



# COMPETITION ISSUES IN DIGITAL MARKETS

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## Abstract

This policy brief provides a comprehensive analysis of competition issues in digital markets, elucidating their distinctive characteristics and implications on market dynamics. Recent orders, both final and *prima facie*, of the Competition Commission of India (CCI), have found digital companies to be indulging in unfair market practices related to tying, bundling, self-preferencing, data usage, anti-steering provisions, deep discounting, exclusive tie-ups, advertising policies, and restriction of third party applications; leveraging their dominant positions; and creating ecosystems and walled gardens to the detriment of competition and, consequently, consumer welfare. Key areas of concern highlighted by the CCI include exploitative business practices, unequal bargaining power, and exclusionary behaviours towards competitors. Drawing from the 53rd Report of the Parliamentary Standing Committee on Finance, specific anticompetitive practices are identified, along with the theoretical framework of competition harm underpinning these practices and proposed remedies. The policy brief concludes with pertinent questions related to the growing demand for regulating competition in digital markets and proposes further consultation to formulate regulatory strategies that are India-specific rather than just borrowing from international proposals.

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# Competition Issues in Digital Markets

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## 1. Introduction

A good starting point before delving into the competition issues in digital markets is to understand digital markets and what makes them different from a competition perspective. First, delivery of services in these markets is organized differently in comparison to the one-sided firms operating in traditional markets. Business models characterizing these markets are multi-sided. In these markets, firms—known as platforms—act as intermediaries linking distinct market participants such as advertisers and website visitors. The business of these platforms is premised on exploiting the interdependent interest between several groups of users. Platforms improve information flow, bring buyers and sellers together, reduce search cost for consumers, and minimize transaction costs. Nobel laureate Jean Tirole showed that it is not possible to arrive at an efficient outcome by avoiding the platform and bargaining bilaterally.<sup>2</sup>

The economics of these markets have created a cohort of a few large intermediation/aggregator platforms that have data hegemony. Data plays a central role in digital markets. Digital technologies allow firms to use digital interfaces to gather real-time data on users and profile them almost perfectly, store this data on the cloud, and analyze it through artificial intelligence algorithms to create demand-side efficiencies. Big data has promoted business models that are entirely based on data collected from users. However, the ‘ownership’ of this data does not rely on a properly defined property regime but on the control exercised by these digital platforms

over important entry points for consumers to access the internet.<sup>3</sup> Therefore, the inherent bigness in these business models allows them to operate across markets and create walled garden ecosystems.

The term “ecosystem” has been used to describe these firms as they orchestrate the creation of products and services across multiple markets. These markets may not be in horizontal competition with each other but be complementors inasmuch as they aid each other in value creation and data and have one common input that is used across such markets that reinforce each other. The concept of ecosystems has infiltrated the jargon of enforcers, courts, and regulators. Legal decisions, market inquiries, and legislative materials are increasingly relying on the concept of ecosystems broadly defined as an aggregation of economic activities coordinated by a central actor.<sup>4</sup>

## 2. The Indian Context

The push towards digitalization has led to a dramatic rise in internet penetration in India. On an average, 79.06 million internet subscribers were added year on year during the 2016-22 period.<sup>5</sup> The expanding internet subscriber base and the growth of data usage has provided an impetus for the rapid entry and scale-up of a plethora of internet-based businesses, leading to the digital economy exhibiting a 2.4-time growth rate vis-à-vis the overall economy during the 2014-19 period.<sup>6</sup> India is set to reach a \$1 trillion digital economy by 2030, and it is expected to make up 12-13% of India’s GDP. B2C e-commerce GMV (Gross Merchandise Value) is expected to rise by

1 The author acknowledges the learnings from her former position as Adviser, Economics, and Head, Economics Division, at the Competition Commission of India. The author also acknowledges the research assistance of Nikita Jain, Consultant (fellow), ICRIER. Views are personal. Correspondence: pmalik@icrier.res.in

2 Malik, P., “Protecting Competition in the Digital Space,” Financial Express, November 4, 2022.

3 Michael G. Jacobides and Ioannis Lianos, “Regulating Platforms and Ecosystems: An Introduction,” *Industrial and Corporate Change* 30 (2021), 1131–42.

4 Konstantinos Stylianou and Bruno Carballa-Smichowski, ““Market” Definition in Ecosystems,” December 2023.

5 Calculated from TRAI Performance Indicator Reports

6 See article “India’s digital economy grew 2.4 times faster than economy in 2014-19: RBI Article” <https://economictimes.indiatimes.com/tech/technology/indias-digital-economy-grew-2-4-times-faster-than-economy-in-2014-19-rbi-article/articleshow/96412446.cms> Accessed 30 January 2024.

six times, from \$65 billion to \$380 billion by 2030. Digital financial services are expected to witness promising growth in the range of 8-10% CAGR between 2022 and 2030 across subsectors (i.e., payments, lending, investments, and insurance).

Digitalization is aiding innovation in products, business processes, and business models across industries. India has witnessed the emergence of a new class of entrepreneurs and innovators who are revolutionizing industries and business landscapes, piggybacking on new technologies and the opportunities they offer. These developments augur well for economic growth but also raise concerns on multiple fronts, impact on competition being one of them. Against this background, the attention of policymakers and the competition regulator is shifting to these new-age markets, so that these intermediaries do not operate in the absence of public oversight.<sup>7</sup>

### **Big Tech and Startups**

Large-scale digitalization in India has been facilitated by startups across sectors. Most startups are technology-driven businesses and are typically rooted in innovation, and they try to address the deficiencies of existing products and services or create new categories of goods and services.

