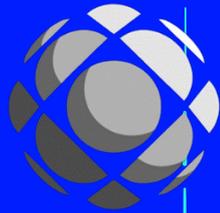
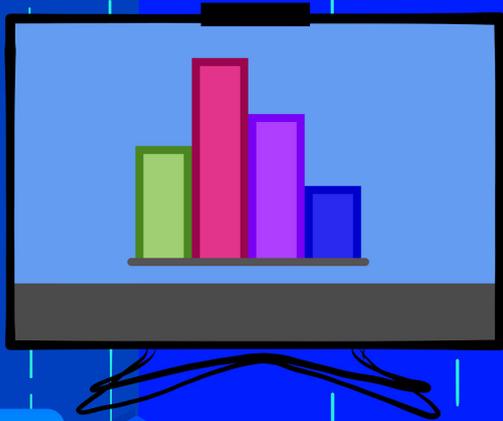


# DETERMINING THE RELEVANT MARKET FOR DIGITAL MULTI-SIDED PLATFORMS

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## EXECUTIVE SUMMARY

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### Chapter 1

- The availability of data and devices has spurred the growth of digital platforms. Consumers increasingly rely on these platforms for products and services in a range of different sectors, including transport, hospitality and retail.

- Growing consumer reliance on digital platforms gives grounds for scrutiny by competition regulators around the world. This is often predicated on characteristics of digital markets, such as network effects and economies of scope and scale, that are conducive to dominance by a single firm.

- With cases involving digital platforms only likely to increase in the coming years, it is important to assess whether existing antitrust tools can be applied to digital markets.

- This paper examines whether the existing legal framework for relevant market determination is appropriate for multi-sided markets.

### Chapter 2

- Most digital platforms operate as multi-sided markets, which facilitate interactions between two or more interdependent groups of users. E-commerce platforms, cab aggregators, online travel agencies are examples of multi-sided markets.

- Given their multi-sided nature, digital platforms display characteristics absent in one-sided markets. These include indirect network effects, zero price and multi-homing. These qualities have a tangible impact on relevant market determination.

- Relevant market determination is

traditionally based on the concept of demand side substitutability. In multi-sided markets however, demand on one side of the platform is typically linked to conditions prevailing on the other, and a one-sided approach to market determination will likely result in inaccurate and undesirable outcomes.

- Current research suggests various ways to improve the accuracy of relevant market determination for multi-sided markets. Some scholars argue that platform typology should be considered in deciding how many markets to define. Others suggest modifications to existing metrics like the SSNIP test, to make them better suited to multi-sided markets. Some of these suggestions have found their way into decision practice by competition authorities around the world.

### Chapter 3

- Competition authorities are increasingly deciding cases that involve digital platforms. A study of these cases reveals the authorities are accounting for the peculiarities of multi-sided markets in determining relevant markets.

- There is clear evidence from the US, UK and Germany to show that courts and regulators have used the platform typology approach to help determine relevant markets. In other jurisdictions such as Brazil, emphasis has been placed on studying indirect network effects case by case to determine the relevant market.

- Competition authorities seldom use quantitative metrics like the SSNIP test to determine substitutability in multi-sided markets, in keeping with the research reviewed in Chapter 2. There is evidence instead of a gradual shift to qualitative factors, such as product features and characteristics. But the use of qualitative factors remains limited, due

to difficulties in accurately assessing subjective dimensions of competition such as consumer preference.

### Chapter 4

- The CCI has dealt with close to 40 cases involving digital platforms in the past eight years. It passed prima facie orders in most cases, but only after determining the relevant market. This yields sufficient jurisprudence to evaluate the CCI's approach in determining relevant markets where multi-sided markets are concerned.

- Unlike other jurisdictions, the CCI has not acknowledged the multi-sided nature of markets in most cases. Instead it has defined distinct and independent markets in these cases. Where it acknowledged the multi-sided nature of platforms, it did not fully account for the competitive constraints faced by each side due to indirect network effects.

- There is evidence of the CCI relying on features and functionalities to identify which products and services are substitutable. But the use of such qualitative factors is often inconsistent, and does not rely on empirical evidence such as consumer preference surveys.

- Discretion in quasi-judicial decisions is undesirable from the legal and economic perspective.

### Conclusion

- There is a need to adjust the CCI's approach toward relevant market determination for multi-sided platforms. The Government is already considering amendments to law to incorporate suggestions made by the Competition Law Review Committee on defining the relevant product market, as well as the factors the CCI may consider in determining these markets.

- Given the dynamic and ever-changing nature of digital platforms, a legislative amendment is unlikely to suffice. There is a need to define first principles that would guide the CCI's approach in every case involving digital platforms. These principles must account for the characteristics of multi-sided markets mentioned above.

- The CCI should consider how its determination of qualitative aspects can be made evidence-based and objective. A possible way is to conduct consumer facing surveys in order to determine substitutability where quantitative analysis is difficult.

## INTRODUCTION

Digital platforms are online businesses that facilitate a variety of interactions between distinct user groups through apps or websites, and are becoming ubiquitous in modern consumer economies. They operate in sectors including retail, hospitality, transport and entertainment. Inexpensive data and devices have enabled a large number of consumers to use digital platforms, increasing their importance.<sup>1</sup>

A report by the Ministry of Electronics Information and Technology (MeitY) pegged the value of India's digital economy at \$200 billion in 2017-18, of which digital communication services, e-commerce and digital payments constituted \$49 billion or roughly a quarter.<sup>2</sup> These three segments of the digital economy are projected to grow to a combined value of \$100 billion by 2025.

