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CCI'S STUDY ON E-COMMERCE IN INDIA: ANTITRUST ISSUES AND RECOMMENDATIONS

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Prompted by the ballooning relevance of digital commerce, the Competition Commission of India (CCI) commenced a market study on e-commerce (Study) in April 2019. The CCI published its findings on 8 January 2019, in its report titled "Market Study on E-commerce in India: Key Findings and Observations" (Report). The Report is a follow-up to the CCI's interim observations of the Study, published in August 2019. Unlike the interim observations, the Report provides insight into what various stakeholders, including customers, view as considerations when opting to use one marketplace platform over another. Key findings of the Study and guidance on the various issues are summarised below:

The Claim against Platforms

➤ Platform Neutrality

The unique position of marketplaces provides them unfettered access to heaps of data on prices of competing products, consumer preferences, etc. Issues of platform neutrality arise when marketplaces use this data to tilt the competitive landscape (through manipulation of search-rankings, prices, etc.) in favour of the following:

- Private Labels – This scenario arises when operators of platforms wear dual hats and function as both, marketplaces and retailers (through "private labels"), on that marketplace; and
- Preferred Sellers – This scenario refers to situations wherein marketplaces afford certain retailers a "preferred" status on their platform, for reasons such as additional commissions.

Findings: The Report acknowledges that in both situations, the lack of transparency vis-à-vis (i) search-ranking criteria, (ii) use of black-box algorithms and (iii) commercial terms offered by platforms, may disadvantage other retailers listed on the platforms.

➤ Platform-to-business Contract Terms

A predominant concern was the unilateral imposition of "unfair" conditions on retailers and the unilateral revision of contractual terms by platforms. Conditions related to (i) deep-discounting, (ii) bundling of delivery services with listing (in

the context of food delivery platforms), and (iii) data-masking of retailers' data by marketplaces, were highlighted as particularly distortive by stakeholders.

Findings: The Report concludes that it is the imbalance in bargaining power between large marketplaces and smaller retailers that could render the environment incompatible with competition laws. The Report recommends that platforms devise ways for transparent negotiation of basic contract terms, discount policies, penalties and conflict resolution.

➤ Platform Price Parity Clause

Price parity clauses, which require that retailers don't offer better prices on other marketplace platforms and/or on their own website, were identified as potentially distortive.

The Report confirms that online travel agencies (OTAs) and food delivery platforms typically don't allow retailers to offer better prices on their own websites or on competing platforms. Anticompetitive effects of their implementation include, lowered incentive for platforms to compete, increased coordination between platforms and increased barriers to entry. On the contrary, procompetitive effects include increased efficiencies, prevention of free riding by retailer websites and increased competition on non-price factors.

Findings: The Report concludes that such clauses could constitute an unfair condition and/or anticompetitive vertical agreement where the marketplace is dominant and/or exercises a degree of market power, and there are foreclosure effects. However, the assessment would be on a case by case basis owing to the procompetitive benefits, which cannot be disregarded.

➤ Exclusive Agreements

Common types of exclusivity arrangements are (i) those relating to exclusive launch of a product on a platform and (ii) those which allow the platform to list only one brand in a product category. Both arrangements were noted to result in increased prices and reduced choices to consumers. However, these factors were counterbalanced by increased efficiencies and competition amongst brands of different retailers.

Findings: Owing to several efficiencies, the Report concludes that a case specific analysis would be required to arrive at a conclusive finding in such cases.

➤ Deep Discounts

While general retail platforms denied a role in pricing and/or discounting, food delivery platforms and OTAs admittedly engaged in discounting their products. Retailers submitted that deep discounting raised concerns such as unfair conditions and/or discrimination due to differential discounting structures, demotion in rankings, profitability erosion and loss of brand equity, etc.

Findings: The Report acknowledges that while deep discounts aided customer on-boarding and increased network effects, no identifiable cost-savings arose from the same. Accordingly, it concludes that while discounting for a limited period might be justifiable, longer durations would be subjected to a fact-intensive analysis.

Self-Regulation: The Way Forward

The Report concludes that the imbalance in bargaining power and information asymmetry may result in market distortion. Accordingly, the measures (set out below) are directly aimed at improving market transparency in the e-commerce sector:

- Search-Ranking - Platforms to set out search-ranking parameters in clear and intelligible terms in their terms and conditions, including the impact of remuneration by retailers (if any). However, disclosures should not enable manipulation of search-results by third parties;
- Data Regulation - Platforms to set out a transparent policy in relation to the data collected. This must include details of the actual/potential sharing of data with third parties and/or related entities;
- User Review and Rating Mechanism - Platforms to maintain transparency when publishing user reviews and ratings. The reviews must comply with the guidelines in the Draft National E-Commerce Policy published by the Ministry of Commerce and Industry;
- Contractual Terms - Platforms to notify retailers of proposed contractual changes in advance and provide a reasonable period within which such changes will be implemented; and
- Discounting - Platforms to adopt transparent policies for discounting with details of, amongst other things, the implications of non-participation in discounting schemes and basis of discount rates being offered.

Comment:

On the whole, the Report is fairly exhaustive encapsulating the viewpoints of various stakeholders in the digital market ecosystem servicing diverse sectors like travel and hospitality, food, etc. The most consequential section of the Report is the self-regulatory measures that the CCI has very carefully formulated with the objective to reconcile and balance out conflicting interests of stakeholders. This feted advocacy initiative of the CCI certainly promises to serve as a Magna Carta for future investigations in this space.

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