9

Bridging the Implementation Gap

9.1 INTRODUCTION

In the last two decades, six out of eight South Asian countries have adopted some version of a modern competition law: India was the first to do so in 2002, followed by Sri Lanka in 2003, Pakistan and Nepal in 2007, Bangladesh in 2012, and most recently Maldives in 2020. Although the remaining two countries, Bhutan and Afghanistan have not yet adopted modern competition laws, they have not remained untouched by the growing momentum of what may be called the competition law movement across the region: Bhutan adopted a national competition policy in 2014 which it revised and updated in 2020, and Afghanistan finalised a draft competition legislation in 2011 it is yet to enact. However, with the exception of India and Pakistan, South Asian countries are yet to meaningfully implement their competition laws and policies: among them, Bangladesh has established the first-tier competition authority as envisaged in the Bangladeshi Act, but at the time of writing had still not operationalised it; and Nepal and Sri Lanka though not obliged by their respective competition legislations to establish specialist or fully independent competition authorities, have the requisite competition enforcement infrastructure in place but have not taken up any competition matters. Maldives, despite enacting its competition legislation in 2020, had allowed itself a reprieve until 2021 to implement the law, however, at the time of writing there was still no information as to whether it had commenced competition enforcement beyond the 2021 deadline. Consequently, the region's overall competition enforcement experience remains weak and uneven at best, and the anti-competitive practices that the competition legislations are designed to address, continue unchecked and unabated.

As discussed particularly in Chapter 8, the extent and quality of competition enforcement in the South Asian countries that have already adopted competition legislations is in large part attributable to the strategies and institutions through which they adopted these legislations: while the Indian Act, adopted through *socialisation* and the interplay of a relatively wide range of experienced bottom-up, participatory,

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and inclusive institutions and the Pakistani Act, adopted by *coercion* through a narrow category of top-down, exclusive institutions have both proceeded to the implementation stage, the Bangladeshi, Sri Lankan, and Maldives competition legislations adopted through a combination of *coercion* and relatively less experienced bottom-up, participatory, and inclusive institutions, and the Nepalese Act, adopted by an executive order, are yet to be enforced. This suggests that competition legislation is more likely to be enforced in one of two situations: if it is *socialised* through extensive, domestic consultations with a wide range of stakeholders, or if it is introduced through *coercion* and delivered through an all-powerful executive.[1] While the former situation generates the compatibility and legitimacy necessary for meaningful implementation, the latter displaces the need for such compatibility and legitimacy, at least temporarily, by keeping the adoption and implementation firmly within the executive. In contrast, legislations introduced through *coercion* and then enacted through parliaments that do not have the history, experience, or even the requisite inclination to aggregate or apply local knowledge, are only superficially compatible with context and have, at best, only a degree of formal legitimacy that does not translate into the ownership and understanding necessary for meaningfully operationalising the adopted legislation.

While the failure of countries to generate sufficient compatibility and legitimacy in the adoption process is not fatal to their ability to implement their competition legislations, the 'success' they are likely to enjoy in this regard depends in large part on their governments' commitment to competition enforcement which in turn is linked to the extent of compatibility and legitimacy that the adopted legislations enjoy in their domestic contexts. In countries where competition legislations mandate independent competition authorities such as in India, Pakistan, and Bangladesh, the governments' support may be discerned by the efforts they make for operationalising these authorities, including appointing their members, and allocating funds for their activities. On the other hand, in countries where legislations do not envisage fully independent competition enforcement authorities (such as Sri Lanka, Nepal, Maldives) or that are yet to adopt competition legislation (such as Bhutan and Afghanistan) the government's support makes the difference by generating greater awareness of and acceptability for the legislation in their contexts.

This chapter argues that regardless of the scenario in which these countries adopted their competition legislations, it is argued that their, governments are more likely to support competition enforcement if they are themselves convinced of competition's potential to help deliver their broader and more pressing economic and social goals. The chapter further argues that not only is it possible for multilateral agencies that have influenced and shaped the diffusion and transfer of

[1] Nepal like Pakistan had introduced its competition legislation through an all powerful executive, however, Nepal still not able to implement the legislation may be explained by the fact that the all-powerful executive that enacted the Nepalese Act was removed from power the very day after the enactment.

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competition legislation in nearly all South Asian countries to play a role in generating this understanding, but also it is open to countries to learn from each other in this regard. To this end this chapter is organised as follows: Section 9.2 makes the case for the connection between competition enforcement and economic development across South Asia; Section 9.3 examines the growth in digital economy in these countries and explores how competition enforcement may help South Asian countries address the competition concerns arising from the digital economy; Section 9.4 explores the possibility of South Asian countries benefitting from each other's experiences in competition law enforcement in the traditional as well as the digital economy; and Section 9.5 discusses possible implementation strategies for South Asian countries that can harness competition regulation to realise the potential for traditional as well as digital economic growth in their contexts.

9.2 THE DEVELOPMENT IMPERATIVE

Economic growth and development feature very prominently in the economic and political agenda of South Asian countries. It is likely, therefore, that the governments of these countries may be more inclined to publicise, operationalise and enforce their adopted (or proposed) competition legislations if they understand that doing so would help deliver the development and growth dividends they very much desire. This section identifies the key economic challenges faced by South Asian countries and explores how competition law may help in addressing these.

9.2.1 *Economic Profiles and Challenges of South Asian Countries*

In varying degrees all South Asian countries are characterised by low levels of per capita income, low Gross Domestic Products (GDP) and high economic vulnerability. Among them Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka are classified by the World Bank as lower-middle-income countries;[2] Maldives is classified as an upper-middle-income country,[3] and Afghanistan as a low-income country.

Afghanistan, Bangladesh, Bhutan, and Nepal are also categorised by the United Nations as 'least developed countries' due to their low GDP and considerable economic vulnerability.[4] All South Asian countries are characterised by

[2] Nepal has recently been re-classified upwards from the low-income category and Sri Lanka re-classified downwards, from the upper-middle-income category. The World Bank, 'Data, Countries and Economies' <https://data.worldbank.org/country> accessed 25 November 2020; Umer Serajuddin, Nada Hamadeh, 'New World Bank Country Classifications by Income Level: 2020–2021' <https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2020-2021> (World Bank Blogs, 2020) accessed 25 November 2020.

[3] For the relevant income thresholds 2021 see The World Bank, 'World Bank Country and Lending Groups' <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 1 December 2020.

[4] United Nations, 'Country Classifications: Data Sources, Country Classifications and Aggregation Methodology' <www.un.org/en/development/desa/policy/wesp/wesp_current/

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considerable income inequality[5] with Gini indices ranging from 39.8 (Sri Lanka) and 31.3 (Maldives):[6] the Gini index in Bhutan and India is 37.4[7] and 37.8[8] respectively; Bangladesh and Nepal have a Gini index of 32.8 and 32.4 respectively;[9] and Pakistan of 33.5.[10] The considerable income equality in all these countries is further exacerbated by a sizeable proportion of their populations living below the poverty line: 54.5 per cent in Afghanistan, 25.2 per cent in Nepal, 24.3 per cent in Bangladesh and Pakistan respectively, and 21.9 per cent in India.[11]

South Asian countries also have an extensive history of state control and central planning which despite efforts at liberalisation persists in the form of state-owned or controlled enterprises (SOEs) operating throughout these countries.[12] Historically, these countries had established a range of SOEs in the belief and hope that these would deliver industrialisation while also safeguarding the public interest. Given the public nature of their mandates these SOEs were not particularly interested in instituting measures for the greater efficiency, accountability, and transparency of their operations, and remained largely unconcerned about the significant losses they incurred in the absence of such measures. In time, several South Asian countries launched privatisation drives in an attempt to address these issues and in response to changing global priorities in this regard: Sri Lanka was the first to do so in 1977,[13] with India, Pakistan, and Bangladesh following suit in 1991, Nepal in 1993,[14] and Maldives in 2006 with technical assistance from the World Bank.[15] Despite these efforts however, these countries were not able to

2> accessed 25 November 2020. Maldives graduated from being an LDC (Least Developed Country) in 2011 while Bhutan is set to graduate in 2023. The classifications of both Bangladesh and Nepal were up for review in 2021, however remained unchanged.