As in other jurisdictions, the economic importance of digital platforms has attracted the scrutiny of the Competition Commission of India (CCI). The scrutiny is prompted by the characteristics of digital markets that make them prone to tipping in favour of a dominant firm. These include network effects, high fixed costs, near zero marginal costs, and economies of scale.<sup>3</sup>

**THE CCI HAS DEALT WITH 38 CASES INVOLVING DIGITAL PLATFORMS BETWEEN 2014 AND JUNE 2021. 35 OF THESE CASES INCLUDE ALLEGATIONS OF ABUSE OF DOMINANCE UNDER SECTION 4 OF THE COMPETITION ACT.**

The potentially durable nature of dominance in digital markets was noted by the CCI's Chairperson in a recent speech:<sup>4</sup> 'Not long ago, it was widely contended that market power in technology markets is fleeting, and interventions would entail a high risk of discouraging innovation... However, critics of this notion of digital markets have pointed out that market dominance in these markets is not

fragile, but durable.' It is unsurprising that most antitrust cases against digital platforms in India involve allegations of abuse of dominance. The CCI has dealt with 38 cases involving digital platforms between 2014 and June 2021. Thirty-Five (35) of these cases include allegations of abuse of dominance under Section 4 of the Competition Act.<sup>5</sup>

As digital platforms become ubiquitous such cases will only become more frequent. Determinations by competition authorities are likely to impact not only the platforms in question, but other small and possibly innovative firms in the digital ecosystem.<sup>6</sup> It is important to assess whether the legal framework for competition (comprising legislation, regulations and decisional practice) can be used to effectively address anti-competitive conduct in India's digital markets.

This paper evaluates the approach adopted by competition authorities including the CCI for relevant market determination in digital markets, which is the first step in inquiries into abuse of dominance.

A relevant market is one in which interchangeable products or services are sold. Relevant market determination is a tool used by competition authorities (CAs) to define the bounds in which to assess the actions of a firm. The purpose of market determination is to identify the products that exert competitive pressure on the products sold by a firm, and are substitutable to the extent that the firms producing them can be considered its competitors.<sup>7</sup> This helps the CA identify the market in which to assess the dominance of a firm. Market determination is also used to assess the adverse effect a merger or combination may have on competition in the relevant market.

A relevant market has two dimensions: the product market and the geographic market. The Competition Act 2002 defines the relevant

product market as that comprising all products or services regarded as interchangeable or substitutable by consumers because of their characteristics, intended use or price.<sup>8</sup> In other words, the Competition Act relies on demand-side substitutability to determine the relevant product market. The relevant geographic market meanwhile comprises the area in which conditions of demand and supply of the good or service are distinctly homogeneous, and can be distinguished from conditions prevailing in neighbouring areas.<sup>9</sup>

This paper's focus is on relevant product market determination in cases involving digital platforms. While characteristics of digital platforms, such as their global reach, do create complications in determining geographic markets, there appears to be a degree of consistency in the way CAs, particularly the CCI, have approached the issue. By contrast there is considerable debate and lack of uniformity in the way relevant product markets are defined.

Relevant market determination is only the first step in antitrust inquiries, but it serves an important purpose in identifying the goods and services that can be substituted for each other. A narrow market determination that includes fewer substitute goods increases the likelihood that a firm will be deemed dominant. Conversely, a broad market determination may include a large number of substitutes, leading CAs to overlook instances of anti-competitive conduct.

Thus, market determination and assessment of market power are distinct though interlinked steps in antitrust inquiries. Evaluating assessments of market power by CAs is important for understanding the consequences of erroneous market definition. This paper's

analysis of market power assessment by various CAs highlights the spillover effects of market determination. The scope of analysis is limited, however, to assessing how CAs can define the relevant market accurately in cases involving digital platforms.<sup>10</sup>

**IT IS CHALLENGING TO DEFINE RELEVANT MARKETS FOR DIGITAL PLATFORMS. THIS IS BECAUSE MOST DIGITAL PLATFORMS OPERATE AS MULTI-SIDED MARKETS, SERVING AT LEAST TWO DISTINCT BUT INTERDEPENDENT CONSUMER GROUPS.**

It is challenging to define relevant markets for digital platforms. This is because most digital platforms operate as multi-sided markets, serving at least two distinct but interdependent consumer groups.<sup>11</sup> An e-commerce platform, for instance, serves buyers on one side and sellers on the other. This multi-sided structure gives rise to peculiarities, such as indirect network effects, that complicate relevant product determination. It is also increasingly difficult to draw a line between the services offered by digital platforms, due to convergences in functionality and utility. Indeed it has been argued that digital platforms, especially social networks, all compete for user attention and can conceivably be part of the same market.

The next section briefly discusses the characteristics of multi-sided markets and their interface with relevant market determination. The subsequent chapters discuss the different approaches adopted by CAs including the CCI to resolve these complications. The paper concludes with recommendations to make the CCI's process of relevant market determination more consistent and accurate for digital markets.

