

## **CUTS' Comments to the on the Competition Commission of India on Interim Observations from a Market Study on E-Commerce in India**

On August 30, 2019 the Competition Commission of India (“the Commission”) presented Interim Observations of a market study on e-commerce in India (“Interim Observations”) during a workshop (later published on its website) and invited public feedback/comments/inputs on the same till 30<sup>th</sup> September 2019. Following are some of the feedback/comments by CUTS on the released Interim Observations, mainly with the aim to make the market study more enriched.

At the outset, CUTS appreciates the effort by the Commission to study the e-commerce market, which has somewhat different market dynamics (with unique competition concerns) than that of the bricks and mortar markets. Better understanding of the new economy/market will certainly enrich competition assessment/analysis in discharging enforcement and advocacy functions of the Commission.

### **Preliminary Comments**

- Publication of a draft full report, instead of mere ‘interim observations’ would have given better insights, including for the purpose of providing feedback and comments.
- Though the study determined its scope vis-à-vis e-commerce in terms of goods and products (mobile, electronic/electrical appliances, lifestyle and grocery), as well as services (hotels and food), it does not seem to take into account the prevailing “definition(s) of e-commerce” in other laws and regulations (some are still in draft form). This could have provided a better regulatory insight, including applicability of rules on the chosen segments within e-commerce market. At present, the Information Technology Act, 2000<sup>1</sup> (along with Rules therein) and the Consolidated FDI Policy 2017<sup>2</sup> (FDI Policy) clarified further by the Press Note 2 of 2018,<sup>3</sup> are seemingly the only two additional (to that applicable on brick and mortar trade) binding instruments on the e-commerce

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<sup>1</sup> <https://indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>

<sup>2</sup> [https://dipp.gov.in/sites/default/files/CFPC\\_2017\\_FINAL\\_RELEASED\\_28.8.17\\_1.pdf](https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf)

<sup>3</sup> [https://dipp.gov.in/sites/default/files/pn2\\_2018.pdf](https://dipp.gov.in/sites/default/files/pn2_2018.pdf)

entities. However, it is not clear whether same set of regulations are applicable on the e-commerce related with the mentioned goods and e-commerce related with hotel booking and food delivery – for instance, whether the FDI regulation applies to e-commerce related to grocery, hotel booking and food delivery? Divergence in regulatory approach towards different segments of e-commerce platforms may impact their scope and operations. This in-turn should inform and influence the market study for such e-commerce segment.

- Dual role of platforms (inventory-model of e-commerce), which seems to be present in all the segments studied by the Commission, is perhaps the genesis of most competition concerns. This menace is unlikely to be tamed solely by case-to-case enforcement by the Commission under the Competition Act, and would require an overarching ex-ante Platform-to-Business (P2B) regulation<sup>4</sup>. Such P2B regulation could address general small business' concerns in their interaction with dominant platforms, which include: the possible adoption of discriminatory practices by platforms to favour specific service providers; unreasonable pricing that deters small service providers; lack of transparency in the listing of goods and services; changes in terms and conditions by platforms without prior notice; and unilateral delisting/suspension of accounts, among others. It is hoped that the present market study will recommend P2B regulation, and the Commission will use its 'advocacy' function to influence the government for this purpose. In addition to P2B regulation, the Commission should advocate for adoption of the sector neutral National Competition Policy which can aid in introducing competition reforms in different e-commerce segments, among other sectors. It will also aid in better coordination between the Commission and other regulatory agencies.
- From the given interim observations, it is certain that there is presence of 'dual role' in all the segments studied, however, it is not coming out clearly whether the platforms use 'customers' data' (consumers'/users' and businesses' data) to 'leverage' its own goods and services in the market and such goods and services (including private labels) having exclusive arrangements with platforms. If not investigated, 'leveraging' is an important dimension for further study.

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<sup>4</sup> <https://www.livemint.com/opinion/online-views/opinion-an-optimal-way-to-usher-small-businesses-into-the-digital-age-1556214402619.html>

- Another important dimension, which is not coming out clearly from the interim observations, is the ‘network effect’ – preferences and behaviour of the businesses on the platforms vis-à-vis number of users on such platforms; whether ‘network effect’ act as entry barriers for new platforms etc.
- The market study, as suggested by the interim observations, dwells into algorithm-related concerns, particularly flagging its opaqueness and search biasness. It may be noted that the algorithmic investigations are not only costly but also require tech-oriented human resources. Thus, it might be better to adopt effect-based approach (instead of studying the algorithm itself), should the Commission decides to study this aspect further.
- The market study would be enriched if it could capture recent mergers and acquisitions in the e-commerce sector, whether or not the same had been reviewed by the Commission. The same could be in tabular form, including date of M&A and the deal value. This could follow a brief analysis on concentration level in the market and some reflection upon market tipping point.
- The study could also be enriched by investigating the issue of common ownerships between different platforms operating in a specific ecommerce segment.