5 Index Mundi 'GINI Index (World Bank estimate)-Country Ranking' <www.indexmundi.com/facts/indicators/SI.POV.GINI/rankings> (updated 2019) accessed 2 February 2021.

6 ibid. The data for Sri Lanka and Maldives relates to 2016.

7 ibid. This is per 2017 data.

8 ibid. There is some discrepancy in the Gini Index for India. According to the World Bank, the Gini Index is 35.7 as per 2011 data while according to the UN, it stands at 37.8 also as per 2011 data. UNDP Human Development Reports 'India' <http://hdr.undp.org/en/countries/profiles/IND> accessed 2 February 2021.

9 ibid. The data for Nepal relates to 2010 and for Bangladesh to 2016.

10 ibid. This is on the basis of 2015 data. There is no data available for Nepal.

11 Bhutan and Maldives with only 8.2 per cent and Sri Lanka with only 4.1 per cent of its population living below the poverty line do not appear to have a significant poverty problem. These figures are obtained from the World Bank data for 2018 with the exception of India and Nepal whose figures are from 2010. See n.1.

12 These are sometimes referred to in the literature as public enterprises and abbreviated as SOEs or PEs.

13 Despite the early start, Sri Lanka's privatisation drive remained slow and was punctuated with long periods of inactivity. Asoka F Balasooriya, Quamrul Alam and Ken Coghill 'Market-based Reforms and Privatization in Sri Lanka' (2008) 21(1) International Journal of Public Sector Management 58–73.

14 Nirmal Kumar Raut, 'Causes and Impact of Privatisation in Nepal: A Theoretical Review' (2012) 2(2) Banking Journal 3.

15 Asian Development Bank, Technical Assessment Completion Report <www.adb.org/sites/default/files/project-document/73639/39664-012-mld-tcr.pdf> accessed 8 December 2020.

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reorganise the operations of several remaining or even privatised SOEs along competitive lines and therefore, failed to achieve the desirable levels of economic efficiency.

9.2.2 *Do Multi-lateral Packages of Economic and Institutional Reform Address Development?*

The considerable economic challenges that South Asian countries face have led the majority of them to rely extensively on Western multi-lateral agencies for financial aid. guidance and technical assistance in carrying out their legal reforms. In most cases these countries have have also fully accepted the conditionalities on which multi-lateral agencies have provided this aid and assistance.

The majority of these countries have obtained support from the International Monetary Fund (IMF). From the 1980 onwards, the IMF launched its first-generation reforms, which aimed to alleviate global poverty and inequities[16] by revitalising markets through economic liberalisation and reducing, if not altogether eliminating, state ownership of commercial enterprise and state intervention in market entry, market exit, and product pricing.[17] Within two decades, however, the IMF had realised that market liberalisation and deregulation alone were not sufficient either for establishing sustainable market-led growth or for maximising social welfare. This led to the launch of the IMF's second-generation reforms whose purpose was to sustain, consolidate, and boost market-led growth by 're-regulation' and 'institution building' through positive state action and in co-operation with civil society.[18]

Given the market focus of IMF reforms, it was only natural that the reform packages introduced by it throughout South Asia would also include the market regulating competition laws.[19] However, even as South Asian countries adopted

Bhutan and Afghanistan did not engage in this exercise most likely because their economies were either too underdeveloped, or too small, or both. For Afghanistan see Richard Ghiasy, Jiayi Zhou, Henrik Halgreen, 'Afghanistan's Private Sector: Status and Way Forward' (Stockholm International Peace Research Institute 2015) <www.sipri.org/sites/default/files/2016-04/SIPRI_Afghanistans-Private-Sector_Report-2015.pdf> accessed 8 December 2021, and for Bhutan, Asian Development Bank, Country Partnership Strategy: Bhutan 2014–18 'Private Sector Assessment (Summary)' <www.adb.org/sites/default/files/linked-documents/cps-bhu-2014-2018-psa.pdf> accessed 8 December 2021.

[16] James M Boughton 'The IMF and the Silent Revolution: Global Finance and Development in the 1980s' (IMF 2000) <www.imf.org/external/pubs/ft/silent/index.htm> accessed 3 January 2021.

[17] Scott H Jacobs, 'The Second Generation of Regulatory Reforms' delivered at the IMF Conference on Second Generation Reforms, November 1999 (IMF 1999) <www.imf.org/external/pubs/ft/seminar/1999/reforms/jacobs.htm#I> accessed 28 December 2020.

[18] ibid.

[19] South Asian countries had long-standing relationships with the IMF. India had become a member of the IMF in 1945, Pakistan and Sri Lanka in 1950, Afghanistan in 1955, Nepal in 1961, Bangladesh in 1972, Maldives in 1978, and Bhutan in 1981. All these countries have and participated in both first- and second-generation reforms at different points in their histories. International Monetary Fund 'List of Members' <www.imf.org/external/np/sec/memdir/memdate.htm> accessed 28 December 2020.

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these laws as part of the reform packages prescribed for them, they often failed to grasp the potential of these laws to contribute to their economic development.[20] This was partly due to the fact that the majority of these countries were adopting competition laws in response to external stimulus rather than indigenous demand, and partly because despite encouraging and urging South Asian countries to adopt competition legislation, the IMF perhaps did not sufficiently clarify or emphasise that these laws were appropriate for their stage of economic development and would support them in realising their economic potential and goals.

The extent to which the different South Asian countries understand the possibility of a connection between competition regulation and economic growth and development may to some extent be deduced from the preambles of their respective competition legislations. A review of these preambles suggests that India and Bangladesh had some awareness of possible links between competition legislation and economic development: the Indian Act adopted through *socialisation* and a range of bottom-up, participatory, and inclusive institutions keeps 'in view the economic development of the country',[21] and the Bangladeshi Act, acquired through *coercion* but enacted through democratic institutions recognises that adopting such legislation is necessary in the 'context of gradual economic development of the country'.[22] However, both the Indian and the Bangladeshi Acts relegate economic growth and development to the background by making it part of the context in which competition takes place rather than acknowledging its potential as a tool for realising economic growth and development. In contrast, the preambles of the Sri Lankan Act[23] and the Pakistani Act (and the Ordinances preceding it),[24] both of which were adopted through *coercion* by multi-lateral agencies albeit with a

[20] India was perhaps the only country among this group of South Asian countries that had some understanding of the reasons for which it needed a modern competition law even if its impetus to develop this understanding came from the WTO's plans of including competition within its framework.

[21] Indian Act, Preamble: 'An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.'

[22] Bangladeshi Act, Preamble: 'Whereas in the context of gradual economic development of the country, it is expedient and necessary to make provisions to promote, ensure and sustain congenial atmosphere for the competition in trade, and to prevent, control and eradicate collusion, monopoly and oligopoly, combination or abuse of dominant position or activities adverse to the competition.'

[23] Sri Lankan Act, Preamble: 'Whereas it is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade and the prices of goods and services and to protect traders and manufacturers against unfair trade practices and restrictive trade practices; And whereas the Government of Sri Lanka is also desirous of promoting competitive pricing wherever possible and ensure healthy competition among traders and manufacturers of goods and services.'

