NLIU-IKIGAI POLICY CASE COMPETITION

THEME

INTERNET PLATFORM REGULATION

POLICY TITLE

ADVANCING A ROADMAP FOR HARMONISING USER-FRIENDLY INNOVATIVE DIGITAL COMPETITION (ADHUNIC) FOR INDIA AND THE WORLD

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STATEMENT OF PROBLEM

The Digital Markets Act (DMA) aims to regulate internet platform services and serve as an additional layer of regulation over national competition frameworks of respective countries of European Union ("EU"). It has prescribed certain obligations and restriction on the designated gatekeepers, some of which have inherent issues that need to be addressed, so that other jurisdictions can pursue similar policy lines as per their competition frameworks and market conditions. The issues dealt in the subsequent part of our proposal would entail the domains of insufficient merger control tools, prohibition of parity clauses, undermining the role of data in digital markets, consent fatigue in relation to requirement of various consent request, unfair play with platforms (non-gatekeepers) in terms of obligations, and adjudicatory provision in case of conflict with Inter-Member State of EU or National laws. The proposed suggestions in our policy recommendation try to balance the user interests, regulatory concerns and the need to allow innovative businesses to flourish, by suggesting a combination of known ex-ante frameworks and an improved ex-post mechanism, while also laying emphasis on certain emerging novel approaches to tackle specific issues in the realm of digital competition.

EXISTING JURISPRUDENCE

The existing approach to regulate digital markets in India and around the globe has been mostly centred around an ex-post framework, by way of a 'soft touch' regulation in the form of Competition Laws. Such a framework aims to correct the market when an anti-competitive conduct arises i.e., on a case-by-case basis. In India, the Competition Act, 2002 is sector agnostic and covers all sectors/industries including e-commerce/digital markets. Countries like Peru, Philippines, Russia, New Zealand, China, Singapore, Mexico and the like share the same tale. While most of these countries have been practicing a form of horizontal regulation across all sectors, the likes of the United States recognise the presence of specific industries that might be characterized as comprising "digital markets", that may be subject to sector-specific regulation considering competition.[1] The anti-trust authorities in all of these nations have been investigating several tech giants, those who have allegedly engaged in unfair competition practices. However, regulatory bodies around the world have recognised the unique nature of e-marketplaces, the asymmetric relationship between platforms and business users, shortcomings in ex-

[1] Ministry of Business, Innovation and Employment, *Competition Law and Regulation in Digital Markets* (Cm 2020) 44

post regulation framework and have accordingly, devised various mechanisms to bridge the regulatory gaps in the form of ex-ante regulations. It is a form of sectoral intervention mechanism that creates a structural framework intended to prevent market failures from occurring.[2] The proposed Digital Market Act of EU, specific regimes under Australian Competition Commission like Consumer Data Right (CDR) & News Media Bargaining Code, and the antitrust legislative package in USA, are some of the steps taken by regulatory bodies globally. Regulators across the world have followed the EU's lead and some have even overtaken it, mostly with more specific rules for a subset of behaviours. South Korea, for instance, passed Telecommunications Business Act, requiring app stores to allow third-party payment options. Apart from ex-ante approaches, attempts have also been made by the likes of South Africa, India, U.K., to strengthen the existing competition tools for effective enforcement.

POLICY RECOMMENDATIONS

CHAPTER I – THRESHOLD FOR CLASSIFICATION OF GATEKEEPERS & INSUFFICIENT MERGER CONTROL TOOLS

INTRODUCTION

Since the primary focus of a digital platform is often on user growth in order to take advantage of network effects of digital markets, the business model in digital environments is such that they may fail to generate significant income for a number of years.[3] Further, in the initial stages, these companies may be characterised by low turnovers, but owing to their innovative mechanisms, degree of technical know-how and their potential to disrupt the market for their competitors, their valuation might be quite large.[4]

ISSUES

Designation of Gatekeeper: DMA lays down the requirement for the designation of Gatekeepers, wherein, a platform should have a significant impact on the EU market through an annual turnover of EUR 7.5 billion in each of the last 3 financial years in the EU.[5] This could be problematic for jurisdictions like India, whose existing Competition laws rely on asset and turnover thresholds for merger control**,** which may expose themselves to the risk of letting high value transactions in digital markets escape the radar of the DMA and the corresponding National Competition laws, despite such transaction posing an anti-competitive risk.

