

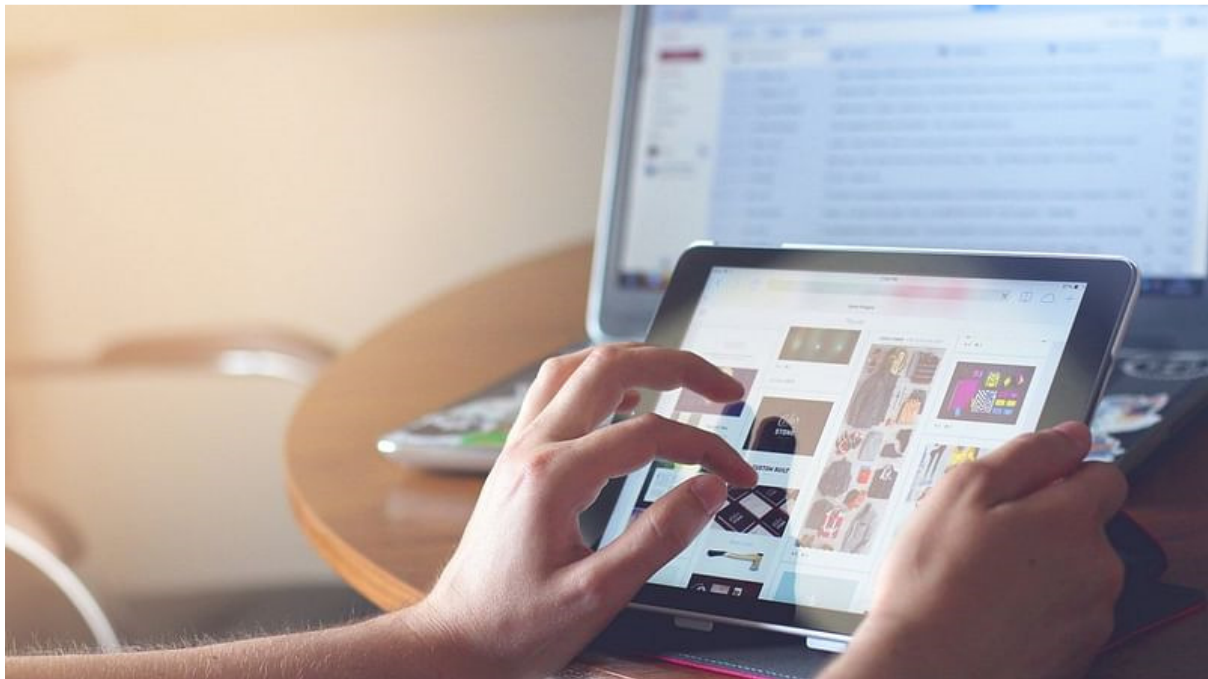
# New market, new problems—unfair trade practices rising with ‘Digital India’. CCI, take note

There is a fine line between acceptable and unacceptable market competition—and the law needs to carefully outline when to intervene, and when not to.



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**C**ompetition has emerged as a major concern in digital markets. The Department Related Parliamentary Standing Committee

on Commerce, in its report on Promotion and Regulation of E-Commerce in India, has highlighted the potential anti-competitive behaviour by e-commerce marketplaces, such as “self-preferencing, lack of platform neutrality, deep discounting, exclusive agreements and preferential treatment to selected sellers.” The government has also announced its intention of bringing in a new **Digital India Act**, which will find some intersection with issues of competition. As our digital markets become pervasive, it is important to first develop a consensus on how to approach the issue of competition, before rushing ahead with heavy-handed use of state power to ostensibly protect competition.

## Uptick in abusive behaviour

Economists have traditionally been worried about monopolies because they do not produce maximum output, lead to higher prices, and are likely to thwart innovation. This is detrimental to consumer welfare.

However, the questions that policymakers have always grappled with are as follows—First, is the firm truly a monopoly? If two firms are seeking a merger, will the merged entity become a monopoly, and should therefore not be allowed to merge? Second, is a monopoly (or firms acting as a cartel) killing competition through unfair means such as imposing unfair purchase or selling prices, and limiting technology innovations by smaller competitors? For example, in 2016, the Competition Commission of India (CCI) **had imposed a penalty against 11 cement companies for fixing prices**. Third, maybe it is not killing competition but is engaging in practices that harm consumers and other stakeholders, who have no other choice. For example, in 2021, a case against Apple at the **CCI** alleged that the latter was abusing its dominant position in the mobile application market by imposing restrictions on developers and preventing them from reaching devices outside the Apple App Store.

A new concern in the digital space is that harm is not just price-related. Risks to privacy, and cognitive manipulation of users are other downsides. These issues are assuming significance as online platforms are increasingly becoming ‘gatekeepers’ of the digital market.

## Tackling monopolies in the Indian market

The answers are non-obvious, and establishing evidence of monopoly or abuse is easier said than done. The task is made harder in the digital space where firms give away products and services to users free of cost, or at deep discounts. One may rightfully ask, if there are no high prices, where is the immediate harm? The answer is also driven by how much importance one gives to only estimating effects on prices and efficiency in the market. Should we not consider the impact on rivals, or on issues such as the spread of misinformation and other fundamental rights even if they do not necessarily affect consumers in the present? How then, should we approach the regulation of competition and of non-price harms?

First, we need to establish basic facts on the ground and sustain a system wherein these facts are regularly updated and evaluated. Without clarity on what the ‘relevant markets’ are, or whether there is price discrimination or abusive behaviour vis-a-vis smaller sellers, interventions may actually turn counter-productive. For example, one has to ask, what is the relevant market (of say an Amazon), and can a consumer easily switch out of this market to another in response to an increase in price? Does Short Message Service (SMS) constitute an alternative market when examining WhatsApp?

Second, we need to peer into the future—what if the counterfactual is that some new technology would have led to more competition anyway? For example, **Facebook is losing users** without any competition-related intervention by the State.

Sometimes, investments by one firm to attain critical mass can benefit later entrants, as has been seen in the case of **Facebook gaining over MySpace**. A world of low growth will limit the ability of venture capital to establish one lone survivor, as we are seeing with **ride-hailing services like Uber**. It is incorrect to assume that the market is stagnant, and that ex-ante regulation is the best recourse.

Third, we need tools to evaluate what aspects of a firm's business practices cause a problem, or whether or not there is a network effect. For example, for those aspects that are termed as 'essential facilities', competition regulation can and should mandate a framework of interoperability or access to the essential facility.

Finally, non-price-related harms should be best left to privacy and consumer protection regulations, as these problems are larger than the issue of competition.

The Parliamentary Committee rightly suggests that several competition issues fall under the ambit of the Competition Commission of India and that it is the Competition Act that needs to be updated to deal with these new marketplaces. The law also needs to carefully outline when not to intervene, given the gaps and uncertainty in the information set of regulators. A cautious approach to these new challenges in market competition will serve our best interests.

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(Edited by Zoya Bhatti)