[24] Pakistani Act, Preamble: 'Whereas it is expedient to make provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour and to provide for the establishment of the

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different combination of institutions, do not appear to recognise the connection between competition and economic growth and development. However, while the Pakistani Act recognises achieving 'economic efficiency' as a goal of competition, the Sri Lankan Act does not even do that. The Nepalese Act is the only South Asian legislation which recognises competition law's potential to enhance 'national productivity'.[25] However, in the Nepalese Act as in all other South Asian competition legislations, the focus on protecting consumer interests and facilitating internal trade overshadows any awareness of the link between competition and economic growth and development. Throughout these countries therefore competition legislation is cast as an essentially consumer protection role and is thereby rendered peripheral if not altogether irrelevant to the economic growth and development priorities of these countries.[26]

9.2.3 *Adapting Competition Legislation for Economic Development*

Scholars argue that for developing countries (including South Asian countries) to be persuaded to enforce, rather than merely adopt their competition legislations, they must be convinced that competition enforcement would spur domestic productivity and economic growth, and while it cannot directly alleviate poverty, may help avoid harm to the poor, create an enabling environment for achieving other social objectives,[27] and generate positive distributional effects.[28] In the South Asian context, it may also be important to make governments appreciate that rigorous competition enforcement would help break up old, politically supported market power, attract fresh capital investment and entrepreneurship, and encourage both investors and entrepreneurs to adopt innovative production and process strategies.[29] Unfortunately, the historically strong nexus between economic and political power in most of these countries, means that their governments may be reluctant to

Competition Commission of Pakistan to maintain and enhance competition; and for matters connected therewith or incidental thereto.'

[25] Nepalese Act, Preamble: 'Whereas, it is expedient to make legal provisions in order to further make national economy more open, liberal, market-oriented and competitive by maintaining fair competition between or among the persons or enterprises producing or distributing goods or services, to enhance national productivity by developing the business capacity of producers or distributors by way of competition, to protect markets against undesirable interference, to encourage to make the produced goods and services available to the consumers at a competitive price by enhancing the quality of goods or services by way of controlling monopoly and restrictive trade practices, and to maintain the economic interests and decency of the general public by doing away with possible unfair competition in trade practices.'

[26] Although Afghanistan has not adopted a competition legislation, its preamble is more in line with that of Sri Lanka and Pakistan. Bhutan, which only has a competition policy is perhaps the only country that articulates the rationale for the policy most clearly, however, it still does not expressly refer to economic growth and development.

[27] Thomas K Cheng, *Competition Law in Developing Countries* (OUP 2020), 5.

[28] ibid 29.

[29] ibid 310–11.

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enforce competition in areas where such power is concentrated[30] even if those are the very areas where enforcement is most needed and where doing so is likely to lead to more equitable distribution of both economic and political power.[31]

Matters are likely to become even more complicated when it comes to the question of employing competition law to achieve social objectives such as reduction of inequality, promoting sustainability, and poverty alleviation. Some scholars argue that such social objectives are beyond the remit of competition law and if included in competition analysis are likely to comprise its efficacy. They therefore recommend that competition authorities may at best be mindful of the impact of their enforcement decisions on social welfare rather than actively working towards it.[32] Other scholars, however, are of the view that even though competition law cannot alone be burdened with the 'delicate task of changing the current socio-economic fabric' of developing countries,[33] it has the potential to reduce inequality of opportunity as well as of wealth,[34] and given the often dysfunctional distribution systems in these developing countries, may also be called upon to address distributive concerns without compromising its traditional focus on economic efficiency.[35]

Despite these complications, barring state capture by vested interests, it is entirely plausible that if the governments of South Asian countries and their competition authorities (where they have been established and have the autonomy and capacity to take decisions), appreciate the development dividends that even traditional competition enforcement may deliver for their economies, they may be more amenable to meaningfully implementing their competition legislations. This means that South Asian governments and competition authorities must understand that sanctioning cartels, checking abuses of dominant power, or monitoring mergers and acquisitions that significantly lessen competition will not only generate competitive prices, choice, and transparency for the benefit of consumers (whether natural or legal) and end-users in the short run, but will also spur entrepreneurship in their economies and provide livelihood to more people in the medium run, and thereby

[30] A case in point is the reluctance of and delay on the part of the CCP to take up Pakistani sugar cartels. See Amber Darr 'Cartels & the Politics of Competition Law Enforcement in Pakistan' (Competition Policy International 2020) <www.competitionpolicyinternational.com/cartels-the-politics-of-competition-law-enforcement-in-pakistan> accessed 5 August 2021.

[31] Lina M Khan, Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 Harvard Law and Policy Review 235, 237.

[32] ibid.

[33] Michal S Gal, 'The Social Contract at the Basis of Competition Law: Should we Recalibrate Competition Law to Limit Inequality?' in Damien Gerard, Ioannis Lianos (ed) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (CUP 2019) 108; Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65(1) The Antitrust Bulletin 3–86.

[34] Gal, ibid 95.

[35] Ioannis Lianos, Amber Darr, 'Hunger Games: Connecting Competition Law and the Right to Food' CLES Research Paper Series 2/2019, 9 <www.ucl.ac.uk/cles/sites/cles/files/cles_2-2019.pdfpapers> accessed 9 February 2021.

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help alleviate poverty and re-distribute wealth throughout the economy in the long run. It is also important that multi-lateral agencies working with these countries engaging with these countries in the process of adopting their competition legislations, cast its benefits in development and growth language and thereby help draw competition in from these countries' peripheral consumer protection concerns to their core agenda of economic growth and development.

9.3 COMPETITION IN THE DIGITAL AGE

South Asian countries are increasingly engaging with foreign e-commerce platforms and developing their own e-commerce initiatives primarily for the economic growth and development that such it promises. This section examines the state of e-commerce in South Asia and the regulatory infrastructure individual countries have put into place to faciliate the digital economy and discusses how they may employ their competition legislations to address the challenges presented by e-commerce platforms.

9.3.1 *The State of E-commerce in South Asia*

Among South Asian countries India is a frontrunner in e-commerce and ranks among the top ten countries for e-commerce sales throughout the world:[36] in 2017 India's total e-commerce sales, 91 per cent of which were B2B (Business to Business) sales, were worth US $400 billion and comprised 15 per cent of India's total GDP.[37]

The remaining South Asian countries are only gradually waking up to the potential of e-commerce.[38] However, with the exception of Daraz,[39] which commenced operations as a Pakistani e-commerce platform and swiftly grew to become

[36] UNCTAD, 'Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries' (United Nations 2019) ('the Digital Economy Report'), 15.

[37] ibid. India's top ten e-commerce platforms for 2020 were Amazon India, Flipkart, Alibaba, Snapdeal, Myntra, IndiaMart, Book My Show, Nykaa, First Cry, 1mg (e-Commerce Guide, 'Top 10 Ecommerce Sites in India 2020' <https://ecommerceguide.com/top/top-10-ecommerce-sites-in-india> accessed 24 February 2021).

[38] The Digital Report (n.35), 67. The region's exports of digitally deliverable services grew from US $39,260 million in 2005 to US $140,310 million in 2018. Viviana Perego, Sanjay Kathuria, Arti Grover, Aaditya Mattoo, Pritam Banerjee, 'Can E-commerce Drive Trade in South Asia?' (The World Bank Blogs 2019) <https://blogs.worldbank.org/endpovertyinsouthasia/can-e-commerce-drive-trade-south-asia> accessed 24 February 2021.

[39] Daraz was launched in Pakistan in 2012 as 'Daraz.pk' with investment from Rocket Internet SE. In 2018, Alibaba having previously invested in Paytm in India <https://techcrunch.com/2017/03/06/alibaba-paytm-amazon-india> accessed 8 March 2021, acquired Daraz in a move to consolidate its access to South Asian markets <https://techcrunch.com/2018/05/08/alibaba-buys-rocket-internets-daraz/?guccounter=1> accessed 8 March 2021.