With tremendous technological transformations in the country over the past few years, India has emerged as a global startup hub, with the third largest startup ecosystem in the world.<sup>8</sup> During the 2017-22 period, the average year-on-

year (YoY) growth of startups stood at 44.30%, while unicorns saw an average annual growth of 51.42%.<sup>9, 10</sup> As of 2022, it is estimated that India had 74 startups per billion USD of value addition in the ICT sector—the highest among G20 countries. Besides overall growth in digitization and significant policy support (with several incentive schemes such as Fund of Funds for Startups (FFS), Startup India Seed Fund Scheme (SISFS), Credit Guarantee Scheme for Startups (CGSS), etc.), the boost to the startup landscape has also been driven by a surge in investor confidence and the country's rich talent pool. For instance, VC investments have witnessed a CAGR of around 14% (2017-22), with greatest investor interest in fintech (44.9%), e-commerce (22.1%), and enterprisetech (6.8%).<sup>11</sup> Skilled IT and business professionals have contributed to a steady inflow of requisite talent for the ecosystem, which has created over 9 lakh jobs, with a CAGR of 40.68% (2017-22).<sup>12, 13</sup>

The vibrant and dynamic startup ecosystem of the country has also been at the forefront of adoption of industry 4.0 technologies. It is estimated that over 4% of recognized startups are engaged in emerging technology applications, with IoT (Internet of Things), robotics, and computer vision accounting for the majority share of innovations.<sup>14, 15</sup> Moreover, despite a slowdown in tech startup funding in recent months of this year, AI-led deep-tech startups recorded a 79% surge in funding in the second quarter of the year.<sup>16</sup>

As the startup ecosystem in India evolves and matures, the startup interface with Big Tech is set to

7 Malik, P. et al., "Competition Law Enforcement in Digital Markets – Emerging Issues and Evolving Responses in India," in *The Evolution of Antitrust in the Digital Era: Essays on Competition Policy*, ed. David S. Evans, Allan Fels A.O., and Catherine Tucker (2020).

8 See Startup India website <https://www.startupindia.gov.in/content/sih/en/international/go-to-market-guide/indian-startup-ecosystem.html> Accessed 30 January 2024.

9 See newsletter <https://www.startupindia.gov.in/content/dam/invest-india/Newsletters/April2023.pdf> Accessed 30 January 2024

10 IBEF Report. *The Emergence of India as a global startup hub*. <https://www.ibef.org/download/India-as-a-Global-Startup-Hub.pdf>

11 Inc42. *Indian Tech Startups Funding Report*. Inc42, Q1 2023. <https://inc42.com/reports/indian-tech-startup-funding-report-q1-2023/>

12 See article "Economics Survey 2022-23: DPIIT recognized startups have created over 9 lakh direct jobs" <https://inc42.com/buzz/economic-survey-2022-23-dpiit-recognised-startups-have-created-over-9-lakh-direct-jobs/> Accessed 30 January 2024

13 See press release "DPIIT recognized startups create over 8.6 lakh direct jobs since the launch of Startup India" <https://www.pib.gov.in/PressReleaseDetailm.aspx?PRID=1884256> Accessed 30 January 2024

14 See press release "Startups in Emerging technology" <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1911913> Accessed 30 January 2024

15 S.K. Malik, "Adoption of Industry 4.0 Technologies in India's Start-up Ecosystem," ISID Working Paper, <https://isid.org.in/wp-content/uploads/2023/05/WP262.pdf>

16 NASSCOM. *Tech Startups Quarterly Investment Factbook – Q2 CY2023*. NASSCOM, July 2023. <https://nasscom.in/knowledge-center/publications/tech-startups-quarterly-investment-factbook-q2-cy2023>

become more important. The internationalization of research and development (R&D) has resulted in digital companies becoming eager to build on India's initial advantage in software development and engage in both technology-deepening and technology-widening activities. There is potential for immense value creation resulting from the complementarities between the strengths of big technology companies operating these platforms and startups.<sup>17</sup>

Businesses in India—including retailers, hotels, restaurants, media, app developers, and other startups—depend on digital platforms such as app stores, search engines, social media platforms, and advertising platforms for visibility and entry. Digital platforms act as the first touchpoint in a consumer's transaction journey.

### 3. Anti-Competitive Practices

There has been a steady rise in competition matters before the Competition Commission of India (CCI), where governance rules of the platform imposed on business users has been the subject matter of the information filed. These range from across the verticals, such as marketplace platforms, app stores, payment gateways, online travel, food aggregators, and social networking. Such cases pertain to issues such as self-preferencing, leveraging, data-collection practices, and deep discounting.

The core antitrust issues are twofold: the first concerns situations in which the platform operates a business on one side in which the platform has allegedly used its governance system to raise rivals' costs or exclude competitors. These competition harms fall under exclusionary conduct cases—a familiar territory for antitrust law. Another issue that maybe characterized as exploitative conduct is a grey area in competition law, as sanctions against such conduct are limited only to a near monopolist and hence, may not cover firms with

market power, which maybe a blind spot in the law. Bargaining power imbalance and information asymmetry between platforms and their business users leads to one-sided contracts and unilateral revision in contract terms, competition law may not be best suited to deal with such issues on a case-by-case basis.

In addition to these specific issues is the overarching issue of how certain practices are entrenching digital markets due to the unparalleled opportunities for these firms to develop insights on individual customers, which helps the firms develop products or services that are customized to customer preferences.<sup>18</sup> This may allow the platform to leverage market power as well as provide related advantages in adjacent markets, giving established platforms an edge over potential or existing standalone competitors, thus limiting entry prospects. The non-rival nature of data enables data to be repurposed for other products across multiple markets. Therefore, competition authorities consider how firms' control and use of data shapes competition dynamics.

Data-related conduct or deals require not only a reframing of the classic categories of antitrust concerns (i.e., tying, leveraging, foreclosure, denial of market access, and loss of potential competition) around personal and non-personal data as the relevant asset but also add other dimensions of competition, such as quality and privacy. Such concerns may be accommodated within the existing antitrust frameworks by treating competition along these dimensions as non-price attributes that are relevant to the assessment of the effects of potentially anti-competitive acquisitions and other conduct.<sup>19</sup> There is already increasing support for treating the compromise of privacy by a dominant firm as an element of quality degradation for the purposes of competition analysis.

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17 P. Malik and V. Sridhar, "A Report on the Workshop on Startup Ecosystem and Competition," Competition Commission of India, *Journal on Competition Law and Policy* 3 (December 2022).