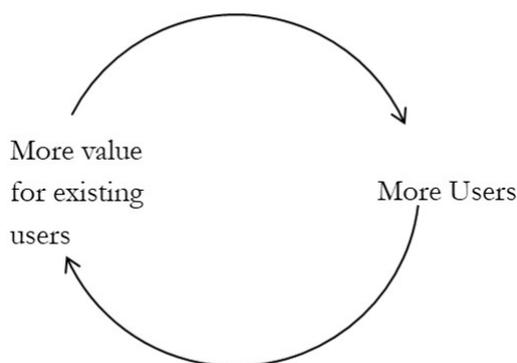
# DIFFICULTIES IN DETERMINING THE RELEVANT MARKET FOR MULTI-SIDED MARKETS

Broadly considered, multi-sided markets enable interactions between two or more groups of users in a manner that generates value for at least one of the user groups.<sup>12</sup> A key feature is that the user groups, though distinct, are usually interdependent.<sup>13</sup> Their interdependence stems from network effects – a situation where the value derived by each user from a product increases with the number of people using that product.

**MULTI-SIDED MARKETS ENABLE INTERACTIONS BETWEEN TWO OR MORE GROUPS OF USERS IN A MANNER THAT GENERATES VALUE FOR AT LEAST ONE OF THE USER GROUPS**

Network effects can be of two types:

1. Direct network effects occur when the product becomes more valuable to each user as the total number of users increases. For instance, social media platforms like Facebook are of greater value to a user if a larger share of their acquaintances also use the platform.



**FIGURE 1: DIAGRAM OF DIRECT NETWORK EFFECTS**

2. Indirect network effects occur when the value derived by one consumer group from a product or service depends on the presence of another group. A typical example is a cab aggregation platform: the two sides of the market are users looking to book cabs and drivers who wish to provide their services. For a user the value of the cab aggregator depends on the number of drivers available, which would lead to lower wait times, fees, etc. Drivers too will attach more value to a platform that has more users. So the utility or value derived by each side of the market depends on the other side.



**FIGURE 2: DIAGRAM OF INDIRECT NETWORK EFFECTS**

Competition analysis has traditionally deemed the network size of a platform a core element of its value, and hence its market power – there is considerable research on the role of network effects in making digital markets prone to tipping in favour of a single firm. However, as shown above, the presence of indirect network effects in multi-sided markets tends to create links between different user groups that influence which products and services are seen as substitutes by consumers. This directly impacts demand side substitutability, the standard usually adopted to determine the relevant market. Thus analysis of indirect network effects is increasingly important to

determine relevant markets.

In multi-sided markets, demand side substitutability can be assessed with regard to more than one consumer group or side.<sup>14</sup> This may result in multiple relevant markets being defined, as the different sides of the platform may consider different goods to be substitutes.

**Take a platform that caters to three user groups:**

1. Consumers who want to order food
2. Restaurants preparing the food
3. Delivery personnel

While the product provided by the platform rests on interaction between all three sides, each side may see the interaction differently. The consumer may not be concerned whether the food is delivered by a restaurant employee or by independent delivery personnel. The delivery service may not differentiate between an order for food or groceries. So a demand side substitutability assessment for each group would offer different results. The market for consumers could be defined as the market for home food delivery, while for delivery personnel it may be the market for delivering small packages.<sup>15</sup> Given the existence of different substitutes, and hence different competitive constraints, competition authorities may need to define multiple relevant markets, while also accounting for their interdependence.

Situations also exist where user groups have essentially the same need for liaising with other user groups – as a result there is little divergence in how the groups regard substitutability.<sup>16</sup> An example is credit card payment systems, which facilitate a single simultaneous transaction between both the parties. In such cases a single relevant market can be defined for both sides, as they have similar views regarding substitutability.<sup>17</sup>

**FIRST ASSESSMENT THAT CAs NEED TO MAKE IN DETERMINING A RELEVANT MARKET FOR MULTI-SIDED PLATFORMS IS WHETHER TO DEFINE A SINGLE RELEVANT MARKET FOR THE ENTIRE PLATFORM, OR MULTIPLE INTERRELATED RELEVANT MARKETS FOR EACH SIDE.**

Hence, the first assessment that CAs need to make in determining a relevant market for multi-sided platforms is whether to define a single relevant market for the entire platform, or multiple interrelated relevant markets for each side. This involves assessing the presence of indirect network effects as well as their strength and direction – a complicated assessment for CAs to make.<sup>18</sup>

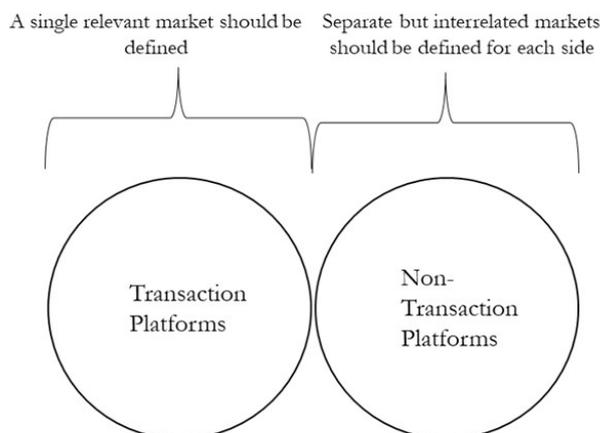
**Single market vs multiple markets: Platform typology approach**

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To simplify assessment of how many markets are to be defined, scholars suggest relying on the platform nature or typology. Filistruchhi, a pioneer of this approach, suggests differentiating between transactional and non-transactional platforms.

Transactional platforms enable direct, observable, bidirectional transactions between two user groups. In them indirect network effects flow from both sides: payment card systems, e-commerce marketplaces and travel aggregators are examples of transactional platforms.<sup>19</sup>

Non-transactional platforms on the other hand enable interactions other than transactions between user groups. As a result they only exhibit unilateral cross-side network effects. For instance, an increase in the number of users of a social media platform will likely increase its value for advertisers. However, an increase in the number of advertisers won't always affect the value derived by users.