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a subsidiary of the Chinese giant Alibaba,[40] and has a presence in Pakistan, Bangladesh, Sri Lanka, Nepal, and Myanmar, e-commerce throughout these countries remains largely localised.[41] Pakistan has several specialist and non-specialist local platforms[42] such as Shopify, Tibolli.net, and Dukanlay which connect buyers and sellers, while consumers in Bangladesh rely more on social media websites, particularly Facebook,[43] and platforms such as Daraz Bangladesh, bikroy.com, clickbd.com, and bagdoom.com for their online shopping needs. Global e-commerce players are also largely absent from Sri Lanka where e-commerce is dominated by domestic companies like Kapruka.com, Daraz.lk, WOW.lk, Takas.lk, and MyDeal.lk and from Nepal which hosts emerging online shopping portals such as Sastodeal and Daraz[44] as well as a few platforms such as Foodmandu which allow traditional retailers the opportunity to offer their products online.[45] Maldives, though more digitised than India, Pakistan, and Sri Lanka,[46] appears not to have explored its e-commerce potential: there are only two major e-commerce platforms in Maldives, Ibay.com.mv and koo.mv that connect small businesses and consumers, however, several businesses employ e-commerce components,[47] and as in Bangladesh, Facebook e-commerce pages play an important role in connecting businesses and consumers.[48] Interestingly, Bhutan despite being the smallest South Asian country, has been active in developing its e-commerce: businesses

[40] Ming Zeng 'Alibaba and the Future of Business' <https://hbr.org/2018/09/alibaba-and-the-future-of-business> accessed 8 March 2021.

[41] Daraz. 'About' <www.daraz.com> accessed 8 March 2021.

[42] Freebie Freak 'Best E-commerce Platform in Pakistan to Start an Online Business' <https://medium.com/@tibollinet.2019/which-is-the-best-ecommerce-platform-in-pakistan-189996295067> accessed 8 March 2021. Also see Claritypk, 'List of Online Marketplaces and Ecommerce Stores in Pakistan' <https://clarity.pk/ecommerce/list-online-marketplaces-ecommerce-stores-pakistan> accessed 8 March 2021.

[43] The e-commerce Association of Bangladesh (e-Cab) which is the trade body for e-commerce in Bangladesh, estimates that in 2017 there were 700 e-commerce sites and around 8,000 e-commerce pages on Facebook <https://e-cab.net> accessed 8 March 2021.

[44] International Trade Association, 'Nepal-Country Commercial Guide' <www.trade.gov/country-commercial-guides/nepal-ecommerce> accessed 12 March 2021.

[45] ibid. At present, however, the Nepalese are not allowed to import goods online and, therefore, do not participate in cross-border e-commerce.

[46] Raul Katz, 'The Transformative Economic Impact of Digital Technology' contribution to the United Nations Commission on Science and Technology for Development (UNCTAD 2015). <https://unctad.org/system/files/non-official-document/ecn162015p09_Katz_en.pdf> accessed 12 March 2021.

[47] See for instance e-Tukuri Local, developed by Maldives Post <www.maldivespost.com/e-commerce> accessed 12 March 2021, and DHL e-commerce <www.dhl.com/mv-en/home/our-divisions/ecommerce/customer-service/contact-ecommerce-consumer.html> accessed 12 March 2021.

[48] A simple internet search brings up a large number of Facebook shopping pages, including pages for 'Shop Maldives' <www.facebook.com/shoppersmaldives> 'Maldives online Shop'; <www.facebook.com/MaldivesOnlineShop> 'Asters'; <www.facebook.com/Asters.Maldives> 'Trending Home Maldives'; <www.facebook.com/trendinghome.mv> 'Fashnova'; <www.facebook.com/Fashnova-366264203551737> to name a few; accessed 12 March 2021.

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and government organisations have been using social media for sales for some time,[49] and between 2019 and 2020 the Bhutanese Department of Trade issued thirty-one e-commerce licences primarily to cottage and small-scale industries in a bid to facilitate sales in the international market.[50]

Except for India and Bangladesh, South Asian countries primarily engage in homegrown and domestic B2C e-commerce.[51] Although there is some indication that Pakistan is working towards B2B e-commerce, there is no evidence of ny such momentum in Maldives, Nepal, Sri Lanka, and Bhutan. Interestingly, however, the operations of the e-commerce platform Daraz, which is a subsidiary of the Chinese e-commerce platform Alibaba, and operates in four out of the eight South Asian countries – Pakistan, Bangladesh, Sri Lanka, and Nepal – creates the possibility for cross-border e-commerce among these countries.[52] In 2020 Daraz launched a 'Daraz index' in Pakistan and Sri Lanka in which it utilised data it had aggregated from these countries to provide insights into consumer behaviour and to map the growth of the e-commerce.[53]

9.3.2 *Digital and E-commerce Policies in South Asian Countries*

Their varying engagement with e-commerce notwithstanding, South Asian countries are increasingly adopting digitalisation and other policies for facilitating e-commerce. India is the furthest along in this regard: it launched the 'Digital India Programme' in 2015 to create a 'faceless, paperless, and cashless' India,[54] and

[49] See for instance, Bhutan Online Shop <www.facebook.com/pages/biz/topic_shopping_retail/Bhutan-online-shop-1923845024530344> Bhutan e-mart; www.facebook.com/EMartBhutan; and Bhutan Duty Free Limited <www.facebook.com/BhutanDutyFreeLimited> accessed 12 March 2021.

[50] Druksell, '31 E-Commerce Licenses Issued till 2019. More E-commerce Business to Start-up post 2020' <https://druksell.com/blogs/business/e-commerce-in-bhutan> accessed 12 March 2021.

[51] Examples of B2B platforms in Bangladesh include: bfmea.com.bd, bizbangladesh.com The Financial Express Bangladesh 'e-Commerce in Bangladesh: where we are headed' <https://thefinancialexpress.com.bd/views/views/e-commerce-in-bangladesh-where-are-we-headed-1578666791> accessed 22 May 2021.

[52] See n.40 and text thereto.

[53] For Pakistan, see Inisde Daraz, 'Pakistan's First E-commerce Index Powered by Daraz Shows an Increase in Digital Payments and Growing Demand for Online Shopping' <http://insidedaraz.com/pakistans-first-e-commerce-index-powered-by-daraz-shows-an-increase-in-digital-payments-and-growing-demand-for-online-shopping>; and for Sri Lanka, see Daily FT 'Trends and Growth of Sri Lanka's E-commerce Industry: An Overview of Daraz E-commerce Index' <www.ft.lk/business/Trends-and-growth-of-Sri-Lanka-s-e-commerce-industry-An-overview-of-Daraz-e-commerce-Index/34-703498> accessed 22 May 2021.

[54] The programme was launched through a specially constituted Digital Economy & Digital Payment Division in the Ministry of Electronics and Information Technology. Economic Times 'PM Narendra Modi to launch Digital India Programme on July 1' <https://economictimes.indiatimes.com/news/politics-and-nation/pm-narendra-modi-to-launch-digital-india-programme-on-july-1/articleshow/47819644.cms> accessed 20 March 2021.

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engaged ministries, governmental departments, and Indian states to develop 'an ecosystem to enable digital payments across the country',[55] and to promote a range of measures necessary for building a digital infrastructure.[56] The Indian government also issued Foreign Direct Investment Rules 2016 to facilitate cross-border investment in e-commerce[57] and drafted an e-commerce policy in 2019 to balance data protection and the growth of the e-commerce sector.[58] The government also circulated a 'Model Framework for Guidelines on e-Commerce for Consumer Protection' for consultation with state governments responsible for regulating trade and commerce in their territorial jurisdictions[59] and in June 2019 established a 'Standing Group of Secretaries Constituted for Promotion of Industry and Internal Trade' to streamline and co-ordinate these initiatives.[60] However, despite or perhaps because of these efforts regulation of e-commerce in India remains fragmented giving rise to increasing calls for its rationalisation.[61]

[55] Ministry of Electronics and Information Technology, Digital Economy and Digital Payments Division <www.meity.gov.in/digidhan> accessed 20 March 2021. In 2019 the ministry released a vision statement for 'Digital India' which provided a roadmap for India's digital future and projected that by 2025 e-commerce would add USD 15 to 20 billion to the Indian economy, and e-trade would account for 10–15 per cent of the country's total trade. Also see the ministry's 'India's Trillion Dollar Digital Opportunity,' 245 <www.digitalindia.gov.in/ebook/MeitY_TrillionDollarDigitalEconomy.pdf> accessed 22 March 2021.

