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Update

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Competition Commission of India publishes a Market Study on Artificial Intelligence and Competition

TL;DR

Earlier this month, the Competition Commission of India (CCI) released a market study on Artificial Intelligence and Competition (Market Study), marking India's first comprehensive regulatory examination of AI markets.

The Market Study identifies several competition concerns relating to AI development and deployment. Key concerns include leveraging through self-preferencing and tying, algorithmic collusion, data advantages, and lack of interoperability. The Market Study makes several recommendations including (i) self-audit of AI systems, and (ii) implementation of measures to improve transparency and reduce entry barriers.

AI Stack and Indian AI Ecosystem

According to the Market Study, the AI stack comprises upstream and downstream "layers" including infrastructure, data, pre-trained models, fine-tuned models, and applications. At the upstream level, the layers involve inputs for developing AI models including FMs. At the downstream level, specific actions and applications make up various layers such as fine-tuning. The downstream layers lead to deployment of AI models.

The Market Study collected primary data from various stakeholders including startups operating in the AI space in India. After reviewing the data, the Market Study found that 67% of Indian AI startups are building applications on top of existing AI models. The Market Study highlights that limited innovation is happening in the compute infrastructure space in India. While there are planned investments in semiconductor space, there is heavy reliance on external infrastructure. For instance, cloud services market has two to three large players (hyperscalers). The study mentions that AWS is the leading cloud service provider in India (with 32.6% market share) followed by Azure (with 20.8% market share). The Market Study also cites a report that found Appen, AWS, Google, Azure and Scale AI to be the top five players in India providing training datasets.

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A well-designed stakeholder consultation is integral to any effective policy-making exercise. The published study does not disclose details of stakeholders consulted or how the consultation process was designed and carried out. Further, some of the findings of the study require clarifications: the study mentions that 67% of respondent companies are building applications on top of existing AI models, it also states that 76% of the respondent companies are building applications on top of 'open source' AI models, 63% use pre-trained proprietary AI models, and 66% use pre-trained open-source AI models.

The Market Study also does not clarify if the market shares in data market (cited from another report) include all possible data categories such as public data without copyright protection, public data with copyright protection, non-public copyrighted content, government data, synthetic data, proprietary datasets, and specialized datasets.

Competition concerns identified in the Market Study

1. Algorithmic collusion

Algorithms can facilitate tacit collusion by aligning prices among competitors without explicit agreements or direct price coordination. Algorithmic collusion can also extend to non-price parameters and can be implemented by way of market allocation and bid-rigging.

2. Leveraging through self-preferencing and tying

Firms with presence in multiple upstream layers of the AI stack can leverage their position to favour their own downstream services. Self-preferencing conduct may be implemented through tying practices.

3. Exclusive dealings

AI partnerships may involve exclusive dealings that can foreclose competition by denying access to essential inputs or by raising rivals' costs. Exclusive dealings can also reduce startups' ability to innovate and scale, as well as incumbent firms' incentive to innovate.

4. Entry barriers

Access to data for training and fine-tuning is a critical competitive advantage. Firms with extensive user data will be able to develop sophisticated AI models and create feedback loops that are difficult for new entrants to overcome. According to respondents, data availability, cost of cloud services and talent availability can act as significant barriers for Indian AI startups.

5. Price discrimination through personalized pricing

AI can enable firms to engage in discriminatory practices by offering 'personalised' prices based on purchasers' willingness to pay and purchasing power.

6. Other concerns

The Market Study also highlights that firms can engage in predatory pricing through algorithms, likelihood of and increase in market concentration, reduced transparency and choice resulting from "black-box opaque" algorithms that operate without "guardrails", and network effects.

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While the study highlights tacit collusion by firms through algorithms, the case laws cited in support of international jurisprudence involve existence of an anti-competitive agreement which is implemented using a pricing software. In other words, there is a nuanced yet clear difference between using pricing algorithms to implement an anticompetitive agreement and using pricing algorithms that, on its own, facilitate collusive coordination among competing firms without an express anticompetitive agreement.

While highlighting personalised pricing as a competition risk, the Market Study acknowledges that personalised pricing can be welfare-enhancing where it allows certain consumers to purchase products at lower prices on account of their lower ability and willingness to pay.

Recommendations made by the Market Study

The Market Study proposes several regulatory and market-based interventions to address identified competition concerns including the following:

- firms with market power or wide consumer reach to undertake self-audits of AI systems for early identification and mitigation of competition risks;
- firms to adopt transparency measures such as disclosure of use and purpose of AI deployment in decision-making and disclosure of main parameters based on which AI-based decisions are taken; and
- Indian government to take measures to reduce entry barriers such as building (public?) AI infrastructure, creating data repositories to improve access to high-quality non-personal datasets, promoting open-source AI frameworks that allows model portability and platform-neutral deployment, building skilled workforce, and enhancing domestic technology capabilities by developing cross-border data governance and technology transfer frameworks.

The study includes a guidance note on conducting self-audit of AI systems. The guidance note sets out various components of a self-audit framework including reviewing input data for representativeness and bias, reviewing how algorithms process competitors' data, implementing safeguards and guardrails, implementing test cases to assess market outcomes, and establishing triggers for human review of AI-based decisions.

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While the Market Study serves as a good starting point for delving further into whether there is a need to regulate AI, the need for a more extensive stakeholder consultation is critical. That said, the measures recommended by the Market Study are far-reaching and, in many cases, go outside the realm of competition law. Since the existing provisions of the Competition Act, 2002 are sufficiently flexible and can capture anticompetitive conduct relating to AI, the question really is – does India need more regulations to redress anti-competitive conduct in AI markets?

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Lagna Panda advises clients on the entire spectrum of competition law including advising and representing clients in abuse of dominance investigations, cartel investigations, dawn raids, appellate proceedings, and merger control filings. She has significant experience in advising clients on distribution arrangements, sourcing and supply practices, and information sharing. She has also advised clients on Indian data protection laws and regulations.

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