

INTERNATIONAL CONFERENCE COMPETITION AND BIG TECH

March 21, 2023 | 14:00-20:00 IST | India International Centre, New Delhi

EXECUTIVE SUMMARY

Consumer Unity & Trust Society (CUTS) International, CUTS Institute for Regulation & Competition (CIRC) and BRICS Competition Law & Policy Centre organised an international conference on 'Competition and Big Tech' at the India International Centre, New Delhi, India. The Competition Commission of India (CCI) collaborated in organising the conference.

The international conference was dedicated to understanding the challenges of competition in digital markets and the regulation of Big Tech players. During the inaugural session, Pradeep S Mehta, Secretary General, Consumer Unity & Trust Society (CUTS) International and Alexey Ivanov, Director, BRICS Competition Law and Policy Centre signed a Memorandum of Understanding (MoU) for future collaborations between CUTS International and the BRICS Competition Law & Policy Centre.

The first session of the conference was a meeting of the BRICS working group on the research of competition issues in the automobile industry. The discussion highlighted the emerging issues in the automobile industry due to digitalisation such as the manufacturing of electric vehicles (EVs) and cab aggregators.

The second session of the conference was on the 'Ecological Approach to Competition Law in the New Economy.' This session focused on an innovative approach to the regulation of the digital economy called 'eco antitrust'.

The third session of the conference was titled 'Ex Ante Rules and Competition Law for the Digital Economy: An Indian Perspective.' The session encouraged a detailed discussion on the recent trend of *ex-ante* regulation of Big Tech in India.

The event was attended by representatives of the competition authorities of the BRICS countries, international organisations, economists, law practitioners, academicians, students, and several leading experts in the field of antitrust law all over the world. The conference saw participation of around sixty participants in-person and over a hundred participants attended the conference virtually.

1. CONTEXT

Many countries are on the verge of passing or have recently passed *ex-ante* rules for regulating the Big Tech players. The Indian government is planning to pass three bills targeted at restraining the abuse of market dominance by Big Tech. The three Bills are-Digital Competition Bill, Personal Data Protection Bill, and the Digital India Bill. The conference highlighted the Indian perspective with respect to the *ex-ante* regulation of Big tech. The panel for the final session consisted of speakers who are current and former employees of the CCI, law practitioners, economists, academicians etc. Furthermore, other international speakers were highlighting the international perspective on competition as well. Hence, the conference was hosted at an opportune time when the upcoming *ex-ante* regulation is one of the biggest developments in the Indian competition regulation space.

The conference also highlighted the importance of competition issues arising in the automobile sector due to increasing digitisation in the sector. Another unique concept called ‘Ecoantitrust,’ combining ecology with platform economies was discussed in the second session of the conference.

2. OBJECTIVE

The objectives of the conference were to:

- understand the challenges faced in regulating the Big Tech players and analyse the way forward in regulating these players;
- discuss the suitability of *ex-ante* regulation of competition law in India;
- build an understanding of alternative perspectives to regulations adopted internationally; and
- bring together experts in competition law and policy who represent diverse stakeholders to obtain a holistic perspective of the competitive landscape.

3. SESSIONAL PROCEEDINGS

The following section contains highlights of the four sessions of the conference.

3.1 Inaugural Session

Pradeep S Mehta spoke about the organisation’s initiatives, such as the India Competition Regulatory Report (ICRR). The ICRR is a report on the state of competition and regulation in India every second year since 2007. He applauded the stimulating discussions held by the BRICS Competition Law & Policy Centre.

The first address was given by Jyoti Jindgar Bhanot, Secretary (I/c), Competition Commission of India. She spoke about the technological revolution caused by Big Tech. The concentration of market power in the hands of a small number of digital companies has raised fears of systemic and widespread harm to competition. She stressed the need to develop a more systemic and adaptive approach to the competition law.