**FIGURE 3: DIAGRAM OF PLATFORM TYPOLOGY AS THE BASIS FOR RELEVANT MARKET DETERMINATION**

Scholars propose that for transactional platforms, both sides should be treated as a single relevant market, due to the existence of bidirectional indirect network effects. In non-transactional platforms each side should constitute a separate market, as different economic considerations and substitutes may exist for the different sides.<sup>20</sup>

The platform typology approach, with various classifications, has been used by CAs in different jurisdictions to decide how many markets to define. This approach is still evolving and has its limitations, as discussed later. CAs must be careful not to rely excessively on platform nature or typology.

### Determining substitutability: a shift from quantitative to qualitative analysis

An important step in determining the relevant market is to identify existing substitutes for the product or service offered by the platform. The ‘Small but Significant Non-Transitory Increase in Price’ (SSNIP) test is an important conceptual tool used by CAs to determine substitutable products or services in one-sided markets.<sup>21</sup>

The SSNIP test, also known as the hypothetical monopolist test, defines the market as the smallest set of substitutable products in which

a small but significant price increase (usually 5-10%) that is non-transitory (over a year) would be profitable for a hypothetical monopolist.<sup>22</sup> In other words, it assesses whether consumers would move away from the product due to the price increase – which can only happen if a close enough substitute for the product or service exists. Where such a substitute exists, the price increase will be unprofitable for the hypothetical monopolist. When a close enough substitute does not exist, leaving no alternate product or service for consumers to shift to, the price increase is profitable and the relevant market worth monopolising.

### THE ORIGINAL SSNIP TEST DOES NOT ACCOUNT FOR THE IMPACT OF INDIRECT NETWORK EFFECTS ON PRICING MECHANISMS. IN MULTI-SIDED MARKETS A PRICE INCREASE ON ONE SIDE CAN IMPACT DEMAND ON THE OTHER

Applying this test to multi-sided markets is fraught with complications. The original SSNIP test does not account for the impact of indirect network effects on pricing mechanisms. In multi-sided markets a price increase on one side can impact demand on the other.<sup>23</sup> For instance, a hike in the commission rate charged from drivers by a cab aggregator may reduce their willingness to provide their services. Fewer drivers would in turn prompt users to switch to platforms with a larger roster. Fewer users would further impact the number of drivers

willing to offer their services on the platform. A hypothetical monopolist therefore needs to account for the impact of a significant, non-transitory price increase on both sides of the market. Failure to account for these feedback effects may result in the market being defined too narrowly.

Scholars suggest that where multi-sided markets are involved the SSNIP test should be applied to both sides of the market to arrive at an accurate determination.<sup>24</sup> This is not an easy assessment for CAs to make, due to the complications of modelling indirect network effects, and the lack of adequate data on digital multi-sided markets.<sup>25</sup>

Compounding the problem, multi-sided markets often have indirect network effects that are asymmetric. Here one user group derives greater value from the presence of the other side than vice versa.<sup>26</sup> The platform capitalises on the asymmetry by charging different prices from different groups of users. In some cases it is able to completely cross-subsidise one user group and provide a service for free, while charging a fee from the other side.<sup>27</sup> For instance, a social media platform may provide services to its users for free while charging a fee from advertisers to host their ads. This is because advertisers derive greater value from the presence of a large

user base than users do from more advertisers. A situation is therefore created where one side of the market is effectively being charged 'zero price'. Applying the SSNIP test to a side being charged 'zero price' is practically impossible, as a 5-10% increase in price will remain zero.<sup>28</sup>

Given the difficulties in applying the SSNIP test to multi-sided markets, scholars suggest considering other dimensions of competition, such as quality and costs, to determine substitutability. A 'Small but Significant Non-Transitory Decrease in Quality' or SSNDQ test has been proposed, which assesses substitutes by observing the consumer response to a decrease in product quality. But given the multi-dimensional nature of product differentiation, it is not easy in practice to assess quality.<sup>29</sup>

It is clear from the above analysis that certain peculiarities of multi-sided markets, especially indirect network effects, must be considered in determining the relevant product markets. Failure to do so will likely result in erroneous and inconsistent determinations by competition authorities. The following section assesses how CAs in different jurisdictions, particularly the US, UK, and Germany account for the characteristics of multi-sided markets in their decisional practice.

# RELEVANT MARKET DETERMINATION IN MULTI-SIDED MARKETS: GLOBAL DECISIONAL PRACTICE

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The unprecedented rise in valuations of multi-sided digital platforms and perceived concentration in their markets has prompted the scrutiny of competition authorities worldwide. This has led to an increase in the number of antitrust cases involving such platforms. There is enough jurisprudence on the subject to identify trends in how CAs have dealt with relevant market determination in cases involving multi-sided markets. With little consensus on the best approach for relevant market determination, analysis of these cases may provide important guidelines for the application of competition law to digital markets in India.