[56] Government of India, Ministry of Electronics and Information Technology, Annual Report 2019–20, 15, 20–24. <www.meity.gov.in/writereaddata/files/Annual_Report_2019–20.pdf> accessed 22 March 2021. The infrastructure proposals include establishing a National Knowledge Network to provide a secure and 'high-speed digital connectivity backbone' for research and education and launching the 'Aadhar system', under which each Indian is issued a unique digital identification number.

[57] See for instance, see Ministry of Commerce & Industry, Department of Industrial Policy and Promotion, Press Note no 3 (2016 series), 'Guidelines for Foreign Direct Investment in e-commerce' <https://dipp.gov.in/sites/default/files/pn3_2016_0.pdf>; the Consolidated FDI Policy 2017 <https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf> as clarified in 'Review of the Policy of Foreign Direct Investment (FDI) in e-commerce'; <https://dipp.gov.in/sites/default/files/pn2_2018.pdf> accessed 24 March 2021.

[58] Ministry of Commerce and Industry 'Draft National E-Commerce Policy' <https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf> accessed 22 March 2021, 5.

[59] Multiple ministries are at work on their own e-commerce rules <https://economictimes.indiatimes.com/news/economy/policy/multiple-ministries-at-work-on-their-own-ecommerce-rules/articleshow/71191487.cms?from=mdr> accessed 24 March 2021. The Ministry of Consumer Affairs has issued the draft guidelines and invited comments from the public. <https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Guidelines%20on%20e-Commerce.pdf> accessed 24 March 2021. The Consumer Protection (E-Commerce) Rules were finally issued in July 2020. <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf> accessed 24 March 2021.

[60] *Business Standard*, 'Standing Group of Secretaries Constituted for Promotion of Industry and Internal Trade' <www.business-standard.com/article/news-cm/standing-group-of-secretaries-constituted-for-promotion-of-industry-and-internal-trade-119062100616_1.html> accessed 24 March 2021.

[61] *Economic Times*, 'Imminent Need for Uniform Laws for E-commerce in India' <https://economictimes.indiatimes.com/industry/services/retail/imminent-need-for-uniform-laws-for-ecommerce-in_india/articleshow/73692139.cms?utm_source=contentofinter

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Sri Lanka, despite being a somewhat late entrant to the world of e-commerce, has already adopted legislation to develop a National Policy on Information and Communication Technology – and has devised an action plan for its implementation. The act establishes a Task Force for Information and Communication Technology as well as the Information and Communication Technology Agency of Sri Lanka.[62] Since it has been operational, the agency has assisted in formulating 'Digital Sri Lanka', a national policy which outlines timebound strategies for utilising information communication technology for citizen empowerment and for establishing an infrastructure for digital government and economy.[63] In 2006, Sri Lanka also enacted the Electronic Transactions Act based on the United Nations Commission on International Trade Law (UNCITRAL), Model Law on Electronic Commerce (1996), and Model Law on Electronic Signatures (2001),[64] which institutes, among other things, a Digital Signature and Authentication regime.[65] More recently, after consulting comparable laws in the United Kingdom, Singapore, Australia, Mauritius, and California, and the draft Indian Bill, Sri Lanka has drafted a Data Protection Bill[66] based on OECD Privacy Guidelines, the APEC Privacy Framework, the Council of Europe Data Protection Convention, and the EU General Data Protection Regulation.[67] At the time of writing this bill awaited certification by the speaker of the Sri Lankan parliament.[68]

Despite making important inroads into e-commerce particularly with Darazpk, Pakistan launched its first comprehensive Digital Policy only in 2018,[69] which was intended to be a precursor to appropriate legislation in this area.[70] Like the Indian policy, Pakistan's Digital Policy is 'based on a multi-stakeholder model'[71] which aims to lay the 'foundation for the construction of a holistic digital ecosystem with infrastructure and institutional frameworks for the rapid delivery of innovative digital services, applications and content';[72] and to capitalise on the rapidly growing connectivity in the country to encourage 'Payment Service Providers (PSP) and

est&utm_medium=text&utm_campaign=cppst> accessed 24 March 2021; Cyril Amarchand Blogs, 'India's Foreign Investment Policy on E-commerce Retail: Is the Time Ripe for a Reworking?' <https://corporate.cyrilamarchandblogs.com/2020/02/indias-foreign-investment-policy-on-e-commerce-retail> accessed 24 March 2021.

[62] ibid Preamble.

[63] ICTA (official website) <www.icta.lk/digital-srilanka> accessed 14 April 2021.

[64] Electronic Transactions Act 2006 as amended in 2017 <www.srilankalaw.lk/Volume-III/electronic-transactions-act.html> accessed 14 April 2021.

[65] n.63. 'Enabling Legal Environment' <www.icta.lk/legal-framework> accessed 14 April 2021.

[66] Draft Personal Data Protection Act 2019 <www.icta.lk/icta-assets/uploads/2020/06/Data-Protection-Bill-3-10-2019-Amended-Draft-FINAL-LD-Release.pdf> accessed 14 April 2021.

[67] n.65.

[68] ibid.

[69] Ministry of IT and Telecom, Digital Pakistan Policy <https://moitt.gov.pk/SiteImage/Misc/files/DIGITAL%20PAKISTAN%20POLICY.pdf> accessed 25 March 2021.

[70] ibid 8, 15.

[71] ibid Preface.

[72] ibid 5.

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Payment Service Operators (PSO)'.[73] In October 2019, Pakistan also launched an e-commerce policy,[74] which identifies a range of 'key players'[75] in e-commerce and proposes 'a National e-Commerce Council' to provide a 'single window for policy oversight to facilitate e-Commerce players'.[76] It highlights the need for global connectivity;[77] establishing an e-payment infrastructure;[78] ensuring consumer protection;[79] and introducing a simplified taxation structure[80] and a data protection regime.[81] In April 2020, the government circulated a Personal Data Protection Bill which aims to provide a framework for data protection and for a data protection authority. However, at the time of writing, this bill was still to be passed into law.[82]

Nepal and Bangladesh, despite their limited engagement with e-commerce, have also developed digital policies: Nepal adopting one in 2019,[83] and Bangladesh in 2021.[84] The Nepalese policy aims to foster holistic economic development by harnessing digital technologies to transform the government, society, and economy;[85] recognises the need for an e-commerce eco-system[86] beyond the Electronics Trading Act (2063) 2008,[87] the Privacy Act (2075)

[73] ibid.

[74] Commerce Division, 'e-Commerce Policy of Pakistan' <www.commerce.gov.pk/wp-content/uploads/2019/11/e-Commerce_Policy_of_Pakistan_Print.pdf> accessed 25 March 2021.

[75] ibid 14.

[76] ibid 15.

[77] ibid 44.

[78] ibid 31.

[79] ibid 35.

[80] ibid, 37.

[81] ibid 42–43.

[82] Pakistan Personal Data Protection Bill 2020 <https://moitt.gov.pk/SiteImage/Misc/files/Personal%20Data%20Protection%20Bill%202020(3).pdf> accessed 26 March 2021.

[83] Ministry of Communication & Information Technology, 2019 Digital Nepal Framework, <www.mocit.gov.np/application/resources/admin/uploads/source/EConsultation/EN%20Digital%20Nepal%20Framework%20V8.4%2015%20July%20%202019.pdf> accessed 24 May 2021. Also see ICT Frame, 'Digital Samvad: Policy Environment for Digital Agenda in Nepal' <https://ictframe.com/digital-samvad-policy-environment-for-digital-agenda-in-nepal> accessed 24 May 2021.