Conflict with National Frameworks: DMA provisions are to apply without prejudice to national rules concerning merger control.[6] There might arise a conflicting situation between the market investigation so done and the existing competition law framework, if the latter does not recognise thresholds other than turnover criteria. There seems a lack of legal certainty and efficiency in enforcement of the DMA.

PROPOSED SOLUTIONS

Widening the ambit of merger scrutiny of the existing Competition Law frameworks by exploring other thresholds for merger control that are in consonance with the evolving realities of digital platforms such

[2] N. Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (1st edn, Cambridge University Press 2015)
[3] Carl Shapiro, 'Antitrust in a time of populism', [2018] International Journal of Industrial Organisation 714
[4] Ministry of Corporate Affairs (India), Report of Competition Law Review Committee (2019)
[5] Council Regulation (EC) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/30 (Digital Market Act)
[6] Digital Market Act, art 1(6)(c)

as 'size of transaction' and 'deal value'. These have been recently introduced in the Competition (Amendment) Bill, 2022 by the Government of India and implemented by countries like U.S., Germany & Austria. This proposed measure is in line with strengthening the existing ex-post framework.

PREVALENT PRACTICES

The authority to examine non-notifiable transactions that do not surpass jurisdictional thresholds has been granted to competition regulators in **Brazil and Ireland**. This prevents merger control thresholds that are out-of-date or ineffective from affecting the work of competition authorities. A novel approach has been adopted in the **South African** landscape, the Competition Commission must decide whether a merger can be justified on public interest grounds, including its impact on the ability of small and medium-sized businesses controlled or owned by historically disadvantaged people to effectively enter the market, participate in it, or expand within it. A similar provision has been introduced in the recent Competition (Amendment) Bill, 2022 of India, however, the term 'Public Interest' has not been well defined and raises ambiguity.

CHAPTER II – ENCOURAGING PLATFORM' S ABILITY TO OFFER SERVICES

INTRODUCTION

There are business models that depend on gathering and combining various forms of data from customers and service providers like online travel, hotel and other booking agencies, to create their own eco-systems that employ data as both an input and output. Platforms employ these first-party products and services as a crucial strategic tool to differentiate their platforms, to compete with bigger or more established platforms, and re-direct complementors' innovation efforts towards other less-developed sectors that are beneficial to consumers.[7]

ISSUE

Undermining Value Creation by Data: There are limitations imposed by DMA on the ways platforms can combine and utilize their data sets by prohibiting gatekeepers from using data accumulated on their platform to compete with business users.[8] This might prevent competitors in traditional industries, who seek to become competitive, from transforming their business models by embracing platform-based business models and creating their own ecosystems.[9]

PROPOSED SOLUTIONS

Data-Sharing: We propose that instead of prohibiting platforms from using their accumulated data, the same could be shared/accessed by the bottom ones so that there is no loss in value creation by data. A regulatory solution in this regard can be to go one step beyond Data Portability, by allowing customers to use data on more than one platform. Here, by permitting 'porting' of services across competing ecosystems while keeping the platform in charge of its own ecosystem, the advantages of a successful ecosystem can be spread more widely. This can be termed as "in situ information exchange", where data, instead of being transferred to a competitor's interface, is used at the location it is collected.[10] This

[7] Carmelo Cennamo, Juan Santalo 'Platform competition: Strategic trade-offs in platform markets' [2013] Strategic Management Journal 1331
[8] Digital Market Act, art 6(2)
[9] Wen Wen, Feng Zhu, 'Threat of platform-owner entry and complementary responses: Evidence from the mobile app market' [2019] Strategic Management Journal 512
[10] Parker, G., G. Petropoulos and M. Van Alstyne 'Digital platforms and antitrust' (2020), Bruegel Working Paper 06/2020, <https://www.bruegel.org/sites/default/files/wp-content/uploads/2020/11/WP-2020-06-1.pdf > accessed 15 December 2022

should, however, be followed by the user consent as to whether access to their data shall be granted to third parties or competing business users.