## Single market vs multiple markets

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The first point of analysis is the approach used by competition authorities to decide whether to consider a single relevant market for both sides or distinct markets for each. The platform typology approach has been used by courts and CAs in multiple jurisdictions, including Australia, Netherlands, Germany and the United States.<sup>30</sup>

The transaction/non-transaction approach is notably found in the US Supreme Court's decision in *Ohio vs Amex*. The court was asked to determine whether the anti-steering provisions employed by credit card banks to prevent merchants from steering customers to the cards of other issuers that charged lower transaction fees constituted anticompetitive practice. It ruled by a 5:4 majority that they did not, reasoning that credit card payment systems constitute a two-sided transaction platform that facilitates a 1:1 transaction between merchants and card users. Hence, in keeping with the scholars' suggestions discussed above,

it ruled that both sides constituted a single relevant market, and that 'net harm' needed to be proved on both sides. As no harm had been proved on the side of the card user, the practice was not anti-competitive.<sup>31</sup> Antitrust lawyers and scholars have argued however that the transaction/non-transaction platform distinction does not neatly apply in all cases concerning digital platforms, and should not be the sole basis for relevant market determination. Research suggests that lower courts have indeed faced difficulties in determining whether platforms are transactional or non-transactional.

The transaction/non-transaction typology was also used by the UK competition authority to evaluate the merger between Just Eat and Hungryhouse. It observed that when a platform does not facilitate transactions between different sides of the market it would be sensible to define distinct relevant markets, as each side faces different competitive constraints.<sup>32</sup>

Platform typology has also been relied on by the German CA, albeit with a difference in classification. Instead of transaction/non-transaction platforms, it sorted them into matching and advertising platforms. The former helps user groups on both sides find the best match, without a transaction always taking place. Dating apps, though they may occasionally display ads, are an example of matching platforms. The primary objective of advertising platforms on the other hand is not to facilitate a match or interaction. Instead they focus on providing an audience for the advertisements they host. Matching platforms display positive indirect network effects on both sides, while advertising platforms usually display only unidirectional indirect network effects. So a single relevant market may be defined for matching platforms, while separate markets

should be defined for advertising platforms.<sup>33</sup>

**WHAT IS CLEAR, HOWEVER, IS THAT CAs HAVE RECOGNISED THE INTERDEPENDENCE BETWEEN BOTH SIDES OF THE MARKET DUE TO INDIRECT NETWORK EFFECTS, AND HAVE FACTORED THIS INTO THEIR RELEVANT MARKET DETERMINATIONS.**

Despite its widespread adoption there is no consensus on using the platform typology approach to determine how many markets to define in a multi-sided market. CAs in Austria,<sup>34</sup> Brazil<sup>35</sup> and Portugal<sup>36</sup> have refrained from using any typology in their determination, examining the operation of indirect network effects case by case instead. What is clear, however, is that CAs have recognised the interdependence between both sides of the market due to indirect network effects, and have factored this into their relevant market determinations.<sup>37</sup>

## Assessing substitutability

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The unsuitability of the SSNIP test for multi-sided markets reflects in the fact that it is rarely used in competition cases to determine the basket of substitutable products or services. A comprehensive analysis of cases in the US and European Union concludes that none of the CAs applied a specific two-sided formula to conduct the SSNIP test.<sup>38</sup> The German CA expressly noted the unsuitability of the SSNIP test for multi-sided markets in its CTS Eventim decision.<sup>39</sup> It followed this by a working paper on ‘Market Power of Platforms and Networks’ which proposes using surveys on the switching behaviour of platform users to determine substitutability in multi-sided markets.<sup>40</sup>

The German CA’s decisions are part of a larger trend of CAs using qualitative factors to

determine the relevant market in cases involving multi-sided digital markets, especially zero-price ones. Another example of this is the 2010 Horizontal Merger Guidelines issued by the US Federal Trade Commission, which include reduction in product quality as a relevant factor in the hypothetical monopolist test. The guidelines further suggest that regulators engage in qualitative comparison to determine the peculiar characteristics and functionalities of a platform in zero-price markets.<sup>41</sup>

Similarly, when it approved the Hungryhouse/Just Eat merger, the UK competition authority commissioned a consumer survey to determine switching patterns among users as well as restaurants in their use of food delivery platforms. The results of the survey were used in addition to econometric data to define the relevant market in this regard.<sup>42</sup>

Absent such evidence, the inclusion of qualitative factors will lead to discretionary and inconsistent determination by competition authorities.

CAs have also recognised that performing qualitative assessments is not straightforward and requires rigorous evidence collection in the form of surveys to discover which products consumers consider substitutable.<sup>43</sup> Absent such evidence, the inclusion of qualitative factors will lead to discretionary and inconsistent determination by competition authorities.

To conclude, there are two observable trends in the decisional practice on determining substitutability in multi-sided markets – a shift away from the SSNIP test, and increased reliance on qualitative factors. The following section analyses the extent to which the Competition Commission of India’s decisions are in consonance with these trends.

# THE CCI'S APPROACH TO RELEVANT MARKET DETERMINATION IN MULTI-SIDED MARKETS

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The Competition Act requires the CCI to determine relevant markets in cases alleging abuse of dominance under Section 4, and when evaluating the appreciable adverse effects a merger or combination may have on competition under Section 6. While the relevant market is defined for different purposes, it is defined in the same way – as the market comprising all products or services considered substitutable by the consumer for reason of their price, intended use or characteristics.<sup>44</sup> Additional factors the CCI may consider in determining the relevant product market are listed under Section 19(7), and include physical characteristics, the end use of goods, the price of goods or services, and consumer preferences.