[84] ICT Division, 'Digital Bangladesh and Vision 2021' <https://investindigitalbd.gov.bd/page/digital-bangladesh-vision-2021> accessed 26 March 2021. Bangladesh had first floated a concept note outlining its digital vision in 2009, however, it is only now that this has been formalised as a policy. Access to Information Programme Prime Minister's Office 'Digital Bangladesh: Concept Note 2009' <http://btri.portal.gov.bd/sites/default/files/files/btri.portal.gov.bd/page/a556434c_e9c9_4269_9f4e_df75d712604d/Digital%20Bangladesh%20Concept%20Note_Final.pdf> accessed 26 March 2021.

[85] n.83, 26–27. The policy proposes to utilise digital technologies to transform the government, society, and economy by undertaking eighty timebound initiatives in the eight sectors of digital foundation, agriculture, health, education, energy, tourism, finance, and urban infrastructure.

[86] ibid 16, 24.

[87] The Electronics Trading Act (2063) 2008 provides, among other things, for the authentication of electronic records (section 3); the recognition of electronic records and signatures (sections 4–6); the security of electronic records (section 6); and the certification

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2018,[88] and the Consumer Protection Act, 2075 (2018);[89] and proposes a 'thorough assessment of existing policy provisions on data protection, security and privacy'.[90] The Bangladesh policy, rather than developing e-commerce, is more inclined towards digital government, human resource development, the promotion of the IT industry, and connecting citizens with each other to create a more democratic society and a more balanced and sustainable economy.[91] In 2016, the e-Commerce Association of Bangladesh (e-CAB) had produced an e-commerce policy at the instruction of the Ministry of Commerce, however, at the time of writing it had still not been approved by the Bangladeshi cabinet.[92] Bangladesh also enacted a Digital Security Act in 2018, however, this act addresses data crime rather than data privacy.[93]

Bhutan appears to be as invested in developing the regulatory infrastructure for its digital transformation as it is with developing its e-commerce. Since outlining an 'Information and Communications Technology Policy' in 2003,[94] Bhutan has adopted, among others, the 2014 Telecommunications and Broadband Policy[95] and e-Gov Masterplan[96] and has enacted the Information, Communications, and Media Act in 2018 to provide for e-commerce and digital signatures,[97] consumer protection,[98] and data protection and privacy.[99] Interestingly, the more digitised Maldives lags behind in adopting a holistic regime for regulating electronic

of such records (section 5). <www.tepc.gov.np/uSectionploads/files/12the-electronic-transaction-act55.pdf> accessed 24 May 2021.

[88] The Privacy Act (2075) 2018 addresses several forms of privacy including privacy to data (chapter 6); electronics and privacy (chapter 9); and collection and privacy of personal information (chapter 10). <www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Privacy-Act-2075-2018.pdf> accessed 24 May 2021.

[89] The Consumer Protection Act (2075) 2018 <www.lawcommission.gov.np/en/wp-content/uploads/2019/09/The-Consumer-Protection-Act-2075-2018.pdf> accessed 24 May 2021.

[90] n.83, 152.

[91] n.84.

[92] Tareque Moretaza, 'Revised Digital Commerce Policy Yet to Get Cabinet Approval' (*The Independent* 2019) www.theindependentbd.com/post/222994> accessed 26 March 2021.

[93] Nasir Doulah, 'Bangladesh Data Protection Overview' (One Trust Data Guidance 2021), accessed 26 March 2021, and Md Moniruzzaman, 'Personal Data Protection in Bangladesh and GDPR' Bangladesh Journal of Legal Studies (2019) <https://bdjls.org/personal-data-protection-in-bangladesh> accessed 26 March 2021.

[94] Ministry of Information and Communications, 'Information and Communications Technology (ICT) Policy for Bhutan: A White Paper 2003' <https://dit.gov.bt/sites/default/files/whitepaper.pdf> accessed 26 May 2021.

[95] Bhutan Telecommunications and Broadband Policy 2014 <https://dit.gov.bt/sites/default/files/bhutan_telecommunications_and_broadband_policy_pdf_16764.pdf> accessed 26 May 2021.

[96] Bhutan e-Government Masterplan <https://dit.gov.bt/sites/default/files/bhutan_e_gov_master_plan_14953.pdf> accessed 26 May 2021.

[97] Information, Communications, and Media Act of Bhutan 2018 <www.moic.gov.bt/wp-content/uploads/2018/02/ICM-Act-2018.pdf> chapter 14 and 15, accessed 26 May 2021.

[98] ibid chapter 16.

[99] ibid chapters 17 and 21.

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transactions and privacy and data protection.[100] However, it is expected that as it rebuilds its economy post-Covid, Maldives will prioritise digitalisation,[101] and will establish a legal and regulatory framework to facilitate it.[102]

9.3.3 *Competition Regulation, the Digital Economy, and E-commerce*

Digital e-commerce platforms present significant competition challenges developing country competition authorities are particularly likely to find it difficult to identify situations in which multi-sided analysis may be properly utilised and to recognise variations between different types of multi-sided platforms.[103] These authorities are also likely to find it difficult to define the relevant market in which the platforms operate, particularly given the zero-pricing policy adopted by the majority of e-commerce platforms, or to understand the complexity of network effects, and the ability of platforms to leverage their power in one market to other markets in which they operate.[104] In time, these competition authorities are also likely to be confronted with privacy concerns which result from the data collection and aggregation function of digital platforms,[105] that in any event changes the dynamics of collusion and abuse of dominance making it harder for the collusion or abuse to be detected.[106] Although privacy concerns are experienced equally in more advanced competition regimes, the adverse impact of breach of privacy in developing countries is likely to be aggravated due to the generally limited understanding of privacy issues, the absence of strong privacy laws or policies, and where these laws or policies do exist, the absence of an infrastructure for implementing them,[107] making it even more important to consider a competition response to these issues.

[100] Maldives enacted a Consumer Protection Act in 2020, however, the legislative framework for electronic transactions, data protection, and privacy is still only in draft stage. UNCTAD, 'Summary of Adoption of E-Commerce Legislation Worldwide' <https://unctad.org/topic/ecommerce-and-digital-economy/ecommerce-law-reform/summary-adoption-e-commerce-legislation-worldwide> accessed 25 May 2021.

[101] World Bank, 'A Digital Dawn' Maldives Development Update (World Bank 2021), 29–31. <https://thedocs.worldbank.org/en/doc/93bdbd79b45eeb504743f4514f1095e1–0310062021/original/April-2021-Maldives-Development-Update.pdf> accessed 25 May 2021.

[102] ibid 35–37, 41.

[103] OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms (2018)' <www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm> accessed 26 February 2021, 10, 16.

[104] ibid.

[105] Digital Economy Report (n.35), 28.

[106] Ioannis Lianos, 'Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy' in Bonakale, Fox and Mncube (eds) *Competition Policy for the New Era: Insights from the BRICS Countries* (OUP 2017), 98.

[107] Michael Kwet, 'Digital Colonialism: US Empire and the New Imperialism in the Global South' (2019) 60(4) Institute of Race Relations 3–26; Renata Ávila Pinto, 'Digital Sovereignty or Digital Colonialism?' (2018) 15 n.27 SUR 27-15–27.

