Information and Communication Technology Dossier

A Global Perspective

ICTD-2: October-December 2017

For a lot of people across globe, the dawn of 2018 was associated with warm wishes for the new year from family and friends through electronic messages and audio-video calls. This marked the end of greeting cards, now-a-days, a digital image, transmitted through an online application, suffices the requirement, as it is less expensive and convenient mode to transmit the wishes. This is just a glimpse of how deeply we have embraced Information and Communication Technology (ICT), which has also become the core of most social and economic activities these days. It has changed the way humans socialise, learn, communicate, access information, trade, entertain themselves.

At the same time, technology itself is constantly evolving. The year 2017 witnessed numerous technological interventions, which were also associated with a number of pertinent regulatory and competition issues. However, the debate on big data, artificial intelligence and disruptive businesses, caught the limelight. Some of the major issues were captured in our first edition of the quarterly CUTS ICT Dossier,1 while this edition highlights important stories from the last quarter of 2017.

Like the previous edition, the CUTS ICT Dossier (Oct-Dec 2017) focuses on four verticals, namely; IPR and Competition Law; Innovation and Disruption; Connectivity; and Privacy and Data Ownership. Purpose of the dossier, is to flag important issues for each of the four verticals, to a layperson as well as policymakers, remains. This dossier may also be accessed at www.cuts-ccier.org.

Lastly, on behalf of the CUTS family, we wish everyone a Happy New Year.

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[1] CUTS ICT Dossier (July-September 2017) may be accessed at:
http://cuts-ccier.org/pdf/Information_and_Communication_Technology_Dossier.pdf

Policy Reforms on FRAND Assured Standard Essential Patents

On November 10, 2017, the Assistant Attorney General (AAG) for the Antitrust Division of the Department of Justice, Makan Delrahim, announced a crucial course-correction for policies involving standard-essential patents (SEPs) that a patent holder has voluntarily committed to licence on fair, reasonable, and non-discriminatory (FRAND) terms.

Key takeaways include: 1) FRAND is not a compulsory licencing scheme; 2) Unilateral refusals to licence should be *per se* lawful; 3) Seeking or enforcing injunctive relief and breach of a FRAND commitment normally raise contract or fraud, not antitrust, issues; 4) Disputes involving FRAND should be resolved through 'freely negotiated licensing agreements'; 5) Antitrust enforcers have likely 'strayed too far in the direction of accommodating the concerns of technology implementers', which risks undermining incentives for innovators; 6) Holdout by implementers is a 'more serious risk' than holdup by innovators.

Source: www.competitionpolicyinternational.com/the-department-of-justices-long-awaited-and-much-needed-course-correction-on-frand-assured-standard-essential-patents/

Food for Thought

As licencing of SEPs remains one of the most contentious issues at the interface of competition law, Intellectual Property (IP) and contract law, these remarks portray a possibly significant shift in perspective from the US. It reinstates trust in business freedom and the power of good-faith negotiations and thus, provides primacy to contract law and IP law to act as the appropriate defence mechanisms to the underlying legal issues as compared to competition law, which is more of a market regulatory mechanism.

However, this shift might not be transposed to the context of developing nations such as India because of limited domestic innovation and absence of an indigenous patent-pool. This raises a few broad issues, which needs further discussion such as what policy approach should be taken to balance the interests of IP owners (tech developers) and the users of IP (tech implementers) and to simultaneously benefit the consumer moving forward (bearing in mind industry convergence and a world of hyper-connectivity)?

It is also imperative to gauge how should patent law, contact law and competition law be reconciled to work for the common goal of ensuring innovation, especially in context of developing nations? What kind of approach is necessary to solve the patent-antitrust paradox inherent in the process of licencing of SEPs? Finally, how can developing nations ensure that incentives to invest (required by tech developers or SEP owners) are kept intact while not compromising on ensuring fair access for users?

Net Neutrality Recommended for India

The Telecom Regulatory Authority of India (TRAI) has come out in favour of net neutrality in its recommendation paper. The regulator has mandated that Internet Service Providers (ISPs) should not deploy any discriminatory practices, such as blocking, degrading or slowing down of certain web traffic while giving preferential treatment to any specific content at the same time.

The decision was made after a series of consultations with stakeholders between May 30, 2016 and January 04, 2017. The TRAI paper also suggests the formation of a regulatory body to monitor and deal with any such violation of net neutrality. In various countries with no regulation on net neutrality, ISPs are already clubbing content into packages, compelling users to pay for apps and websites which were previously free.

Source: www.livemint.com/Technology/rWh2oMqvXBCtuQmFl8lB1M/Why-Trai-is-backing-net-neutrality-and-how-it-will-affect-IS.html

Food for Thought

Globally, the net neutrality debate has been going on for years now. While some countries have supported/rejected net neutrality, through policies and practice, others are still contemplating on how to deal with the issue. The US Federal Communication Commission (FCC) pioneered the movement by favouring net neutrality and devising appropriate principles and rules for ISPs, in 2015. However, in December 2017, the FCC, under the chairmanship of Ajit Pai, rolled back the net neutrality rules.