Since 2014 the CCI has passed prima facie and final orders and injunctions in at least 38 cases involving digital platforms, primarily e-commerce platforms, online travel aggregators and ride hailing apps. The majority of these cases involved allegations of abuse of dominance, and most were dismissed at the prima facie stage. The 25 orders passed between 2014 and 2018 are analysed in a previous study on the subject and these cases primarily concerned e-commerce, hospitality and cab aggregation platforms.<sup>45</sup> The study notes the CCI's inconsistency on whether offline and online markets constitute distinct markets or merely different channels of delivery in the same market. Another study analysed the CCI's decisional practice for relevant market determination in multi-sided markets, and found that the CCI has failed to consider the multi-sided nature of digital markets in its recent decisions.<sup>46</sup>

This paper adds to the existing research by examining 13 further cases in which the CCI passed orders between 2018 and 2021. Particulars of the cases and the relevant market defined

by the CCI are contained in the annexure to this paper, where the CCI's use of qualitative factors in its decisions is also analysed. The cases mark a shift in focus to OTT communication apps, operating systems, and payment applications. An analysis of the CCI's approach to determining relevant markets in these cases is presented below.

## Single market vs multi-market approach

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A study of the 13 recent cases reveals that the CCI has largely applied one-sided logic in evaluating multi-sided platforms. In most cases concerning multi-sided markets it did not account for the interdependence between multiple user groups caused by indirect network effects. As a result it has defined multiple distinct and **independent** markets, failing to account for interconnections between the multiple sides served by digital platforms.

### **A STUDY OF THE 13 RECENT CASES REVEALS THAT THE CCI HAS LARGELY APPLIED ONE-SIDED LOGIC IN EVALUATING MULTI-SIDED PLATFORMS**

Unlike other jurisdictions such as the US and UK, this approach does not appear to be based on platform nature or typology. Instead the CCI often based its determination on which side had made the complaint in question, noting in *FHRAI vs MakeMyTrip and Others* that, 'Since the allegations in the present case are primarily with regard to the hoteliers, the relevant market analysis needs to be carried out from the perspective of hoteliers'.<sup>47</sup>

Basing the market definition on which side has made the complaint is usually a logical step in one-sided markets, but in multi-sided markets it

can lead to a market definition that ignores the competitive constraints imposed by each side. In the above case, for instance, the constraints placed by consumers on a platform like MakeMyTrip or OYO in their actions towards hoteliers were not adequately considered.

Some of the CCI's recent decisions do however indicate its growing recognition of multi-sided markets and the role of network effects. In *Lifestyle Equities CV vs Amazon* it defined the relevant market as the 'market for services provided by online platforms for selling merchandise in India'. This is important because it distinguishes online platforms, which are usually multi-sided markets, from other forms of online retail. And it specifically noted that network effects characterise multi-sided markets and need to be accounted for.

**THE CCI HAS ELABORATED ON THE NATURE OF MULTI-SIDED MARKETS AND THE ROLE OF NETWORK EFFECTS IN ITS RECENT MARKET STUDIES ON E-COMMERCE AND TELECOM**

The CCI has elaborated on the nature of multi-sided markets and the role of network effects in its recent market studies on e-commerce and telecom.<sup>48</sup> It must continue to build on these trends and arrive at a systematic approach to assess the relevant product market in cases involving digital platforms. Some suggestions for such an approach are made in the next chapter.

**Assessing substitutability**

The CCI hardly used the SSNIP test to determine substitutability. This is due to a lack of the data needed to use the test effectively for relevant market determination. Instead the CCI relied on functionalities to determine substitute goods and services – but the importance given to functionalities varies considerably across its decisions, with inconsistencies in the importance given to functionalities sometimes visible in the same case.

In *Harshita Chawla v WhatsApp*, the CCI was

asked to determine whether the 'bundling' of WhatsApp Pay, a UPI enabled payments system, with WhatsApp amounted to abuse of dominance.<sup>49</sup> In order to assess dominance, the CCI defined the primary relevant market as the 'market for Over-The-Top (OTT) messaging apps through smartphones in India', noting in its analysis that communication apps could be segmented into several different categories on the basis of their peculiar features and functionalities. However, it chose not to rely too heavily on the peculiar characteristics of communication apps, and focused instead on the 'primary or most dominant feature of the app to categorise it into a particular relevant market.'

In *Meru Travel Solutions vs Uber India Pvt Systems Ltd*, the CCI distinguished between radio taxis and other forms of transport such as rickshaws and other private taxis on the basis of functionalities – like the convenience of time saving, predictability and round the clock availability. Despite these differences in functioning, it held that in terms of usage consumers in Kolkata heavily relied on yellow cabs for their daily transport needs, so the relevant market should include the services offered by radio taxis and yellow cabs.<sup>50</sup> This reflects a nuanced approach: the CCI relied on consumer behaviour and not features or functionality to determine the relevant market.

A similar approach was used to approve the combination between Facebook and Jaadhu Holdings Pvt Ltd, where the Commission noted that there was a gradual trend toward convergence in terms of functionality between user apps, so that relying on slight differences in features may not be appropriate for relevant market determination.<sup>51</sup> The CCI's approach in these cases is suited to digital markets as they are dynamic and complex, with features and functionalities being added regularly.

The CCI did however rely on features and functionalities to determine the secondary relevant market in the *Harshita Chawla* case. Defining the relevant market as the 'market for UPI enabled digital payments apps', it stated

that ‘these UPI enabled Digital Payment Apps, e.g. PayTM, Google Pay, Phone Pe etc., allow several value-added features besides traditional transfer of funds, such as integrating payment for utilities, mobile bills, purchasing train tickets, air tickets, movie tickets and thus, provide services which are distinct and which may not be substituted with any other mode of payment such as debit cards, credit cards, net banking, etc.’