The keynote address was given by Jayant Sinha, Chairman of the Indian Parliamentary Standing Committee on Finance. He spoke about the amendments to the Competition Act, of 2002. He addressed concerns regarding the interference of the three bills that aim at regulating the Big Tech companies and their intermediaries namely the Digital Competition Bill, the Personal Data Protection Bill, and the Digital India Bill. He explained that these bills cater to three non-overlapping domains. Data protection and data privacy is one domain, content and content regulation is another domain, and competition is a third domain. Each one of them is dealing with a different set of issues associated with the digital ecosystem, and all three are required.

The vote of thanks was given by Alexey Ivanov. He commended the openness of Indian regulators for cooperation and their readiness to understand the challenges of the digital economy. He finds it noteworthy that the amendments to the Indian competition law are precisely related to changes in the digital markets.

At the end of the inaugural session, Ivanov and Mehta signed a Memorandum of Understanding (MoU) between CUTS International and the BRICS Competition Law & Policy Centre.





3.2 Session I: Meeting of the BRICS Working Group for Research on the Competition Issues in the Automobile Markets (Industry 4.0)

Jyoti Jindgar Bhanot, Secretary (I/c), Competition Commission of India

Alexey Ivanov, Director, BRICS Competition Law & Policy Centre

Andrey Tsyganov, Deputy Head of the Federal Antimonopoly Service (FAS) of Russia

Kong Ru, Deputy Director of the Antitrust Enforcement Division II of the State Administration for Market Regulation of China (SAMR) (*Virtual*)

Karan Singh Chandhiok, Head of Competition and Dispute Resolution, Chandhiok & Mahajan

Suresh Prabhu, Founding Chancellor of Rishihood University (*Virtual*)

- The speakers discussed that digitalisation and the use of data-driven technologies have led to improvements in the quality of vehicles provided by the automobile industry. They highlighted that these vehicles have better provisions for ensuring safety, performance and overall efficiency. Further, the advent of new technologies such as connectivity, autonomous driving, and electrification in the sector has also added several novel features.

Apart from this, it was discussed that new business models such as those of cab aggregators have also emerged. The speakers opined that all these changes and developments presented new challenges for competition authorities. Although it was identified that the goal of the regulators is to create a more competitive and dynamic market that stimulates innovation and serves the interests of both the businesses and the public, this requires a well-adjusted approach so that innovation is not stifled and competitive challenges are addressed in a timely, focused and consistent manner, as per the speakers.

- Automobile companies used to produce internal combustion engines and goods mostly made of metal. However, the industry has become more service-oriented now. Industry leads such as Tesla are betting on the sale of services. Industry 4.0 is about connectivity and openness. Data is playing a crucial role in this economy. The network effects of this interconnectedness must be leveraged.
- This transformation in the industry would require a corresponding transformation in the regulatory mechanism as well. Big Techs which provide solutions for digitalisation and business transformation, apply the same strategies to industrial data as they do to the personal data of users. Hence, regulators need to be more watchful of the potential abuse in the management of industrial data.
- Digitalisation is also spreading to other sectors of the economy, such as mining and agriculture. Microsoft and Bayer recently announced a partnership to create a new cloud-based suite of digital tools and data solutions for agriculture. Such a platform for agriculture can have a huge impact on how competition in this area and agricultural production, in general, will be organised soon. Hence, the problems in the agricultural sector are increasingly reminiscent of the problems of digital markets.
- The Chinese competition authorities consider it their task to strike a balance between protecting competition and supporting the development of innovation. The increasing digitisation of the automobile industry and the disruption of the supply of chips necessary for production are causes for concern for regulators. An important regulatory document for the industry is the Antimonopoly Guideline for the Automotive Industry. The document contains recommendations for preventing anti-competitive practices and defines compliance rules for companies.
- AI and Machine Learning (ML) have revolutionised the industry with the use of data analytics to optimise their operations and improve customer experience. There are unmanned and connected vehicles equipped with intelligence services and internet access, EVs and alternative fuel vehicles, cab aggregators, etc. All these require new approaches to regulation and greater interaction with industry representatives.
- Digitalisation in the automotive industry brings all the risks of digital markets to the industry. Industry 4.0 can disrupt competition and lead to the concentration of market

power in the hands of a few large players. Antitrust authorities should act as the main guarantors of open and fair markets. They should promote the development of national Industry 4.0 players able to compete effectively with incumbent global providers of technology and industry data.