PREVALENT PRACTICES

Regulatory instruments such as the **EU's Payment Services Directive 2** and **UK's Open Banking Programme** have applied this logic. A payment can be initiated through the bank account via API (A mechanism that allows data sharing to selected targets only). The processing is done through the bank's technological system. The account holder should consent and provide to a third-party provider (like, a small fintech firm) credentials that are used for the authentication and security of the payment process. Then, the third party sends these credentials via API to the bank to verify the request to initiate a payment. Another good example is the **Open Algorithms (OPAL)** project, with its deployment in **Colombia** & **Senegal.** To support sharing of relevant data to achieve sustainable development goals around the globe, OPAL allows crucial information to be shared across different digital eco-systems of private companies, protected by firewalls.[11]

CHAPTER III – ALTERNATIVES TO PROHIBITION OF PARITY CLAUSES

INTRODUCTION

The market context affects how competition law assess parity provisions, which must strike a delicate balance between their pro and anti-competitive impacts. Such clauses require that retailers don't offer better prices on other marketplace platforms and/or on their own website. The scope can be reduced in the form of narrow parity clauses that restricts retailers from offering better prices and terms on its own website, but are permitted to offer the same to competing platforms. While wide parity clauses may lead to uniformity in prices and terms across different platforms, narrow clauses may incentivize platforms to compete by lowering its commission to obtain a lower price and to prevent free-riding by the sellers.[12]

ISSUE

Complete ban on Parity: DMA prohibits the use of parity clauses in all forms by the Gatekeepers.[13] The market's structure, the type of parity clause employed, and the market's sellers' and buyers' characteristics, all determine the impact of parity on competition. Therefore, a provision of entirely banning parity agreements cannot be applied as a hard and fast rule for all jurisdictions, especially when there is a presence of both positive & negative competition effects.

PROPOSED SOLUTIONS

Ex-Post Approach: We propose for an ex-post framework to determine the effects of parity clauses. The acknowledged existence of pro-competitive and anti-competitive effects of parity clauses suggest that these cases should be examined on a case-by-case basis and that a generalized approach and regulatory interventions which may stifle innovation in digital markets, which are fast-moving by

[11] Geoffrey Parker, Georgios Petropoulos, Marshall Van Alstyne, 'Platform mergers and antitrust' (2021) 30(5) Industrial and Corporate Change <https://academic.oup.com/icc/article/30/5/1307/6365871> accessed 9 December 2022
[12] JB Baker and JA Chevalier, 'The Competitive Consequences of Most-Favored-Nation Clauses', (2013) American University Washington College of Law 2013, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2144&context=facsch_lawrev> accessed on 4 December 2022
[13] Digital Market Act, art 5(3)

nature, should be avoided. The same was noted by CCI in its study on E-Commerce in India.[14] Further, there can be two alternatives to completely banning the usage of parity clauses; to allow narrow parity clauses in certain instances, or a novel approach to regulate platform fees under Price Parity by restricting the platform's ability to levy high commissions.

Regulating Platform-fee under Parity: The rationale behind regulating platform fee is that in case of a complete ban on parity clauses, platforms may decide to decrease their efforts in improving the quantity and accuracy of information offered to end users. Contrary to this, platforms' ability to charge a greater fee will depend on the informational advantage they provide for end users, and therefore, a platform fee cap would drive platforms to invest in this area, while simultaneously protect the sellers from the abuse of unreasonable platform fee charges.[15] A proper framework to arrive at a quantifiable cap limit will, however, pose a challenge, requiring a detailed market study.

PREVALENT PRACTICES

Green-Flag to Narrow Parity: Many jurisdictions have allowed the use of narrow parity clauses to some extent. In one instance, **France, Sweden & Italy** allowed booking.com (OTA) to narrow down the scope of its parity clauses on prices, conditions and room availability. The **Vertical Agreement Block Exemption Order 2022 (VABEO)** by **U.K**. categorises wide retail parity clauses as hardcore restrictions, meaning that such agreements will be considered to infringe competition law in the UK, while narrow parity clauses fall under the 'safe-harbour' provisions, and will be examined on a case-by-case basis. In India, parity clauses are subject to a fact-specific inquiry which is grounded upon the factors under Section 3 and 4 of the Competition Act, 2002.[16]

Capping of Fees: With regards to the idea of regulating platform fee, regulation of this kind has been enacted for delivery apps during the Covid-19 crisis, with parts of **U.S.** introducing caps of 15% per delivery since May 2020. The **Regulation on Interchange Fees** for Card-based payment transactions by the European Commission is another example, which has reduced the cost of card payments, benefiting both the sellers and buyers, and have also paved the way for innovative payment technologies to be rolled out.