18 Frederic Jenny, "Competition Law and Digital Ecosystems: Learning to Walk Before We Run," April 4, 2021, <https://ssrn.com/abstract=3776274> or <http://dx.doi.org/10.2139/ssrn.3776274>

19 Caron Beaton-Wells, "Antitrust's Neglected Question: Who is 'the Consumer?'" *The Antitrust Bulletin*, 2020 65, no. 1, 173–93, <https://doi.org/10.1177/0003603X19898606>

## 4. Evolution of Competition Law in Digital Markets

In a slew of recent final orders, the CCI penalized digital companies for not playing fair in the market. These orders highlight how these companies are abusing their dominant position through their business practices to harm competition and consumers. The CCI in its orders has come down heavily upon the rules of engagement between platforms and their users. These rules, apart from being exploitative on account of the unequal bargaining power enjoyed by these platforms relative to businesses, also exclude competitors. At the most fundamental level, platforms' interactions with other actors in the economy have come under scrutiny.

Some of the issues that have been taken up by the Commission have been highlighted by the 53rd Report of the Parliamentary Standing Committee (PSC) on Finance. The following sections discuss the identified practices, the theory of harm, and the competition remedies that have been proposed by the Commission in some of its recent orders.

### *Anti-Steering Provisions*

Anti-steering measures, often employed by dominant digital platforms, restrict the ability of users to direct or guide their preferences outside the platform's ecosystem.<sup>20</sup> These practices distort competition and limit consumer choice. The problem with anti-steering lies in the creation of a "walled garden" model within app markets. This implies that both developers and consumers are unable to switch to another platform if they perceive the terms and conditions within that enclosed environment to be onerous.<sup>21</sup> It has been argued that these anti-steering practices

and high commissions pose challenges to market innovation, especially for smaller app developers.<sup>22</sup> Additionally, anti-steering provisions can also result in higher prices and diminished quality of services, as the lack of competitive pressures diminishes the incentive for platforms to improve or differentiate their offerings. Moreover, they may hinder the emergence of new entrants by limiting their ability to attract users.

The CCI's investigation has uncovered that both Apple (a prima facie opinion) and Google are utilizing anti-steering provisions, mandating app developers to exclusively use their own payment systems. Furthermore, they impose significant revenue commissions on developers for utilizing these systems. The Commission is of the view that the presence of the anti-steering clause restricts the choices for app developers.<sup>23</sup>

Further, during the investigation of the Google case, it was found that anti-steering practices limit app users from enjoying discounts and cashbacks provided by banks and other financial institutions, which could be otherwise accessible through alternative payment processing systems. The Commission directed that app developers should be free to choose their communication channels to interact with users to promote and offer services. Any restrictions imposed on app developers in this regard are considered unfair, impeding their ability to increase usage or membership. Accordingly, the Commission directed as follows:

*Google shall not impose any Anti-Steering Provisions on app developers and shall not restrict them from communicating with their users to promote their apps and offerings, in any manner.<sup>24</sup> (Para 395.2)*

20 53rd Report of the Standing Committee on Finance (17th Lok Sabha) on "Anticompetitive Practices by Big Tech Companies"

21 M. Motta, "Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases," *International Journal of Industrial Organization* (2023), 102974.

22 R. Johnson, "The Steering Problem: Differing Legal Approaches to Addressing Large Tech Companies' Use of Antisteering Provisions by the United States and South Korea," *Bus. & Fin. L. Rev.* 6 (2022), 188.

23 *Together We Fight Society Vs. Apple Inc. & Another* (CCI, December 31, 2021) <https://www.cci.gov.in/antitrust/orders/details/32/0>

24 (07 of 2020) *XYZ (Confidential) Vs. Alphabet Inc. and Others*, (14 of 2021) *Match Group, Inc. vs. Alphabet Inc. and Others*, (35 of 2021) *Alliance of Digital India Foundation vs. Alphabet Inc. and Others* (CCI, October 25, 2022) <https://www.cci.gov.in/antitrust/orders/details/1072/0>

## Adjacency/Bundling and Tying

Tying is commonly described as the practice where a dominant firm sells a product with the condition that the buyer must also purchase another product or agree not to buy the tied product from another supplier. This definition also encompasses the sale of products or services that could be considered distinct but are offered only as bundled products.<sup>25</sup> Earlier cases involving tying and bundling were characterized by an instinctive theory of leveraging. According to this theory, a dominant firm could extend its market power from a controlled market to another competitive market with the aim of establishing a “new or second monopoly in this market”. Consequently, engaging in tying and bundling could result in doubling of the deadweight loss and a decrease in consumer welfare. Tying and bundling were thus perceived as strategies to harm consumers by monopolizing a market that was still competitive.<sup>26</sup> There is arguably no distinction between tying and bundling in the digital realm and these practices in physical, brick-and-mortar markets.<sup>27</sup> However, the presence of network effects in the digital markets may increase the impact of bundling and tying strategies.<sup>28</sup>

CCI found that Google ties or bundles specific apps and services (such as Google Chrome, YouTube, and Google Search) on Android devices in India with other Google applications, services, and/or application programming interfaces like Google Play Store. Google’s bundling strategy is seen as reinforcing its dominance across markets and impacting the competitiveness and vibrancy of markets, such as search, web browsing, and online advertising.<sup>29</sup>

The Commission directed Google to implement the following remedies to prevent competition harm:

*OEMs shall not be restrained from (a) choosing from amongst Google’s proprietary applications to be pre-installed and should not be forced to pre-install a bouquet of applications, and (b) deciding the placement of pre-installed apps, on their smart devices.*

*Licensing of Play Store (including Google Play Services) to OEMs shall not be linked with the requirement of pre-installing Google search services, Chrome browser, YouTube, Google Maps, Gmail or any other application of Google.*<sup>30</sup> (Para 617.1 and 617.2)

## Data Usage (Use of Non-Public Data)

The increasing significance of data, coupled with the unique features of digital markets, has raised apprehensions regarding the potential long-lasting market dominance linked to data. Data’s role in reinforcing demand-side aspects of a market, such as search and switching costs, as well as choice and information overload, may further solidify a firm’s market power when it holds a dominant position.<sup>31</sup> Given that data serves as an input into production, firms controlling data can wield market power and hinder the entry of potential competitors. The impact of such behaviour can be amplified through mergers, where data collected in one market can be leveraged in another.