3.3 Session II: Ecological Approach to Competition Law in the New Economy

Andrey Tsyganov, Deputy Head of the Federal Antimonopoly Service (FAS) of Russia
(Moderator)

Alexey Ivanov, Director of the BRICS Competition Law & Policy Centre

Elena Rovenskaya, IIASA Programme Director

Ujjwal Kumar, Deputy Director of CUTS International

Jia Kai, Associate Professor at the University of Electronic Science and Technology of China (UESTC) (Virtual)

Jasper van den Boom, a PhD candidate at the Tilburg Law School (Discussant) (Virtual)

- An ecological approach to competition law in the digital markets is an innovative approach. It is based on the analogy between digital and natural ecosystems. By using concepts and methods from ecology and biology, eco-antitrust helps shape a new set of tools for regulators.
- Modern business models bear little significance to industry-era companies with a clear organisation and structure. The founder of Alibaba, Jack Ma, speaking about the management of an IT corporation, called himself ‘a blind man riding a blind tiger.’ Conventional industrial firms belong to the deterministic business model. They have structured and discrete production and supply value chains. The assessment of the impact of these firms is easy to analyse as it pertains to specific sectors/industries in the economy. On the contrary, firms in the digital economy have an agile and dynamic business model called indeterminism. They are characterised by strong network and linkage effects. Hence, their impact cannot be isolated and defined to include specific sectors of the economy. They tend to have overarching effects on the entire digital economy.
- The example of a Big Tech player, such as Meta’s Facebook was used as a digital ecosystem that is beyond the control of its management. Facebook’s nearly one billion users are the largest unpaid workforce in history. This is a new source of wealth accumulation in addition to the previous mechanisms of exploitation of labour in industrial firms.
- The competition authorities are still approaching the regulation of new forms of business with the old tools. This is contrary to the adaptive nature of the digital economy. This anti-competitive behaviour of the digital ecosystems is considered to be fragmented by the competition authorities of different countries. This makes regulation ineffective.
- Two problems arise out of this fragmented approach. The first is that the competition authorities are setting themselves the wrong targets. They make decisions that do not lead to a change in the behaviour of the digital ecosystem and positive social and economic effects. The second problem is that regulation is in a mechanistic trap. The

regulatory bodies are regulating the fluid digital ecosystem like a mechanistic industrial firm. Hence, an ecological approach to the regulation of digital ecosystems and platforms – eco-antitrust – is required. This approach presumes that digital ecosystem businesses are organised as complex systems and thus their features and behaviour can be compared to some pivotal examples of complex systems like natural ecosystems.

- This approach assumes that digital ecosystems develop cyclically. They go through all stages-from birth and development to strengthening and the externalisation stage, when a closed ecosystem begins to suppress independent players. At this stage, regulators most often intervene and try to force the platform to return to the previous stage of the cycle, that is, to become more open again. By following the logic of cyclicity, one can let the platform go through the subsequent stages of decay/reformatting and continue developing in a new capacity.
- Regulators need to act in concert and mentioned international cooperation on the climate agenda as a positive example. Concerted action by all stakeholders is needed to solve the issue of climate change. This issue cannot be resolved at the national level; working mechanisms are needed on an international scale. However, on economic issues, there is more fragmentation than concerted action.
- The Complex Adaptive Systems (CAS) theory helps to build a model of a multi-agent system in which players interact, make decisions in a non-centralised way, learn from each other and adopt the strategies of more successful agents. This process can lead to market distortion.
- Algorithms play a pivotal role in the ecological antitrust model and hence should be incorporated into the antitrust model. For example, the Chinese Tencent, like most digital giants, consists of many smaller platforms, and each of them has its algorithms.
- An environment-friendly approach to competition regulation can help streamline the work of digital platforms. The boundaries of antitrust law need to be expanded to include various forms of abuse in (co)dependent relationships between complementary and system organisers. This was elaborated with the help of a recent case study of the Russian online retail giant, [Wildberries](#).