Before the FCC's change of stance, India had started moving towards net neutrality, through TRAI's landmark recommendations, which are definitely pro consumers and businesses. The rationale is simple that that internet has performed best in the shape it has been, since its advent and the social and economic benefits, it has rendered for consumers and businesses, are unprecedented. Thus, internet should remain neutral and there should be no differentiation or prioritisation of data packets on any aspect. While the recommendations from the telecom regulator of India are laudable, the onus is now with the Department of Telecommunications, Government of India, to draft optimal rules.

The rules would also need to address some of the critical questions such as, how would the rules, strike a balance between ISPs' revenues, interest of consumes and innovation? How can the last mile access of internet be promoted, without compromising on net neutrality? How would the new regulations fare, if the data is routed through a country, which does not support net neutrality?

Uber Ruled as a Transport Service

Uber is a transport services company, the European Court of Justice (ECJ) has ruled, requiring it to accept stricter regulation and licencing within the EU as a taxi operator. The decision in Luxembourg, after a challenge brought by taxi drivers in Barcelona, will apply across the whole of the EU, including the UK. It cannot be appealed against.

Uber had denied it was a transport company, arguing instead it was a computer services business with operations that should be subject to an EU directive governing e-commerce and prohibiting restrictions on the establishment of such organisations. Lawyers for Barcelona's Asociación Profesional Elite Taxi argued that Uber was directly involved in carrying passengers. The ECJ found Uber's services were more than an intermediation service. It observed that the Uber app was 'indispensable for both drivers and persons who wish to make an urban journey'.

Source: www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu

Food for Thought

This ECJ's decision is likely to curb the 'freedom from regulation', previously enjoyed by Uber in EU's single market. Making Uber subject to tougher national regulations of various European countries it operates in, will resultantly increase the regulatory compliance cost burden for the ride hailing app. Despite the acknowledgement of the numerous benefits brought forth by Uber, for the urban commuters as well as the taxi drivers, the ECJ's decision may adversely impact the sustainability of the business model of technology driven taxi service providers, thereby questioning the viability of providing its services to the European urban commuters.

The convenience brought forth by new age innovative technologies, such as those by Uber, have been embraced by consumers. However, the regulatory uncertainty with respect to most of such business models, which also existed for cab-hailing applications prior to ECJ's decision, result in the digital economy remaining in a state of flux. Such encumbrances highlight the urgent need of devising an optimal regulatory framework, which enables the growth of the constantly evolving disruptive technology-driven businesses.

This leads us to a few questions to ponder over, such as, whether the current laws and regulations can optimally regulate new age technology business models? Is there a need for creating regulatory sandboxes[2] for ensuring optimal regulatory frameworks? How can the practice of conducting Regulatory Impact Assessment (Cost Benefit Analysis) be implemented within the process of framing regulations for such businesses?

India Discusses for a Data Protection and Privacy Policy

The Justice B N Srikrishna Committee, formed on July 31, 2017 to draft a data protection and privacy Bill, released a White Paper recently. The paper suggests setting up a data protection authority, data audit, registration of data collectors, enacting provisions for protecting personal data, defining penalties and compensation in the case of a data breach.

The committee has invited comments from the public on various issues such as the definition of personal data and proposed penalties for misuse of data. The Committee is of the opinion that both the government and the private entities be brought under the ambit of the proposed law.

The Committee appears to be taking a middle path between the EU privacy law, where protection of personal data is equated with protecting the fundamental right to privacy, and the US law, which focuses on protecting the individual from excessive state regulation.

Source: www.business-standard.com/article/economy-policy/srikrishna-panel-moots-data-protection-authority-117112700908_1.html

[2] Regulatory Sandbox is a set of rules that allows innovators to test their products/business models in live environment without following some or all legal requirements, subject to predefined restrictions. (Source: World Bank Document)

Food for Thought

The Supreme Court of India recently held 'Right to Privacy' to be a 'Fundamental Right', guaranteed under the Constitution of India. Therefore, it is the State's duty to safeguard this right of over 1.3 billion citizens, which also account for a substantial portion of the world population.

Not only is the Government of India utilising huge database of Aadhaar, the unique identification number for citizens in India, for several welfare schemes, but also mandating its linkage with key services, such as banking and telecom, which are largely privately held. In absence of a suitable data protection law, breaches to right to privacy, are likely to go unnoticed, unpunished and hence, undeterred.

In today's digital economy, access to consumers' data has assumed central place for competitiveness of private companies and is leading to market concentration, dominance and creation of entry barriers. In light such issues, the formation of the Committee to draft a data protection and privacy law is both timely and important. The White Paper, issued by the Committee, has tried to provide a contour of the draft law upon which public comments have sought.

The deliberations would determine the scope and reach of the proposed data protection law. Some of the pertinent questions, that need to be ventured for clarity on the scope of the proposed law, are: Which data to be protected? How to define personal data? What would be the liabilities of data controller and data processor? Will data controller be required to locally store the personal/consumer data? Will the law also define ownership and rights of consumers over their usage data? What would be the consent mechanism? Will the law permit data portability? What type of authority is required to oversee the implementation of the law? Also, adequate data protection measures from offline service providers, collecting consumer data, would also need to be adequately addressed.

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