In the case of *XYZ v Alphabet Inc and Others*,<sup>32</sup> it was observed by the CCI that Google possesses extensive and detailed data about app users, including comprehensive personal and financial

25 53rd Report of the Standing Committee on Finance (17th Lok Sabha) on “Anticompetitive Practices by Big Tech Companies”

26 M. Motta, “Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases,” *International Journal of Industrial Organization* (2023), 102974.

27 R. Johnson, “The Steering Problem: Differing Legal Approaches to Addressing Large Tech Companies’ Use of Antisteering Provisions by the United States and South Korea,” *Bus. & Fin. L. Rev.* 6 (2022), 188.

28 *Together We Fight Society Vs. Apple Inc. & Another* (CCI, December 31, 2021) <https://www.cci.gov.in/antitrust/orders/details/32/0>

29 (07 of 2020) *XYZ (Confidential) Vs. Alphabet Inc. and Others*, (14 of 2021) *Match Group, Inc. vs. Alphabet Inc. and Others*, (35 of 2021) *Alliance of Digital India Foundation vs. Alphabet Inc. and Others* (CCI, October 25, 2022) <https://www.cci.gov.in/antitrust/orders/details/1072/0>

30 *Ibid*

31 “Data Shaping Firms and Markets,” *OECD Digital Economy Papers* no. 344, December 2022, <https://www.oecdilibrary.org/docserver/7b1a2d70en.pdf?expires=1678857602&tid=id&accname=guest&checksum=1C5BB5C1D5BF283322E400F4AD8A1E64>

32 (07 of 2020) *XYZ (Confidential) Vs. Alphabet Inc. and Others*, (14 of 2021) *Match Group, Inc. vs. Alphabet Inc. and Others*, (35 of 2021) *Alliance of Digital India Foundation vs. Alphabet Inc. and Others* (CCI, October 25, 2022) <https://www.cci.gov.in/antitrust/orders/details/1072/0>



transaction information. With access to this financial transaction data, Google has the ability to distort competition in downstream markets. The Commission observed that providing app developers with access to user-level transaction data would be beneficial, enabling them to offer targeted promotions.

The investigation revealed that Google not only has the capacity but also the motivation to utilize this data to target premium users with its own products. It was observed that the adverse effects on competition are twofold: first, it puts rival apps at a disadvantage by providing Google with customer data that enables it to outcompete them, and second, it solidifies Google's position in the online target advertisement sector. To restore competition, the Commission directed Google to implement the following remedies:

*Google shall set out a clear and transparent policy on data that is collected on its platform, use of such data by the platform and also the potential and actual sharing of such data with app developers or other entities, including related entities.*

*The competitively relevant transaction/ consumer data of apps generated and acquired through GPBS, shall not be leveraged by Google to further its competitive advantage. Google shall also provide access to the app developer of the data that has been generated through the concerned app, subject to adequate safeguards, as highlighted in this order.<sup>33</sup> (Para 395.4 and 395.5)*

In the case of *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*,<sup>34</sup> the Commission observed that WhatsApp's practice of sharing users' personalized data with other Facebook companies is done in a manner that lacks transparency and seems to be prima facie unfair to users. The stated purpose of data sharing, specifically for targeted advertisement offerings on other Facebook products, implies an intended

use of constructing user profiles by interlinking data gathered across various services. The alleged data-sharing by WhatsApp with Facebook appears to constitute a degradation of non-price competition parameters, particularly quality, which is detrimental to consumers. A dominant firm exhibiting lower standards of data protection can lead to not only the exploitation of consumers but may also have exclusionary effects. This could empower WhatsApp/Facebook to leverage its position and exert influence in adjacent or even unrelated markets, such as the display advertising market, creating formidable entry barriers for potential new competitors.

Finding a middle ground between capitalizing on the advantages of innovation driven by data and protecting competition through compromised data privacy is essential for managing the potential drawbacks linked to data utilization in digital markets. Regulatory frameworks, including competition law and other data protection laws, would play a pivotal role in ensuring that data practices are responsible and equitable.

### ***Platform Neutrality/Self-Preferencing***

The concept of self-preferencing and lack of platform neutrality is a prominent subject in antitrust discourse. Initially discussed by the European Commission in reference to Google's conduct in the Google Shopping case, self-preferencing involves a vertically integrated company favouring its own affiliate to the detriment of competitors, which falls under the category of vertical foreclosure practices.<sup>35</sup> It is crucial to recognize that the potential for exclusionary and anti-competitive effects in self-preferencing behaviours is directly tied to the unique role played by dominant digital platforms. Given the business model employed by digital platforms, they possess the actual capability to exclude competitors through unconventional actions by using their "intermediation power".

33 (07 of 2020) XYZ (Confidential) Vs. Alphabet Inc. and Others, (14 of 2021) Match Group, Inc. vs. Alphabet Inc. and Others, (35 of 2021) Alliance of Digital India Foundation vs. Alphabet Inc. and Others (CCI, October 25, 2022) <https://www.cci.gov.in/antitrust/orders/details/1072/0>

34 In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users (CCI, March 24, 2021) <https://www.cci.gov.in/antitrust/orders/details/100/0>

35 Massimo Motta, "Self-preferencing and foreclosure in digital markets: theories of harm for abuse cases", BSE Working Paper 1374, December 2022. [https://bse.eu/sites/default/files/working\\_paper\\_pdfs/1374\\_0.pdf](https://bse.eu/sites/default/files/working_paper_pdfs/1374_0.pdf)