3.4 Session III: Ex Ante Rules and Competition Law for the Digital Economy Indian Perspective

Navneet Sharma, Director General, CUTS Institute for Regulation & Competition

Payal Malik, Adviser (Economic Division), Competition Commission of India

Augustine Peter, Former Member of CCI, Founder and Head of APRLP LAW

Ettore Maria Lombardi, Professor, School of Law, University of Florence

Nicolo Zingales, Professor, FGV Direito Rio (*Virtual*)

Manas Kumar Chaudhuri, Partner, Khaitan & Co. Advocates, New Delhi

Samir R Gandhi, Partner, Axiom5 Law Chambers

Deeksha Manchada, Partner, Competition and Data Privacy, Chandhiok and Mahajan

Vikas Kathuria, Associate Professor, BML Munjal Law School

Daria Kotova, Research Fellow, BRICS Competition Law & Policy Centre

- Economic theory can be employed to enhance the understanding of the contemporary economic situation in the context of Big Tech firms. In conventional economic theory, it was believed that the durability of a firm's market power is ephemeral despite its market size. According to a seminal paper written by Jean Tirole in 2003, it would be difficult to reach an efficient outcome between the buyer and seller without digital platforms. Instead, if these buyers and sellers bargain bilaterally, the outcome could be worse than what it is. However, over time, the market dominance of these platforms became a cause for concern. The business models of Big Tech distinguished them from the existing industrial firms. The locus of value creation of these firms is external. The market dominance of Big Tech could not be wished away. Hence, self-correction did not happen.
- Other conventional sectors of the economy are dependent on platforms such as app stores, search engines, social media etc. for visibility and entry. Cases about self-preferencing, leveraging, and data collection, deep discounting, increasingly began surfacing. The conventional understanding of competition economics was not adequate to deal with the new developments in the digital platform economy.

- The regulators have caught up with the technological know-how and are attempting to control Big Tech. *Ex-post* regulations have limitations. However, *ex-ante* regulation is not the answer. It will bring the entire system to a standstill. The pace of technological change is so fast that *ex-ante* regulations do not seem possible. Hence, *ex-post* is the better alternative.
- A market study on E-commerce (April 2019) highlighted several issues including discriminatory treatment, exploitative terms of contract, deep discounting, bundling of services etc. The CCI suggested that the e-commerce sector should adopt self-regulatory measures. These measures included a clear and transparent policy for the collection, use and sharing of data, verification of purchases by reviewers etc.
- A market study on Telecom (January 2021) called for an appropriate balance between *ex-ante* and *ex-post* regulation. The market size was no longer considered to be a sufficient condition. Merger assessment should include 'combined data power' etc. It also called for formal and informal lines of communication between the telecom regulator, the CCI and the Data Protection Authority (DPA) to ensure robust and consistent decisions.
- The *ex-ante* regulation for competition law in India can tackle transparency, non-discrimination and data power. Quantitative criteria are useful as presumptions but employing only quantitative criteria is tricky. Qualitative criteria should be consistent with the objectives and rationale of the regulation.
- It is important to focus on the causes of the abuse of dominance of the Big Tech. *Prima facie*, the businesses set up by the Big Tech firms were not invalid. They have conducted due diligence and grown due to innovations. For instance, the entry of Google into the market proved detrimental to Bing. This was because Google was a better search engine by merit. The causes of the setting up of Big Tech were not wrong.
- If Big Techs are invincible by competing on their merits, that is fair. Dominance in itself is not a problem; it is the abuse of dominance which is an issue. The competition law is not meant to stop innovation and cause barriers. The Competition Act has a process of investigation that sector-specific regulators like the Telecom Regulatory Authority of India (TRAI) do not have. Hence, *ex-ante* regulations would defeat the purpose of CCI as an off-market regulator. The Competition and Markets Authority (CMA) of the UK recently stated that they want to tame the Big Tech players. However, this appears to be counterintuitive and begs the question- why were the Big Tech companies allowed to set up business in the UK?
- Anti-competition cases were filed by the EU against Microsoft for misusing its dominant position in the market from the 1990s. It was an example of the unfair exclusionary practice of tying. Microsoft advertised its Windows Media Player as

a standalone product but had tied it to its computer operating system. The EU ordered Microsoft to release a version of Microsoft Office without Windows Media Player. However, a lot has changed since then. The advent and popularity of platform economies are unprecedented. These cases point to the fact that markets do self-correct. Competition is redefined by new technology.