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Although all South Asian competition regimes contain provisions which would allow for investigating and sanctioning anti-competitive practices of digital platforms, presently the CCI is the only South Asian competition authority to have initiated proceedings against digital platforms. In its early decisions in respect of platforms the CCI treated online distribution channels as interchangeable with brick-and-mortar distribution outlets,[108] and held that these were simply two different channels of distribution in the same relevant market.[109] In later decisions, however, as the CCI considered platforms in a wider range of sectors including online search engines, cab aggregators, and online travel agencies it refined its understanding of platforms.[110] Between 2015 and 2017 the CCI took up several complaints of abuse of dominance against cab aggregators, but did not find a violation.[111] In 2018 however, the CCI found Google guilty of abuse of dominance for self-preferencing in its search function.[112] In 2019 it ordered an investigation against Amazon and its Indian counterpart, Flipkart for engaging in anti-competitive exclusive vertical agreements with their 'preferred' sellers,[113] and against Google for abusing its dominant position in the licensable Operating System market by forcing smart-phone manufacturers to pre-install Google Mobile Suite and for bundling various Google services.[114] In 2020, the CCI directed an investigation of the online Travel Agents MakeMyTrip (MMT) for abusing its dominant position in the online intermediation services market for booking hotels in India and for entering into an anti-competitive vertical agreement with OYO (providers of franchising services for budget hotels).[115] Also in 2020, the CCI ordered a further investigation against

[108] See for instance, *Jasper Infotech Private Limited (Snapdeal) v Kaff Appliances (India) Pvt Ltd (Kaff)* Case 61/2014 decided 29.12.2014; *Ashish Ahuja v Snapdeal.com & Another* Case 17/2014 decided 19.05.2014.

[109] *Deepak Verma v Clues Network* Case 34/2016 decided 26.07.2016; *KC Marketing, Maharashtra v OPPO Mobiles MU Private Limited* Case 34/2018 decided 08.11.2018.

[110] For instance, *All India Online Vendors Association and Flipkart India Private Limited* Case 20/2018 decided 06.11.2018, para 25, in which it defined the relevant market as the market for 'services provided by online marketplace platforms'.

[111] *Meru Travel Solutions Private Limited (MTSPL) v Uber India Systems (Pvt) Ltd* Case 81/2015 decided 22.12.2015; *Mega Cabs (Pvt) Ltd v ANI Technologies (Pvt) Ltd* Case 82/2015 decided 09.02.2016; *Meru Travel Solutions (Pvt) Ltd v Uber India Systems (Pvt) Ltd* Case 96/2015 decided 10.02.2016; *Fast Track Call Cab (Pvt) Ltd and Meru Travel Solutions (Pvt) Ltd v ANI Technologies (Pvt) Ltd* Cases 6/2015 and 74/2015, decided 19.07.2017.

[112] *Matrimony.com Limited v Google* Cases 07/2012 and 30/2012 decided 08.02.2018.

[113] *Delhi Vyapar Mahasangh v Flipkart and Amazon* Case 40/2019 decided 13.01.2020. Also see Vikas Kathuria 'Digital & Competition: The Indian Scenario' Concurrences N°2-2021, On-Topic: Competition Policy in the Digital Economy, 47. This investigation marks an evolution in the CCI's thinking, as the CCI had not found similar allegations of exclusivity to be anti-competitive in the past. See *Mr Mohit Manglani v Flipkart India Private Limited and others* order Case 80/2014 decided 23.04.2015.

[114] *Mr Umar Javeed and others v Google LLC and others* Case 39/2018 decided 16.04.2019.

[115] *Rubtub Solutions Pvt Ltd v MakeMyTrip India Pvt Ltd (MMT) and others* Case 01/2020 decided 24.02.2020. For a discussion, see Kathuria (n.113), 47.

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Google for abusing its dominant position by favouring GooglePay over other competing apps in the Play Store and Android Operating System.[116]

In April 2019 the CCI launched a study of the e-commerce sector to 'better understand the functioning of e-commerce in India and its implications for markets and competition'. The January 2020 report of this study identified a wide range of competition challenges presented by digital platforms and recommended that platforms address these by self-regulating search ranking; collection, use, and sharing of data; user review and rating mechanisms; revision in contract terms; and by adopting a discount policy.[117] Earlier in 2019, the Indian government had constituted a Competition Law Review Committee to assess among other things whether the Indian Act was equipped to respond to the challenges of the digital age. In its July 2019 report, the committee had recommended amendments to the Act to include 'hub and spoke' cartels; to provide for agreements between platforms that do not fit into the traditional categories of horizontal or vertical agreements, and to consider digital mergers.[118] In February 2020 the government incorporated some of these recommendations in a draft Competition Bill 2020, however, at the time of writing this bill had still not been enacted. Encouragingly, in a 2021 report on the study of the telecommunication industry,[119] the CCI expressly acknowledged the relationship between data privacy and competition, albeit without clarifying its position on the treatment of privacy issues in competition enforcement.[120]

In contrast, at the time of writing the CCP had still not decided any anti-trust proceedings against digital e-commerce platforms; however, it had approved a merger between the cab aggregators Uber and Careem on the basis that 'application based Ridesharing Services [are distinct] from all other modes of transport in Pakistan, by reason of [their] characteristics, price and intended usage'.[121] In arriving at this conclusion, the CCP had considered the two-sided structure of ridesharing apps, network effects, and multi-homing[122] and applied the traditional Small but

[116] XYZ *v Alphabet Inc* Case 07/2020 decided 09.11.2020. For details see Kathuria (n.113), 47.

[117] Competition Commission of India, 'Market Study on E-Commerce in India: Key Findings and Observations' (CCI 2020) <www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 4 June 2021. For a summary see Kathuria (n.113), 49–50.

[118] Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee 2019' <www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 4 June 2021.

[119] Competition Commission of India, 'Market Study on the Telecom Sector in India: Key Findings and Observations' 29 para 70. <https://cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf> accessed 4 June 2021.

[120] India Business Law Journal 'Competition Watchdog Breaks Data Privacy Silence' 9 March 2021 <https://law.asia/competition-watchdog-breaks-data-privacy-silence/#:~:text=Competition%20watchdog%20breaks%20data%20privacy%20silence.%20India's%20antitrust,its%20position%20on%20enforcement%20in%20data%20privacy-related%20matters> accessed 4 June 2021.

[121] *In the Matter Phase II Review of Acquisition of M/S Careem Inc by Uber Technologies, Inc Through Augusta Acquisition BV* File No 1032/Merger-CCP/19 decided 31.012020 para 94.

[122] ibid paras 39–43.

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Significant Non-transitory Increase in Price (SSNIP) test to establish the limits of the relevant market.[123] Interestingly, even though after considering the market shares of the merging companies, the CCP noted that the acquisition would substantially lessen competition in the market,[124] it invoked 'mitigating factors'[125] and 'efficiencies'[126] unrelated to the direct economic impact of the proposed merger and approved the merger subject to certain commitments and conditions.[127] In doing so the CCP not only revealed the limits of its understanding of platforms but also its focus on safeguarding and encouraging foreign investment rather than mitigating the adverse impact of increased market power. Although this order has been heavily criticised in the media for causing harm to consumers,[128] it has not prompted the CCP to undertake a holistic study of the e-commerce sector.

These orders of the CCI and the CCP reveal not only the steep learning curve that these authorities have faced and continue to face when it comes to digital e-commerce platforms but also their respective attitude towards foreign investment. While India has made a strong effort towards understanding competition issues that may arise in relation to e-commerce and has initiated the process of amending the Indian Act to address these, Pakistan has adopted a more passive stance, which suggests that at least at present it prefers to address the challenges as they arise.