In the case of *XYZ v. Alphabet Inc and Others*,<sup>36</sup> the allegation was made that Google, through its Play Store, makes a distinction between its proprietary payment service, Google Pay, and other applications that enable payments through UPI, such as BHIM, Paytm, and PhonePe, by permitting only Google Pay on its platform. The Commission held that Google differentiates between Google Pay and other competing UPI apps by incorporating its payment offering with intent flow technology, while restricting other apps to the collect flow technology. It is observed that such discriminatory practices have led to an increase in the number of transactions processed by Google Pay, resulting in heightened access to data and revenues by Google on the Play Store. Furthermore, as Google Pay is the exclusive UPI app facilitating payments through the intent flow methodology on the Play Store, it is deemed a “must-have app”, and more users are inclined to download the app for the sake of convenience. This, in turn, boosts the popularity and value of Google Pay and its usage beyond the Play Store, consequently diminishing the downloads and usage of other competing UPI apps. It was also noted that Google’s conduct is causing a denial of market access to competing UPI apps. The resulting network effects put Google Pay’s competitors at a competitive disadvantage in the long run. As the usage and downloads of other UPI apps decrease, these apps not only lose the incentive to innovate but also the capacity to innovate, as they are unable to gather user data to comprehend consumer preferences. This, in the long term, renders these apps irrelevant. Given these findings, the Commission directed Google to adhere to the following remedy:

*Google shall not discriminate against other apps facilitating payment through UPI in India vis-à-vis its own UPI app, in any manner.*<sup>37</sup> (Para 395.8)

In *Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors.*,<sup>38</sup> the Informant

had contended that Flipkart and Amazon have instituted an inherently anti-competitive e-commerce model by providing deep discounts and preferential treatment to a specific group of sellers on their platforms. Flipkart designated its preferred sellers, such as Vision Star, Flashstar Commerce, and Flashtech Retail, as “Assured Sellers”, allegedly creating a bias in favour of these sellers to the detriment of others. Similarly, Amazon labels products sold by its preferred sellers (Cloudtail India and Appario Retail) as “Fulfilled”, purportedly introducing a search bias by prominently featuring these sellers in the initial search results pages. Based on the information, the Commission initiated an investigation into the matter.

The economics of self-preferencing has led to authorities bringing many cases related to this vertical restraint on trade against platforms. If one market tips, this conduct can increase the likelihood that other related markets will also tip in favour of the platform, leading to the creation of indomitable ecosystems.

### *Acquisitions and Mergers*

There has been a significant increase in the merger and acquisition activity in digital markets. These acquisitions may be pro-competitive, generating substantial synergies and efficiencies, but competition is threatened when such acquisitions eliminate a competitive threat or raise barriers to entry via economies of scale and scope, data-driven network effects, and control of data. The conventional theory of harm in merger analysis concentrating on prices may encounter limitations and fail to consider essential non-price factors like privacy, data extraction, targeted advertisements, innovation, switching costs, consumer choice, and status quo bias, which can be at the core of potential competitive harm.<sup>39</sup>

36 (07 of 2020) XYZ (Confidential) Vs. Alphabet Inc. and Others, (14 of 2021) Match Group, Inc. vs. Alphabet Inc. and Others, (35 of 2021) Alliance of Digital India Foundation vs. Alphabet Inc. and Others (CCI, October 25, 2022) <https://www.cci.gov.in/antitrust/orders/details/1072/0>

37 Ibid

38 In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors. (CCI, January 13, 2020) <https://cci.gov.in/antitrust/orders/details/110/0>

39 “Theories of Harm for Digital Mergers – Background Note,” OECD Secretariat, June 2023, [https://one.oecd.org/document/DAF/COMP\(2023\)6/en/pdf](https://one.oecd.org/document/DAF/COMP(2023)6/en/pdf)

Additionally, assessing digital mergers often revolves around concerns about the scope of data aggregation and the true value of the amount of data held by platforms. These types of data may create difficulties for a traditional, price-centric approach, but the diversity, volume, and substitutability of data are important factors to take into account while assessing competitive harm. Authorities must also extend their scrutiny beyond immediate relevant product markets to assess the broader impact on the acquirer's ecosystem and the subsequent effects on other product markets through the accumulation of data.<sup>40</sup>

Though there is a growing recognition that non-price competition factors can and should be taken into account in merger assessments when applicable, digital mergers have sparked debates about how much weight should be given to these factors over traditional conceptions of quality and price.<sup>41</sup>

The “loss of potential competition” as a theory of harm as the consequence of a merger is also gaining traction. The reduction in the overall intensity of innovation effort in the economy and the impact of such acquisitions on consumers is being recognised. However, the greatest challenge in investigating the acquisitions of nascent firms is an expectation as to what would happen in the absence of a merger (the relevant counterfactual). A particular challenge when investigating the acquisition of a nascent firm is that there is significant uncertainty over the development of the target's product.

In digital markets, competition harm may not often emerge from horizontal concentration or due to the removal of a vigorous competitor but from vertical or complementary issues. There could be concerns relating to data concentration and the collection or sharing of user data. The acquisition by large horizontal platforms of a

vertical platform or a business which rides on the platform may give rise to conflicts of interest and platform neutrality issues. Thus, competition may not be foreclosed, but such deals may incentivize discrimination. The acquisition route may be adopted to develop ecosystems that include the platform and complementors, further entrenching the dominance of Big Tech companies.

Internationally, novel theories of harm in digital markets have meant that competition authorities may resort to novel merger remedies based on data protection considerations, such as requiring merging parties to keep their databases separate or create a firewall between them.<sup>42</sup> Going forward, behavioural remedies may be preferred to address competition concerns arising from an acquisition. Some commentators are skeptical about such measures as, according to them, competition problems can be attributed to structure and data hegemony, which requires structural responses. Proponents of this reasoning urge to restore break up and divestiture to the toolkit of competition policy.

Under an asset and turnover based notification threshold, some crucial deals in the digital sector may escape competition scrutiny. Innovation-based products and services command lower turnover, especially in their nascent stage, as the emphasis is on growth. Digitization has also led to the proliferation of asset-light business models. The value of the target's sales and assets may be a poor indicator of the merger's significance for competition. To address this, the Competition (Amendment) Act has included an additional criterion for notification. Any acquisition (M&A) would require prior notice to, and accordingly prior approval of, the Commission, if the deal value of the transaction exceeds INR 2000 crores and parties to such transaction have substantial business operations in India, i.e., parties have substantial nexus to India.

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40 *ibid.*

41 *Ibid.*

42 I. Graef, M. Husovec, and N. Purtova, “Data Portability and Data Control: Lessons for an Emerging Concept in EU Law,” *German Law Journal* 19, no. 6 (2018), 1359–98.