This analysis seems to move away from its finding, just paragraphs earlier, that the primary or most dominant feature, which is the online transfer of funds in the case of UPI apps, should be used to determine the relevant market for an app. Indeed, a survey of 113 consumers points to the fact that the online modes of payment mentioned above are used as substitutes for UPI apps.<sup>52</sup> Had the CCI conducted such a survey it would have arrived at a broader definition of the relevant market.

An absence of evidence to justify its conclusions on switchability and relevant market determinations is a trend in the CCI’s decisional practice. For instance, no material is provided to justify its conclusion that the differences in features between UPI and other online payment methods make them non-substitutable in the eyes of consumers.<sup>53</sup> In most cases its determinations of substitutability were influenced by the parties’ submissions, or its own opinion of switchability and functionality. The CCI’s approach is not in consonance with those of other CAs, such as in Germany

and the United States, which undertake evidence collection on consumer behaviour etc. when considering non-price factors such as characteristics and functionality.

### **THE LACK OF A UNIFORM AND PRINCIPLED APPROACH TOWARD RELEVANT MARKET DETERMINATION MAY HAVE LEGAL AND ECONOMIC CONSEQUENCES.**

The lack of a uniform and principled approach toward relevant market determination may have legal and economic consequences. The rule of law requires in excess discretion, and certainty in decision-making by quasi-judicial bodies.<sup>54</sup> Inconsistency and arbitrariness create uncertainty in the business environment, with detrimental impacts on investment and trade. Research has found that companies designing their business practices or considering combinations regularly weigh the costs related to legal and regulatory certainty and predictability, and that regulatory uncertainty can hinder pro-competitive, socially desirable transactions.<sup>55</sup>

Given the importance of certainty and predictability, the CCI must consider how it can incorporate these elements into its decisional practice when determining relevant product markets. In the final chapter, we briefly touch upon some suggestions that would lend a degree of consistency to the CCI’s relevant market determinations in cases involving multi-sided markets.

## CONCLUSION

The relevant market is an important conceptual tool used by the CCI in abuse of dominance cases and assessment of mergers and combinations. Relevant market determination is complicated in cases involving digital platforms because they operate as multi-sided markets. The peculiarities of multi-sided markets such as indirect network effects require competition authorities to readapt traditional approaches of market determination like the SSNIP test.

**THE ADOPTION OF A MORE NUANCED APPROACH BY THE CCI ON RELEVANT MARKET DETERMINATION IS CERTAINLY A STEP IN THE RIGHT DIRECTION. IT CAN BE MADE MORE PREDICTABLE AND CERTAIN THROUGH LEGAL AND REGULATORY INTERVENTIONS.**

The CCI has dealt with these peculiarities in the roughly 40 cases concerning digital platforms in which it has passed orders so far. Initially the peculiarities of multi-sided markets were not fully reflected in the CCI's decisional practice, but its more recent decisions factor in the unique characteristics of digital platforms, such as indirect network effects. The adoption of a more nuanced approach by the CCI on relevant market determination is certainly a step in the right direction. It can be made more predictable and certain through legal and regulatory interventions.

An intervention the Government is considering is to amend the Competition Act. The Competition Law Review Committee noted that the list under Section 19(7) of the Act is exhaustive, and only gives the CCI a limited number of factors to rely on in its relevant market determinations. It recommended that the list should be made inclusive, to accommodate future factors and evidence specific to digital markets.<sup>56</sup> These recommendations are reflected in the Draft Competition Bill 2020, which changes the wording of Section 19(7) to make it inclusive.<sup>57</sup>

While the change would allow the CCI to consider a broader range of factors in its relevant market determinations, it may lead to greater discretionary inclusion or exclusion of factors on a case-by-case basis.

Instead, there is a need to define first principles that would guide the CCI's approach to making relevant market determinations in multi-sided markets. Although the CCI would evaluate each case on its merits, first principles would provide an overarching framework of assessment. Specifically, these principles should outline how the CCI will analyse indirect network effects and determine how many sides are to be defined.

As we have seen, CAs in other jurisdictions use typology-based approaches to make the determination easier, but solely relying on platform typology can lead to inaccurate determinations. While the CCI should pay attention to the typology of the platform and its business model, it must also consider the direction and strength of indirect network effects and homing practices by users in each case.

The CCI may consider following the steps listed below to determine how relevant market determination can be made more certain and predictable:

### Step 1

Evaluate the structure of the multi-sided market. This involves mapping out the different parties/user groups a platform caters to and the services it provides to each, to help the CCI visualise the groups involved and their interrelationships. The typology or nature of the platform can be an important factor in this evaluation, but it should not be the sole criterion. In the case of a search engine, for instance, the CCI should first identify the parties involved (users, advertisers, websites

providing information) and the services provided (search, advertising, and ranking) before proceeding to define the relevant market.

### Step 2

Determine the competitive constraints on one side of the platform. Here, the CCI must evaluate the constraints faced by the platform on one side, usually the side from which the complaint arose. It should determine which products or services are considered substitutable by the user group, to define a preliminary relevant market. Consider a case alleging abuse of dominance by a search engine through a unilateral change in its terms and conditions to the detriment of advertisers. The CCI should first focus on the advertiser side of the multi-sided market, without considering the impact of the other two sides. It should determine the services that advertisers consider substitutable for online search-based advertising. This could include offline advertising, non-search-based online advertising etc.

### Step 3

Assess the degree of interdependence between both sides. This is the most important step in determining relevant markets. The CCI should examine the relationship between different user groups and assess the strength of indirect network effects between them. Where indirect network effects are strong, it would make sense to define a single relevant market encompassing all user groups. Where they are weak, the actions of the platform towards one user group may not have a significant impact on other groups, and multiple distinct though interrelated relevant markets may be defined.