### **Specific Comments**

- Among ‘stakeholders’, the slide 4 mentions about ‘payment systems’, however, there is no finding related with this in the ‘interim observations’.
- The ‘trends’ in the ‘food’ segment (slide 7) shows multi-homing by cloud kitchens and also that platforms own cloud kitchens. It would be interesting to note whether platform-owned cloud kitchens also multi-home?
- Platforms expanding into related B2B domains such as food ingredient supply may be fine but such domains should not be accorded favourable treatment, including as a condition for onboarding restaurants on the platform.
- Slide 8 (Services: Food) Issue
  - *Dual role of platforms* – this is a much bigger a nuisance to be tackled solely by competition enforcement on case-to-case basis and would require a proper P2B regulation to bring-in much needed ‘platform

neutrality'. The market study, therefore, can include this as an important advocacy agenda. The arguments by platforms that this to bridge supply-demand gap and to offer more choice to consumers are either eye-wash or too less a benefit as against bigger national economy losses, particularly those related with MSMEs and jobs.

- *Algorithm and biased search results* – this nuisance need to be disciplined on the lines of the Commission's decision in the 'Google – search engine' case. The Commission may like to introduce guidelines in this regard.
- *Data* – this need to be investigated further whether platforms are leveraging 'data' to help their own inventories. Secondly, whether 'control over data' (along with 'network effect') act as entry barriers for new platforms, may also need to be investigated.
- Issues raised in Slide 11 (Services: Hotels) are mostly of the genre that would better be addressed via P2B regulation than case-by-case competition enforcement. These could be added to the advocacy agenda coming out of the present market study.
- Issues raised in Slide 14 (Goods: Issues)
  - *Platform neutrality* (preferred sellers, private labels, search ranking) – this can be better tackled by a proper P2B regulation (the present FDI rules is applicable only on foreign-owned platform, and that too is being alleged to be not properly followed in spirit). The Commission needs to advocate for such overarching P2B regulation.
  - *Pricing* (deep discounting) is an issue that may be better left for the government to deal. It may be too remote an issue to be tackled under competition law enforcement. Utmost the Commission can advocate for an equitable access to capital, so that its lack does not act as an entry barrier. In addition, the Commission could look into linkages between deep discounting, cross-subsidisation and deep pockets.
  - *Issues vis-à-vis manufacturers* (counterfeit, seller on-boarding) – these are tricky issues and the Commission's response should be such that it does not harm the intra-brand competition, including parallel imports. Unlike the US (which follows national exhaustion principle) and the EU (which follows regional exhaustion principle), India follows international

exhaustion of intellectual property rights<sup>5</sup> (except that in copyright). Therefore, we need to develop our own jurisprudence rather than waiting for such developments in the US and or in the EU. The Competition Authority of Kenya had last year ruled in favour of parallel import of wine and alcohol, removing restrictions for the same<sup>6</sup>.

- *Counterfeit* – the line of argument taken by the Commission in Matrix Info vs. Intel (Case No. 05 of 2019) is much better and should be applied in the e-commerce ecosystem as well. If the good in question is genuine and not fake, it should be immaterial whether the same has been procured from an authorised dealer/seller/ importer or not (*in rem vs. in personam*). In fact the Commission should advocate that the manufactures need to provide all warranties etc. if the goods *per se* is genuine and not counterfeited. Counterfeiting is a crime in India and there is a separate legal regime, however, the same needs to be enforced more rigorously (advocacy agenda). Bestowing extra regulatory powers on manufacturers and/or platforms to regulate sellers on board can be counter-productive. Platforms need to follow a due diligence process, and could black-list and/or remove suppliers on its board if they indulge in sale of counterfeit goods, after due investigation upon receipt of complaint/ notification.
- *Seller on-boarding* – as stated above, sellers need not have brand authorisation from the manufacturers/brand owners. This will discourage parallel import and intra-brand competition, consequently against consumers' interest. In fact, the Commission should advocate just opposite.

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<sup>5</sup> Flexibility under Article 6 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

<sup>6</sup> <https://africanantitrust.com/2018/06/13/restriction-on-parallel-imports-gets-red-lighted-by-cak/>

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