## Pricing/Deep Discounting

Digital platforms have adopted deep discounting and significantly low pricing for leveraging network effects. These pricing models are strategically designed to cultivate a user base that is critical to the platforms' functioning and success.<sup>43</sup> On certain platforms, attracting one side by lowering price is particularly profitable for the platform if this side creates substantial externalities on the other side. For example, media platforms usually give free content to attract users and charge higher mark-ups to advertisers.

While there are considerable risks associated with perceiving deep discounting as inherently harmful to competition, it is essential to distinguish between deep discounting and predatory pricing. Deep discounting is distinct from predatory pricing and involves a retailer offering an unusually large reduction in price, typically in reference to the maximum retail price (MRP) set by the manufacturer or prevailing prices charged by other retailers. Predatory pricing, on the other hand, entails a dominant firm sacrificing short-term profits by pricing below its own cost with the aim of driving competitors out of the market and recouping losses with higher prices in the long run. Predatory pricing requires a broader assessment to determine if it has a legitimate business justification beyond inducing the exit of rivals.<sup>44</sup>

Different digital business models have adopted monetization strategies that have led platform operators to devise a pricing structure rather than a cost-based pricing for each side of the market for profit maximization. Multi-sided platforms often utilize cross-subsidization to harness cross-side network effect. Ascribing competition harm to such monetization strategies, especially in ad-funded platforms, is a challenge that antitrust authorities are facing.

While lower prices can be beneficial to the consumer, sustained and below-cost pricing strategies by dominant digital platforms may negatively impact competition by forcing smaller competitors out of the market. This could result in the reduction of product and service diversity, limiting consumer choice over time.<sup>45</sup>

In the case of Federation of Hotel & Restaurant Associations of India (FHRAI) and another Vs. MakeMyTrip India Pvt. Ltd. (MMT) and others with Rubtub Solutions Pvt. Ltd. Vs. MakeMyTrip India Pvt. Ltd. (MMT) and others, MMT-Go was accused of providing substantial discounts on hotel rooms, offering prices that hotels themselves find impossible to match. While recognizing that deep discounts are commonly employed in platform markets to create network effects, the Commission highlighted that, in the case of MMT-Go, which has held a dominant position since 2000, the practice might not be introductory and could be aimed at purposes beyond network establishment. The Commission observed as follows:

*...deep discounts, exclusivity condition and parity conditions, in conjunction, creates an ecosystem that reinforces MMT-Go's dominant position in the relevant market. Firstly, it helps MMT-Go to retain and further increase its network of users/travelers, who would increasingly use the platform for availing the best deals. Secondly, it impedes the competitive process between OTAs by limiting the competitive levers/instruments at the disposal of other portals who, for instance, cannot get better prices from hotels by offering lower commission rates. Thirdly, the consequent adverse effect on sale of rooms through other platforms/channels and their user bases, further accentuates the dependence of hotels on MMT-Go as well as the bargaining power imbalance that already exists between MMT-Go and its hotel partners. Fourthly, the increased sales through MMT-Go may lead to unilaterally determined higher commissions charged by it,*

43 B. Gulati and V. Puri, "Predation or Competition: Demystifying the Dilemma in Platform Markets," *Competition Commission of India Journal on Competition Law and Policy* (2022), 167–94.

44 OECD, "Abuse of Dominance in Digital Markets," 2020, [www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf](http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf)

45 OECD "Abuse of Dominance in Digital Markets"

giving it the ability to also pass on discounts which are funded through these commissions, which may adversely impact the prices at which the hotels rooms are being offered to end-consumers. While it may be argued that discounts are beneficial for the end-consumers, the net impact may be adverse when seen in light of higher commissions funding the higher discounts leading to overall higher prices on which the discounts are applied.<sup>46</sup>

Thus, discounting practices have to be seen in conjunction with other practices, the object of which is that dependency is maintained and competition is foreclosed. In a broader sense, continued and persistent discounting may not pass the competition on merits test as discounts are coupled with other practices that may make the platform invincible, leading to durable market power.

### **Exclusive Tie-Ups**

One of the prevalent anti-competitive practices seen in e-commerce platforms involves exclusive arrangements. The main anti-competitive concern with exclusive dealing contracts is that a monopolist could use exclusivity to strengthen its market position and ultimately harm consumers.

In the MMT case, it was noted that independent budget hotels formed alliances with franchisors like FabHotels, Treebo, and OYO to gain brand recognition, enhancing their visibility on OTAs through improved search rankings, reviews, and superior consumer handling solutions. The Commission noted that MMT-Go and OYO had entered exclusive arrangements that not only impacted FabHotels and Treebo branded hotels but also budget hotels receiving logistical support from these franchisors while operating independently. This compelled budget hotels to disassociate from these franchisees and engage with OYO to avail franchise services or logistical

support without losing visibility on the largest online booking platform.

This exclusive agreement had the potential to favour OYO in the downstream market for franchisee budget hotels, posing a threat to fair competition. Further, any franchise arrangement with competitors like FabHotels and Treebo would result in delisting from the dominant intermediary, MMT-Go, reducing their visibility and footfall. Delisting sought to create an artificial advantage for OYO and its hotel partners against Treebo's and FabHotels's hotel partners. The Commission held that the arrangement between OYO and MMT-Go, resulting in market foreclosure and denial of market access to FabHotels, Treebo, and independent budget hotels, to be anti-competitive.<sup>47</sup>

In a *prima facie* opinion in *Delhi Vyapar Mahasangh Vs. Amazon and Flipkart*, the Commission observed that few online sellers launch and sell smartphones exclusively through either Amazon or Flipkart. Thus, the exclusive launch of smartphones, coupled with preferential treatment to a few sellers and discounting practices, creates an ecosystem that may lead to an appreciable adverse effect on competition.<sup>48</sup>

Interestingly, while exclusivetiups may not always be anti-competitive, as in the case of discounting, it is an agglomeration of various practices that add up and create classic competition concerns such as barriers to entry and foreclosure.

