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Competition Law and E-Commerce

By Saifullah Khan

Competition is the lifeblood of strong and effective markets. If there is no competition in the market, there would be no incentive to lower prices or bringing improvement in the goods and services. If there is monopoly of one firm in the market, it may charge higher prices without fearing a loss of sales to a competitor or may impose unfair trading conditions on consumers. The role of competition authorities and competition policy is therefore very important in order to maintain healthy competition and to remedy some of the situations in which the free market system breaks down. Competition and anti-trust laws provide the framework for competitive activity and protects the process of competition. The ultimate objective is to protect consumers and save jobs and businesses, all at the same time.

Healthy competition has brought about many innovations, amongst which is ecommerce. On the other hand, the advent of ecommerce has increased the competition and has extended it cross-border. In fact, it is changing the competitive landscape in which companies operate and the way they make commercial and strategic decisions. Hence, there is a need to identify whether changes brought about by e-commerce require specific attention in competition assessments and whether the competition law frameworks can effectively deal with competition issues that might arise in an e-commerce context.

Ecommerce offers many benefits and more chal-

lenges to the competition in the market. On one side, the competitive benefits of e-commerce include lower prices, provision of comparison shopping, introduction of new products and services constantly offering better choices to customers, faster buying/selling procedure resulting due to more efficient distribution, stronger competition, more information and more reach to consumers as there is no theoretical geographical limitations. But on the other side, it also has anti-competitive harms such as an increase in the likelihood of collusion, price obfuscation, network effects and vertical restraints etc. Vertical restraints may include price recommendations or restrictions from manufacturers, restrictions on selling online, restrictions from submission of offers to price comparison websites and contractual restrictions on cross-border sales etc.

E-commerce has reinvented the business models and therefore there is a need to change competition policy and framework as well, and as the technology is constantly changing and will keep on changing the trade patterns, therefore the competition law frameworks should be designed as such to cater the changing dynamics of ecommerce. Ecommerce may tend to change the scope of very basic concepts of competition law. One such concept is "Relevant market". The competition authorities need to decide and determine whether e-commerce constitutes a separate market from the traditional retail activity or not.

Determination of relevant market is the first step in assessment of *abuse of dominance position* which may further lead to predatory pricing, dissimilar trading conditions, tying, price discrimination, limiting production, boycotting or refusal to deal with certain customers. The argument may be that online and offline markets could be considered as separate markets and therefore online market alone may be characterised as a relevant market. The implications of network effects that characterise e-commerce platforms, specifically the multi-sided nature of these platforms, need to be taken into account when defining relevant markets, assessing market power, looking at the impact of agreements and considering the counterfactual market developments in merger assessments.

It is up to the competition authorities whether or not they divide retail market into online and offline. Retail market as a whole is considered a relevant market for deciding whether it has adverse effect on competition or not. Furthermore, for a claim of predatory pricing, price discrimination, tying, and dissimilar condition etc., electronic retailers must be found to be dominant in the market space in which they are operating. A company will be in dominant position only when it has more than 40% (may differ from country to country) market share which may be difficult to be proved when relevant market constitutes both online and offline markets. Competition issues may also arise in relation to major discounting

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Competition is not only the basis
of protection to the consumer, but
is the incentive to progress
”

- Herbert Hoover

which is not considered as abusive or monopolistic but may result into monopolistic behaviour by big online portals. Therefore, Competition authorities need to take stringent measures in regulating such activities. How these digital giants are acquiring small e-commerce entities resulting in lack of competition in online market is another area of concern for competition authorities.

Ecommerce has brought greater price transparency that can result in lower prices, which benefits consumers, but if the focus of competition shifts exclusively to price, the product or service quality may suffer. As per EU commission's e-sector inquiry report, increased price transparency and easier price monitoring (including the use of automatic software programmes in the e-commerce sector) has also made it easier for manufacturers to monitor and enforce price restrictions imposed on their retailers. Further, such price transparency may also result in collusion of firms to inflate prices and formation of supplier cartels.

Customer data protection becomes even more important in the presence of rampant cybercrimes and e-info leaks. E-commerce has made e-frauds more attractive crime, whilst being difficult to detect easily. This area may be beyond the competency of competition agencies. Third world countries may not have the capacity to control this menace and protect its consumers from the ill effects of e-fraud. For ex-

ample, there have been instances where some fly-by-night online retailers collected orders on full advance payments and vanished. This affects not only consumers but also other retailers who lose potential customers and the industry as a whole as consumers lose trust in the medium. Further, the increasing role played by consumer data can create competition and consumer protection concerns. While these issues relate to data protection legislation, the collection and use of data may increasingly come to be seen as a competition issue. Reason being, it has the potential to affect the efficiency of market outcomes. There could be a long chain of online intermediaries, without having physical possession of the product. Deceptive practices in online marketing is an important area of concern for competition agencies.

The use of Most Favoured Nation (MFN) or price parity clauses by online intermediaries may be deemed anti-competitive as this is a very natural commercial choice which may cause competition harm in some cases and may have the effect of increasing price uniformity in the market, consequently reducing scope for competition amongst online intermediaries, whereas “narrow MFN” concept which helps prevent free riding is mostly acceptable by some jurisdictions in EU but not welcomed in some others for the same practice even.

Competition authorities, having jurisdiction to their territorial limits, may find it difficult to tackle such situations, thus may need coordinated effort and unified solution at global level. It could be a big challenge for the comity of nations, as concentration of wealth and market power in a few hands could deprive the nations, small industries, skilled and unskilled labor from their very existence. A few winners may find it difficult to market their products as the purchasing power and consumer base is likely to squeeze. Therefore, an early viable and equitable solution, not from the point of view of developed nations but also from the point of view of developing, under developed and least developed nations, is the need of day.

Mr. Khan, a lawyer cum management consultant, has over 15 years of practical experience in the areas of international trade policy and law advisory. He has expertise in WTO Laws, including Antidumping, Subsidies & Countervailing Measures, Safeguards, General Agreement on Trade in Services and TRIPS. He also practices Anti-trust and Competition law. Currently, he is Chairman of the Standing Committee on WTO Affairs of the Federation of Pakistan Chambers of Commerce & Industry. As a writer, he has contributed articles on international laws on Trade, Trade Defence, Competition, Dispute Settlement, Preferential Trade Agreements, E-Commerce, and Trade in Services.

