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Ref. Comments on the Interim Observations in the Market Study on E-commerce in India

Dear Sir/Ma'am,

We have pleasure in enclosing a submission that has been prepared by members¹ of the Unilateral Conduct Working Group of the Antitrust Committee of the International Bar Association (the **"Working Group"**) in response to the 'Interim Observations in the Market Study on E-commerce in India' (the **"Market Study"**) of the Competition Commission of India.

The Working Group welcomes the opportunity to respond to the most relevant issues raised in the interim observations in the Market Study and to highlight important points for further consideration.

In particular, the Working Group respectfully submits that the Market Study should involve significant consideration on relevant issues like market definition in the digital

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sector; identification of the main parameters of competition in the digital space; take into account the perspective of customers on both sides of the two-sided market; impact of multi-homing and switching by customers; impact of network effects in reality; and enforcement actions in other jurisdictions.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of the Competition Commission of India.

Yours sincerely,

Marc Reysen
Co-Chair Antitrust Committee

Elizabeth Morony
Co-Chair Antitrust Committee



**ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION
UNILATERAL CONDUCT AND BEHAVIOURAL ISSUES WORKING GROUP**

**SUBMISSION IN RESPONSE TO THE INTERIM OBSERVATIONS IN THE
MARKET STUDY ON E-COMMERCE IN INDIA CONDUCTED BY THE
COMPETITION COMMISSION OF INDIA**

1. Introduction and Purpose of Submission

1.1 Introduction

The International Bar Association's Unilateral Conduct And Behavioural Issues Working Group sets out below its submission on the interim observations in the Market Study on e-commerce in India conducted by the Competition Commission of India ("**Commission**").

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 80,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative perspective. Further information on the IBA is available at www.ibanet.org.

1.2 Purpose of Submission

The Working Group welcomes the opportunity to respond to the interim observations in the Market Study on e-commerce conducted by the Commission to develop a better understanding of the functioning of e-commerce in India and its implications for markets and competition.

The Working Group's central focus is to provide an international forum for thought leadership with respect to competition / antitrust law developments. In this regard, and to assist in the further consideration of the potential alternatives being considered, the Working Group has sought to share its perspective on the Market Study being conducted by the Commission as well as the interim observations available on the website of the Commission, i.e., <https://www.cci.gov.in>.

2. Comments on the Interim Observations of the Market Study on E-commerce in India

The Working Group appreciates and welcomes the initiative taken by the Commission in initiating the Market Study in the e-commerce industry in India. Such a market study is necessary considering the growth of the digital economy in the last decade, as well as considering the impact of the digital growth on every facet of human life and the impact of any enforcement action on a fast developing market.

The interim findings of the Market Study provide a considerable insight into the various practices of the online platforms and the concerns being raised by the customers of such online platforms in India. In addition to the perspectives of the customers as well as the online platforms, the Working Group recommends that the Market Study should also focus on several critical issues which are necessary for dealing with competition cases pertaining to the digital sector.

In order to provide guidance to companies and to stimulate exchange of ideas with stakeholders, the Working Group suggests that it is important that the Market Study involves significant consideration on relevant issues like market definition in the digital sector. The Market Study should analyze the functional or economic need of

the consumers fulfilled by the online platforms, as well as the various other products/services which may exert a competitive constraint on such platforms. The idea is not to define the relevant market for each and every platform in the Market Study, but to determine broad issues specific to the digital economy and those that need to be taken into account for the purpose of delineating the relevant market in the digital space. The Market Study should also consider whether traditional antitrust tools of market definition can be applied to the digital sector, or whether a different approach is required. The Market Study should also conduct a high-level research on whether the offline market in India exerts a competitive constraint on the online markets.

A thorough identification of the main parameters of competition and their use by market participants as well as examination of the market definition is important to address the various concerns that may come to light through the Market Study. The analysis pertaining to delineation of relevant markets in the online space is essential to assess the market power of the various online platforms. Without such fundamental analysis of market definition and market power, it may be difficult to fully grasp the dynamics of competition in the e-commerce industry in India, backfiring innovation, one of the main pillars of competition.

The interim observations of the e-commerce Market Study only take into account the concerns raised by the customers (including hotels, restaurants and offline traders) and the corresponding views of the online platforms. However, the Market Study does not take into account the views and perspective of the consumers which are a critical part of the two-sided online markets.

Online platforms are typically two-sided markets where the platform operators have to balance the interests of customers on both sides of the market. As such, it is important that the Market Study takes into account the views of the consumers as well. Any observation taken solely based on the views of customers of only one side of the two-sided market has the potential to lead to false positives. In order to create a robust network, it is important for the online platform to create value for customers on both sides of the market. Any unfair conduct towards customers on one side of the market will ultimately have an adverse impact on the customers on the other side of the market as well. Therefore, it is critical that the Market Study gives due

consideration to the views and perspective of customers on both sides of the two-sided market.