### **Search and Ranking Preferencing**

Users conduct searches on various platforms by using keywords and receive results generated by algorithms. Search engines engage in competition to attract consumers based on various quality dimensions, including result relevance, user-friendly interfaces, visual appeal, privacy and trustworthiness, and incentives for users. Similar

46 Federation of Hotel & Restaurant Associations of India (FHRAI) and another Vs. MakeMyTrip India Pvt. Ltd. (MMT) and others with Rubtub Solutions Pvt. Ltd. Vs. MakeMyTrip India Pvt. Ltd. (MMT) and others (CCI, October 19, 2022) <https://www.cci.gov.in/antitrust/orders/details/1069/0>

47 Ibid

48 In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors. (CCI, January 13, 2020) <https://cci.gov.in/antitrust/orders/details/110/0>

to same-side network effects, where users benefit from improved quality as the search engine gains more users, dominant search engines leverage data that reflect user responses to past searches to enhance their ranking algorithms. This enables them to provide more relevant results compared to their competitors.<sup>49</sup>

Search engines like Google and Bing maintain an index of websites and employ algorithms to determine the results displayed in response to a query. When users input a search query, these engines utilize algorithms to understand the intent of the query and promptly select and present the most relevant and valuable information from their index.<sup>50</sup> In an ideal scenario, organic search results should present products or services without bias and based on some objective criteria, such as top-selling. However, if products are prioritized according to sponsored products or those fulfilled by the marketplace, it indicates a form of search bias.<sup>51</sup>

In the case of *Matrimony.com Limited Vs. Google LLC & Others (30/2012) Consumer Unity & Trust Society (CUTS) Vs. Google LLC & Others*,<sup>52</sup> Google was accused of conducting its core search and search advertising businesses unfairly and discriminatorily, causing harm to publishers, advertisers, and consumers. The Commission contended that the rankings of Universal Results before 2010 were not strictly based on relevance but were predetermined to appear at the first, fourth, or tenth position on the Search Engine Results Page (SERP). This practice, according to the Commission, was unfair as it created a misleading impression that these prominently displayed search results were algorithmically determined based on relevance. Furthermore, the Commission asserted that, by integrating specialized search result pages with commercial

units such as flights and prominently placing them on the SERP, Google can channel traffic to its own pages and generate revenue through advertisements and sponsored results.

### ***Restricting Third-Party Applications***

At times, dominant Big Tech entities limit the installation or functioning of third-party applications. These practices also have the potential to impede innovation and establish a closed ecosystem in which users are confined to a restricted range of services. Such conduct may stifle competition as it obstructs the capacity of third-party developers to reach users and offer alternatives to the platform's native services. These restrictions can curtail consumer choice, impede the diversification of applications, and may lead to a scenario where the dominant platform exerts excessive control over the digital marketplace.

In a *prima facie opinion in the case of Together We Fight Society vs. Apple Inc. & Another*, the Commission observed that Apple's App Store serves as an exclusive platform for app developers to distribute their apps to iOS consumers, as it is pre-installed on every iPhone and iPad. Furthermore, Apple's guidelines and agreements explicitly prohibit the listing of third-party app stores on the Apple App Store, with Article 3.3.2 of the Apple Developer Program License Agreement stating that "*...the Application must not create a store or storefront for other code or applications...*" (Para 33, Page 18). These restrictions essentially close off the market for app stores for iOS to potential app distributors. The Commission observed that it *prima facie* leads to denial of market access for potential app distributors and app store developers, limiting and constraining the technical or scientific advancement of services related to the iOS app store.<sup>53</sup>

49 [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf)

50 *Ibid.*

51 53rd Report of the Standing Committee on Finance (17th Lok Sabha) on "Anticompetitive Practices by Big Tech Companies"

52 (07/2012) *Matrimony.com Limited Vs. Google LLC & Others (30/2012) Consumer Unity & Trust Society (CUTS) Vs. Google LLC & Others* (CCI, January 31, 2018) <https://www.cci.gov.in/antitrust/orders/details/746/0>

53 *Together We Fight Society Vs. Apple Inc. & Another* (CCI, December 31, 2021) <https://www.cci.gov.in/antitrust/orders/details/32/0>

In the case of *XYZ (Confidential) Vs. Alphabet Inc. and Others, Match Group, Inc. vs. Alphabet Inc. and Others, Alliance of Digital India Foundation vs. Alphabet Inc. and Others*,<sup>54</sup> the Commission observed that Google's payment policy mandates app developers offering paid apps or in-app purchases (IAPs) to use Google Play Billing System (GPBS). Due to this mandatory requirement, app developers are restricted from utilizing their preferred payment processing system for handling app purchases and in-app transactions of digital products. This compulsory imposition of GPBS closes off opportunities for other payment processing service providers to cater to app developers handling payments for paid apps and IAPs. Additionally, it disincentivizes app developers from creating their own in-app payment processor.

In light of this, the Commission directed Google to implement the following remedy:

*Google shall allow, and not restrict app developers from using any third-party billing/ payment processing services, either for in-app purchases or for purchasing apps. Google shall also not discriminate or otherwise take any adverse measures against such apps using third party billing/ payment processing services, in any manner. (Para 395.1)*

### **Advertising Policies**

Digital advertising markets operate as multi-sided markets, bringing together advertisers, publishers (and content providers), and consumers. The success of businesses in these markets hinges on their ability to attract high-quality ad space which, in turn, attracts consumers and their ability to draw in advertisers.<sup>55</sup>

There are three main types of digital advertising: search, display, and classified. Search advertising involves advertisers paying for their ads to appear alongside search results on internet search engines. Display advertising allows ads to be placed on websites or apps in various formats, including banners, native advertising, sponsored content, and video ads. Classified advertising entails advertisers paying online platforms to list specific products or services on specialized websites catering to specific vertical markets.<sup>56</sup>

Competition concerns have arisen as some companies wield disproportionately strong market power in the online advertising market. Exclusive contracts limiting competition, bundling of advertising space with other services, or unjustified restrictions on advertising space may lead to anti-competitive practices.<sup>57</sup>

Concerns have been expressed by news publishers in several jurisdictions, including in India, regarding the lack of competition and transparency in the ad tech intermediation. This has allowed intermediaries to take a sizable portion of advertisers' expenditure, which eventually lowers the amount of money that reaches publishers. Reduced revenues for publishers may hinder their ability and incentives to produce quality content that benefits consumers.<sup>58</sup> The lack of competition in digital advertising can harm consumers by increasing the prices of goods and services and undermining the sustainability of news media.

