers of digital markets

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The Competition Commission of India (CCI) has recently issued a spate of orders penalising entities for abusing their dominant positions in digital markets. While covering new grounds, these orders expect digital platforms to serve as gatekeepers to maintain market contestability.

A platform that provides a gateway between consumers and producers must not impose terms that restrict users' ability to compete and innovate. The CCI holds that any condition imposed on business users by the gatekeepers or platform operators should be fair, reasonable and non-discriminatory. It is like a firm in the business of laying highways. Once a highway is laid, it must be open for use to everyone, including the firm itself, on uniform terms.

In a market economy, one has the freedom to do business but not to restrain others from doing so. One restrains freedom by abusing market power (dominance), making it difficult for others to do business. That is why the Competition Act 2002 (Act) proscribes abuse of dominance, and empowers the CCI to protect businesses from such abuse.

In a traditional brick-and-mortar marketplace, a firm abuses its dominance by manipulating mostly price and quantity. To hold it liable for abuse, the Act guides demarcation of relevant markets, determination if it is dominant in the said market, and then whether its conduct amounts to abuse. Such guidance may not be very helpful in the case of digital markets/ platforms such as portal booking airlines and hotels, network for interaction and communication, operating system for development of apps, apps store for distribution of apps, providers of internet, cloud and search facilities.

The platforms confound competition assessment for two reasons. One, access to markets can be limited by denying or restricting access to such platforms. Take the case of an e-retail platform having "significant and durable market power". A firm can sell only if the platform lists its products, and a consumer can buy a product only if it is listed on the platform. In a sense, the platform decides what to be consumed and what to be produced in an economy, and even in the world! It is a classic case of tail wagging the dog.

Second, the firm providing the platform may be competing with other firms and, therefore, having a conflict of interests. For example, a firm may be producing games, and listing games of the same genre, including the ones produced by it, on its platform. Even worse, a firm may provide a platform for development of apps, and lists apps of the same genre, including the ones developed by it. Such platforms can use several subtle means to deny or restrict access or grant discriminatory access to market, whereby own products get precedence over those of other firms.

A platform enjoys certain externalities that enable it to wield huge market power. It has a vast reserve of data collected from its users, which it may use to strategise digital advertising. Larger the size of the reserve, larger is the market power. It may provide free access to the market only to collect data and leverage the data so collected to make revenue from unrelated products. Further, plat-

forms usually create networks of users. They may attract new users by making it free to connect with existing users of the network. The larger the number of users in the network, the larger is the network externality. All these may create entry barriers to digital markets.

These concerns, though not prominent, exist in brick-and-mortar space as well. Take the example of the stock exchange, which is a platform for the sale/purchase of securities. It may deny access to the market by denying listing to a company or give precedence to its own securities. Regulations do not allow it to do so by obliging it to list a company if it meets a set of prespecified 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 also a huge repository of data, which it may use to its advantage. However, it can't do so as it does not own the data, it holds them in trust. Thus, concerns relating to exchange platforms are being addressed, as they emerge, by ex-ante regulations, starting with self-regulation and culminating in statutory regulations.

In July, the Parliamentary Standing Committee on Commerce in its report relating to e-commerce noted that ex-post enforcement does not always lead to optimal restoration of competition in the ever evolving digital markets. It accordingly recommended amendment to the Act to prescribe norms for identification of gatekeeper platforms for stricter oversight. It also recommended the CCI to formulate a mandatory code of conduct that comprises a set of core principles, as well as a list of hardwired dos and don'ts for gatekeepers. The Competition Amendment Bill, which is currently under the consideration of Parliament, may provide for gatekeepers in digital markets as well as combination of gatekeepers.

The advanced jurisdictions are adopting ex-ante regulations to make digital markets fairer and more contestable. The Digital Markets Act of the European Union defines gatekeepers as entities that have significant market influence as well as threshold of turnover or users. It places a set of negative and positive obligations on such entities. It bars, for example, targeted advertising and the use of personal data gathered from one platform to offer services on another.

Dominant digital markets as gatekeepers, a sort of front-line regulator, seems to be a turning point in competition law enforcement. Ex-ante regulation of gatekeepers is likely to prevent abuses of dominance, letting ex-post actions deal with only aberrations. The former has a much higher chance of keeping the digital market contestable.

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OPINION

The writers are, respectively, distinguished professor and assistant professor at National Law University Delhi. The views are personal