CHAPTER IV – PRIVACY AND CONSENT

INTRODUCTION-

The concept of data protection is based on the need to prevent the harms, and it revolves around the issue of who should be allowed to use personal data and how. There are broadly three types of privacy, first, pertaining to physical space (spatial privacy); second, pertaining to self-defining choices (decisional privacy); third, pertaining to personal information (informational privacy).[17] Thus, the concept of data protection is primarily linked with the idea of informational privacy, which has a deep pervasive nature with the developing technology and digital market.[18] **Informational privacy** is often understood as the freedom of individuals to "determine for themselves when, how, and to what extent information about them is communicated to others" and this freedom allows for individuals to protect

[14] Department related to Parliamentary Standing Committee on Commerce, 172nd Report on Promotion and regulation of E-Commerce in India, (Cm 2022)
[15] Renato Gomes and Andrea Mantovani, 'Regulating Platform Fees under Price Parity'(2022) Toulose School of Economics 1325, < https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2022/wp_tse_1325.pdf> accessed 8 December 2022
[16] Ministry of Corporate Affairs (India), Report of Competition Law Review Committee (2019)
[17] Jerry Kang, 'Information Privacy in Cyberspace Transactions', [1998] Stanford Law Review 1193
[18] Maria Tzanou, 'Data protection as a fundamental right next to privacy? 'Reconstructing' a not so new right,' [2013] International Data Privacy Law 88

themselves from harm.[19] However, **not all information** about an individual is necessarily private and deserving of protection.

The Digital Market Act has bought certain obligations and restrictions on the designated gatekeepers which deal with the privacy regime alongside intersecting with the General Data Protection Regulations (GDPR) and National Laws of concerned member states of EU. The gatekeepers have to take end user's consent, follow legal obligation, protect the vital interests, and perform certain tasks in the public interest for the following data processing activities:[20]

- Combining personal data of end users from the relevant core platform service with personal data from end users of any other services provided by the gatekeeper or by the third parties.
- Processing personal data of end users using third-party services which are using gatekeeper's core platform services for their advertising purposes.
- Cross-using personal data from end-users of the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice-versa.[21]

ISSUES

Consent Fatigue- As the Gatekeepers are obliged to take end-user's consent in various processings, the frequency by which the consent is requested when an individual use online services, including core platform services results in consent fatigue which leads to haste-full and meaningless approval or denial of the request.

Non-designated Gatekeepers- Only the Gatekeepers, and not the platforms not designated as the gatekeepers, are obliged to account the consent of the end-users before processing, or combining, or cross-using the personal data.

PROPOSED SOLUTIONS

Proportionality in sector specific service requirement- In a context where there are few grounds for collecting information and few possible applications for it, consent is likely to suffice in such environment. This enables individuals to be able to maintain a track of the information being collected about them and the purposes for which it is being used. The proposed model suggests that only the relevant information in terms of personal data is to be asked by the end-user. This would take the sectorial separation as well as inter-sectorial approach. The following is the inclusive list with special emphasis on the proportionality of the domains from which personal data can be sought by the gatekeeper.

In Messaging and Communication Services- Explicit consent would be required in case the personal data is related to identification number, genetic, mental, cultural, or societal identity. For the purpose of advertisement for the gatekeeper, and criminal investigation by the government, there would be no requirement of consent for the data related to Location details.

[19] Alan Westin, 'Privacy and Freedom'(1968) (25)(1) Washington and Lee Law Review <https://scholarlycommons.law.wlu.edu/wlulr/vol25/iss1/20> accessed 10 December 2022
[20] Daniel P. Cooper and others, 'The Digital Markets Act for Privacy Professionals' (Covington & Burling LLP, 10 October 2022) <https://www.lexology.com/library/detail.aspx?g=ba761170-f596-4c6c-84ae-0630f86e09c7> accessed 10 December 2022
[21] Digital Market Act, art. 5

In E-Commerce along with Web-Browsing Services- Personal data in relation to previous purchases, previous searches and location would not require the explicit consent from the end-user. Other domains of personal information would still need consent for the purpose of processing by the gatekeeper.

In Financial Transaction Services- Every single combination of personal data is to be processed after taking detailed consent from the end-user.

To ensure **user-friendly interface** and **minimising consent fatigue**, the provision of taking explicit consent is to be limited to very essential domains of the service in **proportionality** with requirement of the platform. Also, any data which is considered to be "**sensitive data**" has to be processed after taking due consent from the end-user in every circumstance. Sensitive data would be an inclusive list including passwords, financial information such as Bank account or other payment instrument details, mental or physical health condition, medical history, sexual orientation, biometric information, ethnic or racial origin, philosophical beliefs, membership of political association, and in case of India, caste to be considered.

Other Provisions- In case any platform even if not designated as the gatekeeper, has to ensure above mentioned obligatory provisions, if it processes a **considerable amount** of personal data. Also, such considerable data limit has to be measured on case to case and sector to sector basis in ex-post scheme by the Adjudicatory Tribunal.

