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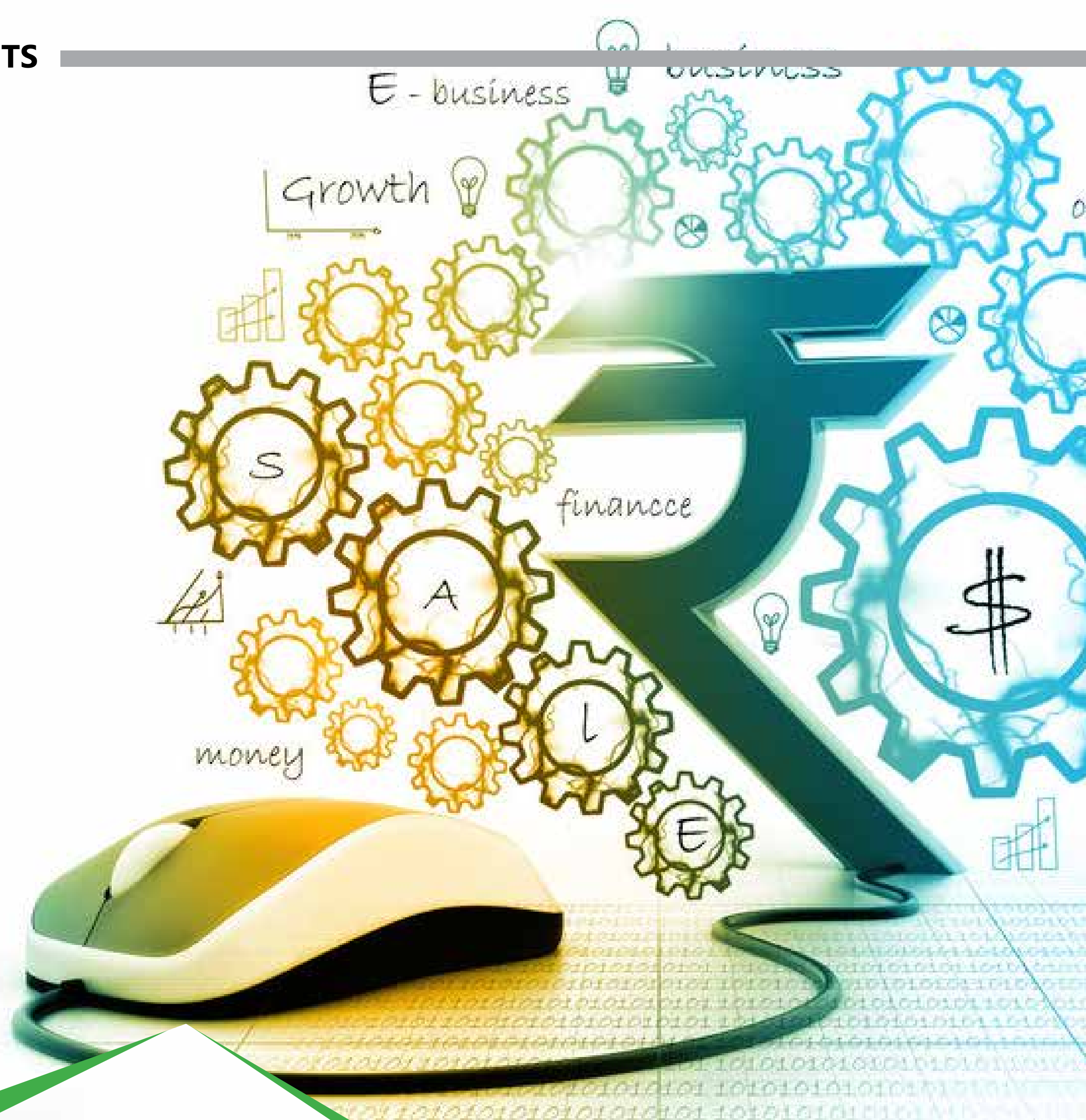

In India, for example, the first trigger to scrutinize any combination of enterprises is assessing the combined thresholds of assets and turnovers of such enterprises

DIGITAL ENTERPRISES
A NEW CHALLENGE TO COMPETITION AGENCIES

Digital economy, extremely fast-paced, is primarily based on innovations. Innovations are one of the most sought-after "safe-harbors" against anti-competitive practices which any defense counsel would prefer to advance this argument in the course of proceedings before competition agencies.

The market-share concentration amongst few global digital enterprises leading to either monopolization or oligopolistic concentration, may be a cause of worry for competition agencies. Coupled with foregoing, the option to acquire start-up digital enterprises is another facet often times characterized as "killer acquisition" but may also be an economic efficiency enhancing conduct between the parties. Thus, it is too early to confirm all commercial activities of digital enterprises are per se anti-competitive.