Using again the example of a search engine, the

CCI should assess the strength and direction of indirect network effects between the advertiser side and the user side. A preliminary analysis would suggest that strong positive indirect network effects flow from advertisers to users (since an increase in the number of users is positive for advertisers) whereas the indirect network effects from users to advertisers are weak and negative (since more ads are not always beneficial to users, and may even be harmful). Given the difference in the strength of these indirect networks, advertisers and users may regard different platforms and services as substitutes for the search engine. In this scenario, the CCI would be better off defining distinct but interrelated relevant markets, as opposed to a single broad relevant market.

Consistency in the CCI's practice can also be developed by ensuring that its findings on the qualitative aspects of competition, such as features and functionality, are based on pertinent evidence. As discussed, this would involve using surveys of switching behaviour and consumer preference to determine the relevant market. As conducting surveys can be time consuming and resource intensive, and may delay decisions in important cases, it is essential that clear guidelines are framed to provide guidance to the CCI and the Director-General on when a survey should be conducted, the manner of its conduct, and the entities that may be involved in creating and executing the survey. For example, the UK competition authority commissioned the data analytics company Growth for Knowledge to conduct the survey on consumer preferences relating to JustEat and Hungryhouse. Similar tie-ups with a set of certified and empanelled agencies would improve the CCI's ability to gather important data and feedback that would inform its market determinations.

**ANNEXURE**

**CASES BEFORE THE CCI  
INVOLVING DIGITAL PLATFORMS  
BETWEEN 2018 AND 2021**

S. No.	Informant	Defendant	Decided On	Order Under Section	Relevant Market Determination
1	Umar Javeed	Google LLC	Case No. 39 of 2018 16th April 2019	S. 26(1)	<p>Primary Relevant Market: 'market for licensable smart mobile device operating systems'</p> <p>Associated Relevant Markets:</p> <p>a) App stores for Android mobile operating systems, proposed by the informants, also appears to be appropriate and necessary</p> <p>b) Relevant market for general web</p> <p>c) Separate relevant market for each application such as online video hosting platform, browser, map, music etc.</p>
2	Re XYZ	Alphabet Inc.	Case No. 7 of 2020 9th November 2020	S. 26(1)	<p>a) market for licensable smart mobile device operating systems in India</p> <p>b) market for app stores for android mobile operating systems</p> <p>c) market for apps facilitating payment through UPI</p>
3	Kshitiz Arya & Ors	Google/ Xiaomi/ TCL	Case No. 19 of 2020 22nd June 2021	S.26(1)	<p>a) market for licensable smart TV device operating systems</p> <p>b) market for app store for Android smart TV operating systems</p> <p>c) separate relevant markets for each Google application</p>

ANNEXURE:CASES BEFORE THE CCI INVOLVING DIGITAL PLATFORMS BETWEEN 2018 AND 2021

S. No.	Informant	Defendant	Decided On	Order Under Section	Relevant Market Determination
4	Baglekar Akash Kumar	Google LLC	Case No. 39 of 2020 29th January 2021	S. 26(2)	a) market for providing email services in India b) market for providing specialised video conferencing services in India
5	RKG Hospitality Pvt. Ltd.	Oravel Stays Pvt. Ltd/ OYO	Case No. 3 of 2019 31st July 2019	S.26(2)	market for franchising services for budget hotels in India
6	Federation of Hotels and Restaurants Ass. Of India (FHRAI)	Make My Trip India Pvt. Ltd (MMT) & Ors.	Case No. 14 of 2019 28th October, 2019	S. 26(1)	market for online intermediation services for booking of hotels in India
7	Shri Vinod Kumar Gupta	WhatsApp Inc.	Case No. 99 of 2016 1st June 2017	S. 26(2)	market for instant messaging services using consumer communication apps through smartphones
8	Jaadhu Holdings LLC (Facebook)	Jio Platforms Limited	24th June, 2020	S.31(1)	No relevant market defined. CCI made observations regarding use of functionality to determine relevant market.
9	Harshita Chawla	WhatsApp Inc. & Ors.	Case No. 15 of 2020 18th August 2020	S.26(2)	a) market for Over-The-Top (OTT) messaging apps through smartphones b) market for UPI enabled Digital Payments Apps

S. No.	Informant	Defendant	Decided On	Order Under Section	Relevant Market Determination
10	Satyen Narendra Bajaj	PayU Payments Private Limited & Enstage Software Private Limited	Case No. 23 of 2019 29th January 2020	S. 26(2)	Mere existence of dominant position, without any prima facie evidence of its abuse, is not recognised as an anti-competitive conduct in the scheme of the Act
11	Ms. Prachi Agarwal & Mr. Tushar Sharma	M/s. Swiggy	Case No. 39 of 2019 19th June 2020	S. 26 (2)	No relevant market defined
12	Lifestyle Equities C.V.	Amazon	Case No. 09 of 2020 11th November 2020	S. 26(2)	market for services provided by online platforms for selling fashion merchandise in India
13	Prachi Agarwal	Urbanclap Technologies India Private Limited	Case No.30 of 2020 24th March 2021	S.26(2)	No relevant market defined

**TABLE 1: CASES BEFORE THE CCI INVOLVING DIGITAL PLATFORMS BETWEEN 2018 AND 2021****SOURCE: AUTHOR'S COMPILATION**

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