Such approach is recognized by the Commission in the recently launched report of “BRICS in the Digital Economy” as follows:

“In past cases involving multisided markets, the CCI has defined the relevant market on a case-to-case basis. For example, in the Google case, two relevant markets were defined for both sides of the platform, i.e. online searchers, and online search advertisers. The CCI took into account that online platforms that provide search services were intermediaries that acted as an interface between search users and advertisers. The two sides of the market complement each other, and they are interdependent. Further, online general web search services and search advertising would not constitute the same relevant product market on account of wide variations in the mechanism for generation and display of results and the clicking behavior. In addition, the CCI considered that these services serve distinct goals and are perceived differently by the various types of users, namely, publishers (websites) and internet users entering search queries. It was noted also that these services constitute complementary services from the point of view of websites interested in attracting more users. Accordingly, the Competition Commission of India defined the relevant markets as: (a) market for online general web search services in India, and (b) market for online search advertising services in India”.

The Market Study should also analyze the impact of multi-homing and ease of switching by the consumers in India. Such an analysis is important to assess the degree of market power of such online platforms. Considering the fast-paced nature of the online market characterized by the need for continuous innovation and improvement, it is important to also study the ability of consumers to use various competing applications, i.e., the ability of the consumers to multi-home and switch on an immediate basis. The ability of the consumers to immediately switch will provide a credible insight into the degree of market power that such platforms truly enjoy. Such studies and analysis are important to understand the dynamics of market power in such online markets as a high market share in such an industry may not always be - relied upon to assess the degree of market power.

Some of the customers have also raised concerns regarding access to data of consumers not being provided to them. In this regard, it is important that the Market Study considers whether data constitutes an ‘essential facility’, as such an obligation,

i.e., to share data may only arise if data is considered to be an essential facility. The Market Study should consider the issue of data being an 'essential facility' both from a factual aspect based on the way business is done in this industry as well whether the competition laws recognize such an obligation.

The Market Study should also consider whether holding data by itself confers a competitive advantage on an online platform. There has been a lot of debate that access to a large set of data provides immense market power to the platforms.

The Market Study should also focus on the barriers to entry in such online markets. It is important to analyze the dynamics of such markets where today's giants may be easily dethroned by new disruptive and innovative technology. Further, considering the fast-paced nature of this industry, such a shift can take place in a very short period of time. It is also important to consider whether certain barriers like network effects, switching costs, economies of scale, data of large number of consumers etc. apply differently across different platforms or whether such concepts are uniformly applicable across all digital platforms.

There is a general perception that network effects create insurmountable entry barriers and confer significant power on a platform, and such network effects prevent new competitors from entering and expanding into the market. The Market Study should also look into whether existence of network effects has in fact prevented new players from entering into various digital segments. A study on the entry of new players in various digital platform markets in the past in India will provide a credible insight on the degree of impact that network effects has on the ground. It is critical to analyze and compare the impact of 'network effects' in theory versus the impact of 'network effects' in reality.

It is important that the Commission considers both the positive and negative effects of certain types of behavior which come to light in the Market Study. Further, the Commission must also take a balanced approach between 'consumer welfare' and 'incentive to innovate' in its enforcement activities. For example, some concerns have been raised regarding price parity restrictions being imposed by the Online Travel Agencies.

In today's digital world, things quickly move beyond the borders of India and similar issues are being considered by competition authorities across the world.

Therefore, the Commission should take into account enforcement activities concerning the digital industry in other jurisdictions as well. The abovementioned study “BRICS in the Digital Economy”, for instance described a decision from the Brazilian Competition Authority (CADE) that *“involved three major online travel agencies (OTAs) operating in Brazil (Booking, Expedia and Decolar) which were investigated due to the adoption of parity clauses, also known as most-favoured-nation clauses (MFN) (Administrative Inquiry 08700.005679/2016-13). According to the General Superintendence, such clauses may restrict competition between the OTAs in question and other OTAs and hinder new platforms from entering the market. The case was closed with cease-and-desist agreements involving all three companies, in which the companies agreed to cease the adoption of wide MFN clauses. The use of narrow clauses, however, was allowed so that the companies could request parity treatment with regard to websites of the accommodation providers. This conclusion was based on the understanding that prohibiting MFN clauses under all circumstances might give hotels incentives to free ride and offer deals at lower prices than the ones announced on the OTAs’ platforms”*.

For all the reasons above, the Working Group believes that the Commission should also take into account the pro-competitive effects of restrictive agreements in the digital space (e.g. reduction of search and negotiation costs, incentivizing specific investments by the platform etc.) in its study. It is important for the Commission to take a balanced approach and give due consideration to both, the pro and anti-competitive effects of various concerns raised in the interim observations.

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