In January 2022, the CCI initiated an investigation into Google's advertising policies. The case highlights concerns about the alleged imbalance of bargaining power stemming from Google's role as a necessary trading partner for digital news publishers. They claimed that the lack of

54 (07 of 2020) XYZ (Confidential) Vs. Alphabet Inc. and Others, (14 of 2021) Match Group, Inc. vs. Alphabet Inc. and Others, (35 of 2021) Alliance of Digital India Foundation vs. Alphabet Inc. and Others (CCI, October 25, 2022) <https://www.cci.gov.in/antitrust/orders/details/1072/0>

55 "Digital Advertising Markets – Background Note", OECD Secretariat, November 2020 [https://one.oecd.org/document/DAF/COMP/WP2\(2020\)3/En/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2020)3/En/pdf)

56 CMA, "Online Platforms and Digital Advertising", CMA Market Study Final Report, July 2020. [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf)

57 Special Report by Monopolies Commission on "Competition Policy: The challenge of Digital Markets" [https://www.monopolkommission.de/images/PDF/SG/SG68/S68\\_summary.pdf](https://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf)

58 CMA, "Online Platforms and Digital Advertising", CMA Market Study Final Report, July 2020. [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf)

transparency on crucial aspects like data and audience management practices, along with the generation and sharing of revenue with publishers, amplifies information asymmetry and appears to be inherently harmful to the interests of publishers. This, in turn, has the potential to impact the quality of their services. The CCI found Google's methodology for determining and sharing advertising revenue with online news publishers, along with not compensating them for the use of their websites' "snippets" in Google's search results, *prima facie* to be abusive. As a result, the CCI directed the DG to conduct an investigation.<sup>59</sup>

## 5. Demand for Regulating Big Tech

Increasingly, terms such as "unfair", "bargaining power imbalance", "asymmetric information", "bottleneck facility", "gatekeepers", and "dependence" are finding use in the competition law lexicon. In order to address these issues, some behavioural rules through regulation may have to be introduced to complement competition rules. Undoubtedly, a case-by-case competition law approach allows for the emergence of evidence-based competition jurisprudence. However, in such fast-moving markets, process constraints make this a long route for regulatory mediation and market correction. Inspired by antitrust cases which, in some sense, have developed pro-competitive conduct rules, a slew of new legislations has either been enacted or is being proposed the world over.

Competition authorities and academics alike have expressed the need for enforceable service-specific codes to prevent anti-competitive conduct. Clear codes would target anti-competitive conduct such as self-preferencing, tying, and exclusive pre-installation arrangements, and could also improve consumer switching, information transparency, and interoperability between different services. The essence of these legislations

is "competition law through regulation". For digital companies, this implies the imposition of access requirements, non-discrimination provisions, and interoperability. The implementation of the Digital Markets Act (DMA) by the European Union, and the United Kingdom's progress in legislating a Digital Markets, Competition and Consumer Bill will constitute an important experiment in regulating digital markets that other jurisdictions closely watch.

The basic premise for regulating these markets is that the "platformisation" of internet access is compromising the canonical principles of interoperability and openness. Thus, some form of policy nudges, including appropriately designed incentives, are required to make the digital ecosystem more open. It is argued that an ex-ante regulatory contract will minimize the need for lengthy, context-specific fact-finding exercises that characterize competition law systems. The move towards regulating Big Tech is to ensure the speedy resolution of issues and to ensure that intervention is fast and, if necessary, pre-emptive.<sup>60</sup>

It is argued that an ex-post case-by-case approach should be supplanted by a framework where the identified practices of gatekeepers will be subject to prescriptive and proscriptive rules. This is viewed by some as a move towards a more *per se* approach that depends on general principles making efficiency considerations irrelevant. Given the disregard for efficiency premised in such rules, the normative basis of competition law, i.e., consumer welfare, is being expanded to include economy-wide concerns.

The call for regulating the digital economy has embedded in it the objective of maximizing the gains from trade on these platforms and maintaining the innovation incentives of the platform as well as the business verticals dependent on them. How far this normative basis

59 Digital News Publishers Association Vs. Alphabet Inc. and Others (CCI, January 07, 2022) <https://www.cci.gov.in/antitrust/orders/details/11/0>

60 Pablo Ibáñez Colomo, "The Draft Digital Markets Act: A Legal and Institutional Analysis," *Journal of European Competition Law & Practice* 12, no. 7 (2021).



deviates from the consumer welfare objective is a wider debate and is beyond the scope of this policy brief. However, this does not mean that the consumer welfare principle is being abandoned in favour of something fuzzy and undefined; it only means broadening the ambit of the consumers to include business users, which fits squarely with several competition harms identified in existing competition laws. This leads us to the question of exploring the need for a distinct law for regulating Big Tech or expanding the scope of the existing law.

The recent report of the Parliamentary Standing Committee on the anti-competitive practices (ACPs) of Big Tech has recommended that the Government of India examine the need for an *ex-ante* regulatory architecture in the context of systemically important digital intermediaries that may address some of these issues. A Committee on Digital Competition Law (CDCL) has been

constituted by the central government and is deliberating on this matter.

This policy brief concludes with some questions for further consultation. Are there specific gaps in the competition law in its current amended form to deal with the identified ACPs? If yes, do these gaps merit some additional powers/amendments under the existing law? Or is a new law necessary/desirable to introduce *ex-ante* obligations? How should the obligations and associated thresholds for application be designed? Should India be guided by global paradigms, both established and emerging, for the regulation of competition in digital markets? If *ex-ante* regulations are to be established, what should be their regulatory structure and what shall be the process of their implementation? Finally, what should be the difference in processes between the proposed *ex-ante* regulations and the existing regulations under the Competition Act?



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