- Nuanced regulation is the way forward in regulating the market dominance of Big Tech. The existing competition law framework is adequate and the CCI's work on regulating the market dominance of Big Tech is commendable. Certain changes would help to tip the balance in favour of the regulators. The CCI must make it incumbent upon the dominant entity to explain why self-preferencing should be allowed.
- *Ex-ante* regulation in competition law is not the only solution. Self-regulation, settlements and commitments along with the deal value threshold are alternatives that the CCI could consider. A combination of measures such as -interim relief, reversal of the burden of proof, and rules which speed up the process of investigation- could provide a good arrangement for regulating Big Tech.
- In the context of Europe, the Digital Markets Act (DMA) is in place. However, there is a lack of clarity on how to interpret the DMA- what it would mean for each of the gatekeepers and how those dos and don'ts would be implemented. DMA is far from being considered the gold standard in regulation. It needs to be applied to the Indian context carefully bearing in mind the nature of the digital ecosystem in India.
- The platform economy in India is quite different from the platform economy in Europe. There have been cases filed against Uber and Ola on predatory pricing. The CCI could not regulate these cases because neither of these two firms is a monopoly. Unlike Europe, where there is a clear monopoly, Indian markets mainly consist of duopolies. Similarly, in another case, it was alleged that Amazon was stealing data from businesses that it hosts on its platform. It was grading these businesses to the second and third page which consumers don't tend to check. Again, the CCI could not regulate this because it is a duopoly between Flipkart and Amazon.





4. SUMMARY OF THE DISCUSSIONS

This section contains a summary of the sessions of the conference.

Session I: Meeting of the BRICS Working Group for Research on the Competition Issues in the Automobile Markets (Industry 4.0)

Industry 4.0 is about connectivity and openness. New technologies such as Artificial intelligence (AI), robotics, cloud computing and the development of the Internet of Things have radically transformed the automotive industry. These developments in the automobile sector pose a challenge for the competition regulators.

The Working Group has been a successful cooperation format for the BRICS competition authorities and the results of its work include a research report on competition issues in the automotive sector released in 2021. The research report highlights the emerging issues in the automobile industry and calls upon the competition authorities to keep an eye on the effects of the digitalisation of the sector. It elaborates on how digitalisation gives a new impetus to the industry and what are the potential areas of concern for competition agencies.

Session II: Ecological Approach to Competition Law in the New Economy

The ecological approach to competition law in the context of digital markets is innovative. It compares concepts from biology and ecology with those of the digital platform economy. The proponents of this approach believe that regulators are in a mechanistic trap. They are used to regulating industrial firms that have a structured pattern of production and distribution. However, digital platforms work very differently. Their functioning is characterised by fluidity. This fluidity implies that their impact spills over to other sectors of the economy and across national boundaries.

The ecological approach compares the digital economy with that of natural ecosystems. Just as the trees in the wilderness grow organically, the platforms also develop organically. Nature is cyclical where one agent impacts the other. Similarly, the platform economy is also very integrated with the rest of the economy. Hence, regulating these digital platforms will require a fluid approach to regulations that resembles nature.

Session III: *Ex-ante* Rules and Competition Law for the Digital Economy Indian Perspective

India is considering a series of reforms aimed at regulating digital markets, and the recent formation of a separate Committee on Digital Competition Law has led to a renewed focus on *ex-ante* regulatory approaches. The primary focus of this session was on examining the need for an *ex-ante* competition framework in India that is specifically tailored for digital markets. The sufficiency of existing *ex-post* frameworks in India to regulate digital markets was also discussed. The experts were from diverse backgrounds and brought in perspectives from competition economics, competition law and policy making.

Lastly, the experts explored the extent to which *ex-ante* proposals in other jurisdictions, such as the Digital Markets Act of the EU, are relevant to the discourse in India. The discussion drew from international best practices and challenges to analyse how similar regulatory frameworks have been implemented in other parts of the world.