Options are being considered to introduce ex-ante legal regime to check the unfettered growth of few digital enterprises. However, ex ante assessment of ex post facto breaches, if any, may rarely be identical to exercising suo motu powers hence, a legal contradiction perhaps.

The economists and other experts who regularly assist and advise the Commissioners of competition agencies in all matters, must engage in carrying out robust research to find out authentic objective and economic justifications of the business models of these innovative enterprises.

As regards "self-preferencing", "gatekeeping" and "network effects", the emerging terminologies governing the current thought processes of

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competition agencies, are concerned, all these ingredients are found in traditional markets also. The members of trade associations, using the platform of trade association, promote their own business interests with all authorities and plead for better commercial terms which seem very similar to "self-preferencing".

These traditional industry sectors, either represented by their associations or by their own corporate business strategies, directly or indirectly prefer not to allow new entrants to enter the relevant market which seems identical to "gatekeeping".

Finally, the unwritten and sometimes written strategies of integration amongst upstream, mid-stream, downstream and end consumers/customers are identical to "networking" amongst the various independent enterprises in the entire vertical business chain of any industry segment. To demonstrate by an example, the concept of maximum retail price ("MRP"), validated by the Indian Legal Metrology Act 2009, is one of the most pernicious concepts of price-fixation in the entire vertical business chain which may be frowned upon by any competition agency not having the disadvantage of Legal Metrology Act equivalent. Most of the time manufacturers, setting the MRP, directly and/or indirectly ensure that a market operating price ("MOP"), below the MRP, be maintained throughout the vertical business chain until it reaches the end consumers. The MOP, more often than not, lead to fixation of "minimum resale price maintenance" between manufacturers and its distributors. The Indian Commission ("CCI") by applying existing provisions of the law has remedied these anti-competitive practices in the traditional markets thus far successfully. The latest decision of the CCI in the Maruti Suzuki case is an illustration in this behalf. With a bit of up to date but robust research by experts within a competition agency it seems that digital enterprises too can be investigated successfully and possible anti-competitive adverse effects, if any, can also be remedied without carrying out drastic amendments to the law.

A bouquet of few on-going cases, handled by the CCI within the existing framework of the law, would confirm the foregoing analyses more comprehensively:

1. The CCI via a prima facie order directed the office of the DG to investigate allegations of abuse of dominance against Amazon and Flipkart and both these digital enterprises challenged the jurisdiction of the CCI in Constitutional Writs before High Court and finally before the Supreme Court of India but failed to get any favorable order against the CCI. Investigation before the DG has resumed and the same is sub-judice as on date.

2. The CCI took suo motu cognizance of WhatsApp's updated privacy policy which enabled it to share user data with Facebook and its subsidiaries. The CCI prima facie held privacy to be an element of non-price competition and that in digital markets, unreasonable data collection and sharing may grant competitive advantages to the dominant players and may result in exploitative as well as exclusionary effects. The investigation is sub-judice.

3. Apple is alleged to impose unlawful restraints on app developers from reaching users of its mobile devices (e.g., iPhone and iPad) unless they go through the 'App Store' which is stated to be controlled by Apple. The Commission is of the prima facie view that mandatory use of Apple's IAP for paid apps & in-app purchases restrict the choice available to the app developers to select a payment processing system of their choice especially considering when it charges a commission of up to 30% for app purchases and in-app purchases.

Finally, amendment as normally has been suggested across jurisdictions, may solve some issues momentarily but it is reiterated that as the innovation in the digital market is extremely fast-paced, the competition agencies cannot keep pace with such dynamism and cannot plead frequent amendments to meet the challenges of the dynamic changes in this market. Most of the competition legislations do not per se envisage that all business entities must be investigated. All businesses are prima facie not engaged in anti-competitive practices. It is the statutory duty of the competition agency, assisted by a competent investigating wing and the experts on law and economics, to find out by adhering to the "principles of natural justice" the sub-set of business within a whole pie of any business model and establish breach, if any. This process must be carved out diligently.

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Conclusion

In India, for example, the first trigger to scrutinize any combination of enterprises is assessing the combined thresholds of assets and turnovers of such enterprises. However, applying these thresholds for digital enterprises may not always allow the CCI to scrutinize combination of digital enterprises. This legal infirmity may be remedied by introducing the transactional value of the deal besides the existing rule of assets and turnover tests. No further amendment in law may be needed in our view as of now.

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