PREVALENT PRACTICES

Reasonably Necessary Criteria- In **Australia**, the Privacy Act consent is not a pre-requisite for collecting the personal information. The only requirement prior is that information should be reasonably necessary for the organisation's activity.[22] Also, there is a higher bar for sensitive data as such data would require individual's explicit consent. Whereas in **Canada**, there is no precise definition for sensitive data, and any personal data could be sensitive, if the context demands, as per PIPEDA.[23]

The **Indian scenario** in this regard is lacking the updated privacy framework as only Section 43A of IT Act 2000 read with IT Rules 2011 is the applicable legal regime. A comprehensive law on Personal digital data is still not enforced in the country, that leads to resulting loopholes to exploit Indian Digital Competitive Market as well as Consumer Wellbeing.

CHAPTER V – ADJUDICATORY PROCESS

INTRODUCTION

Adjudication plays an integral role in the enforcement of any law as it ascertains the rights and obligations of the parties involved in a dispute and prescribes the corrective actions and remedies. The domain which Digital Market Act covers is the Internet Platform Regulation along with Competition Framework. There requires a quick and less-complicated dispute redressal mechanism to ensure that conflict resolution won't harm the market flow in negative sense. The DMA provides the Digital Market Advisory Committee [**DMAC**] to advise the European Commission for the disputes related to Digital Market, also it mandates National Courts of the member states to adjudicate the issue, in compliance with the National Laws, provisions of Digital Market Act, and General Data Protection Regulation.

ISSUES

[22] The Privacy Act 1988 (AUS)
[23] Personal Information Protection and Electronic Document Act 2000 (CAN)

Inter-member state and National Law complexities- The prescription of National Courts to resolve the disputes related to DMA's obligations and other provisions would lead to complexities when the issue is inter-member state, or in conflict with the respective National Laws of the member states. Also, the Digital Market Advisory Committee (DMAC) has only advisory capacity and not the direct adjudicatory power in the era of AI Revolution, where the issues of dispute are getting complex each passing day.

PROPOSED SOLUTIONS

Constitute an Independent Tribunal- An Independent Adjudicatory body ("**Tribunal**") to be constituted in order to resolve the dispute arose in the execution of the obligations and mandates prescribed in Digital Market Act. The General Court would be the court of appeal for the decisions of tribunal. The composition of such tribunal would be of independent experts with experience and expertise in data protection, cyber security and technology along-side diverse composition of different stakeholders. The special tribunal is so formed for the sole purpose of speedy disposal as it would be having the direct adjudicatory power and not of just advisory [DMAC].

PREVALENT PRACTISES

Specialised Tribunals and Courts- The Indian Competition Act of 2002 provides for establishment of a Commission (Competition Commission of India) for the administration, implementation, and enforcement of competition framework in India. The Act along-side establishes the Competition Appellate Tribunal (**COMPAT**), now National Company Appellate Tribunal (**NCLAT**) for the purpose of dealing with the pendency of cases in courts. In **Mexico**, as the digital platforms overlaps with the traditional industries, the disputes involving such complexities are being resolved by the Specialised Court COFECE. This specialised court has the jurisdiction over the markets of Social networks, search engines, and cloud computing services.[24]

Even though EU itself has European Banking Authority, European Securities and Market Authority, European Data Protection Board, etc. as special adjudicatory body for their respective domains for dispute. Therefore, in case of constituting a specialised body for domain for Digital Market, it would not be impractical but feasible for European Union.

CONCLUSION

The notion for the adoption of ex-ante regulations owing to the inability of the existing ex-post framework, cannot be accepted, especially when digital markets are so dynamic and complicated that reliance on only one may lead to detrimental effects upon innovation and competition (as shown above that 'ex-ante' might not be suitable in specific situations like platform parity and adjudicatory mechanism). Both approaches should, therefore, complement one another. Further, while some of the novel solutions cited in our proposal like 'In-Situ Information Sharing' & capping of fee levied on digital platforms, proportionality in requesting the consent to avoid end-user fatigue will have its own implementation challenges in the form of detailed market study and heavy stakeholder-dialogue engagements, they still hold immense value in providing a middle ground for balancing the interests of all the stakeholders involved. For our final comments on the DMA, regulators should focus on why ecosystems are competitive, not on who is winning.

[24] Ministry of Business, Innovation and Employment, *Competition Law and Regulation in Digital Markets* (Cm 2020) 44