The remaining South Asian countries are also likely to encounter similar competition and privacy concerns as e-commerce becomes a greater reality for them. However, the response of their competition enforcement authorities to these issues is likely to depend in large part on the mechanisms and institutions through which the countries originally adopted their competition legislations and the degree of independence these competition authorities enjoy in their operations. The Indian and Pakistani examples are instructive in this regard: India had adopted its competition legislation through *socialisation* and a wide range of bottom-up, participatory, and inclusive institutions. It, therefore, has the capacity and the experience to adapt its competition legislation to respond to the challenges emerging in the wake of the ever-growing digital economy. India has also established a largely independent competition authority which has reasonable autonomy to form its own view regarding digital platforms free from other governmental priorities. Pakistan, on the other hand, having acquired its competition legislation through *coercion* and a limited, top-down, and exclusive institutions had established an enforcement authority which, despite having statutory independence, remained subject to governmental discretion in the appointment and removal of its members. Consequently, neither the Pakistani government nor the CCP have taken the

[123] ibid paras 128–35.
[124] ibid para 141.
[125] ibid paras 153–54.
[126] ibid paras 157–59.
[127] ibid paras 242–44.
[128] Business Recorder, 'Consumers Taken for a Ride?' <www.brecorder.com/news/596181> accessed 6 June 2021.

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initiative to adapt the Pakistani competition legislation to respond to developments in the economy. The CCP particularly remains susceptible to being persuaded by the broader priorities of the Pakistani government and appears to lack the autonomy to initiate any critical evaluation of the digital economy or the laws proposed to regulate it. Given that the remaining South Asian countries have adopted their laws through *coercion* and that the majority of them have done so through democratic institutions, albeit ones that lack strong legislative experience, their ability to adapt their competition legislations to address the evolving challenges of e-commerce is likely to be limited. However, there is an important option available to these South Asian countries, which is to learn from the Indian and Pakistani examples already available in the region, and to adapt these for their contexts.

9.4 REGIONAL DEVELOPMENTS AND COMPETITION LAW ENFORCEMENT

Notwithstanding competition's potential to support economic growth and development in both the traditional and the digital economy, the limited compatibility and legitimacy of competition legislations in the majority of South Asian countries, due in large part to these countries having adopted these legislations through *coercion* and without the meaningful engagement of bottom-up, participatory, and inclusive institutions, is likely to continue to pose a barrier to effective competition enforcement in these countries.

However, some comfort may be derived from the fact that it is entirely possible for South Asian countries to overcome this barrier by consciously committing to competition enforcement and engaging in activities that enhance the compatibility and legitimacy of their adopted competition legislations. This, in turn, would enhance the extent to which these laws are applied and utilised by stakeholders in these countries and over time will allow them to integrate into and become important features of their pre-exisitng legal systems.[129] Interestingly, regional developments in competition enforcement are likely to offer an important impetus in this regard. As South Asian countries observe their regional counterparts implementing their competition legislations and note the impact this has on their ability to generate investment and entrepreneurial activities in their domestic contexts while also attracting foreign investment to their economies they are more likely to consider competition enforcement as an important tool for growth and development. The possibility and potential of competition enforcement in one South Asian country affecting other countries in the region is reinforced by the fact that notwithstanding

[129] This is likely to be easier in countries whose competition legislations envisage independent competition authorities, which once established have a vested interest in demonstrating their utility by enforcing the legislation (see Chapter 8, Section 8.4). For instance, the CCP's increasing *socialisation* in interpreting the provisions of the Pakistani Act, enhances the CCP's credibility in the eyes of stakeholders and is likely to translate into an increase in the number of orders issued by the CCP and its overall effectiveness.

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the very important role of multi-lateral agencies in introducing competition legislations to these countries, a number them have also been influenced by each other in adopting these laws, and for better or worse this though somewhat subtle early influence is as likely to continue through to the implementation stage as the more well-documented influence of the multi-lateral agencies.

South Asian countries had a direct as well indirect impact on each other at the adoption stage: the direct influence is evident in India providing consultation, guidance, and drafting services (whether through its government, the CCI, or thinktanks) to Bangladesh, Nepal, Bhutan, and Afghanistan, and in Pakistan engaging in training and capacity building programmes in Afghanistan, while the indirect influence may be attributed to the *regulatory competition* between these countries[130] which is likely to have been a factor in the South Asian countries adopting their competition legislation in quick succession.[131]

In most instances, the considerable direct and indirect influence of these countries on each other has not diminished even as the competition legislations have entered the implementation stage. For instance, India continues to directly influence several countries in the region through continued consultations and trainings on competition enforcement.[132] It also continues to have an indirect influence simply through publishing its enforcement actions which is likely to encourage its counterparts to remain regulatorily competitive with India. Even though there is no express of official acknowledgement to this effect it is very likely that both the CCI and the CCP without any direct consultative links with each other, are aware of each other's enforcement actions and note the sectors to which these relate. It is further likely that the two countries influence the remaining South Asian countries to match such of their the enforcement initiatives as they find most relevant to their contexts.

There is a danger however, that in the particular context of South Asian countries, regulatory competition may generate 'a race to the bottom' rather than encouraging a race to the top.[133] For instance, there may be a race to the bottom in competition enforcement if the smaller South Asian countries take the view that weaker competition enforcement in their contexts will help them attract more investment. Several factors are likely to play a role in this regard: if a particular country is competing for international investment with another country that has stronger competition enforcement, then it may position itself as a weaker enforcer and, therefore, capable

[130] This means that countries are more likely to adopt a new policy or law in a 'race to the top' if countries similarly situated to it (in terms of economic development or in relation to trade) adopt such law or policy.

[131] Between 2002 when India first adopted the Indian Act and 2020 when Maldives enacted its legislation and Bhutan updated its competition policy Sri Lanka, Nepal, Pakistan, and Bangladesh had adopted modern competition legislations while Afghanistan had a draft legislation by 2011.

[132] India's influence in any of these countries appears to be commensurate with its trading relationship with them.

[133] See n.130.

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of offering a more investment-friendly environment, where investors may capture markets reasonably free of competitive constraints. Whether potential investors seek such an environment is likely to depend on the composition of the sector that the investor seeks to enter: if the desired sector comprises of businesses that are operating at a level and a scale that can exert competitive pressure on the investor, then it is likely to prefer strong competition enforcement to keep existing market power in check. If, however, the sector is populated by small businesses, the foreign investor is likely to prefer weaker competition enforcement so that it may achieve economies of scale and leverage its market power with impunity.[134]

Whether South Asian countries engage in a race to the top or to the bottom may also depend in part on the presence of businesses that operate regionally across these countries Regional cross border business may encourage countries in which they operate to adopt comparable competition rules so that they face a broadly similar competition regime across national markets. An important example in this regard is Darazpk, the e-commerce platform that operates in most South Asian countries and forms a significant proportion of all e-commerce activity in these countries. However, with little or no competition enforcement in the greater part of the area in which Daraz operates, it does not appear to have faced the need to call for the rationalisation of competition enforcement. With more platforms operating across South Asian countries either on their own or as subsidiaries of foreign multi-nationals, regional harmonisation of their competition regimes remains a real possibility.

A 2016 Report issued by the Groupe Spécial Mobile Association (GSMA),[135] on the operations of mobile service providers in certain Asian countries (including India and Pakistan from among South Asian countries) serves as an example of business-led convergence in competition enforcement. The report highlights the importance of effective competition enforcement for countries seeking to move up the digital value chain,[136] and urges co-operation and co-ordination between competition authorities of countries in which GSMA members operate, on the basis, that 'cooperation spreads knowledge and best practice and minimises the risks of diverging decisions and practices among agencies, between countries, making it easier for the market players to operate with legal certainty across borders'.[137] In fact GSMA goes as far as to call for a supra-national body, particularly to regulate

[134] For instance, digital platforms such as Alibaba and Amazon that had first entered India are now exploring the Pakistani market. Pakistan's treatment of the merger in ridesharing apps (see n.121) suggests that it is possible that Pakistan may seek to distinguish itself from India by adopting a different competition stance towards foreign investments.

[135] Groupe Spécial Mobile Association, 'Competition Policy in the Digital Age: Case Studies from Asia and Sub-Saharan Africa' (GSMA 2016) <www.gsma.com/publicpolicy/wp-content/uploads/2016/12/3.CPITDA_Case_Studies_Asia__Sub-SaharanAfrica_Sub-SaharanAfrica-1.pdf> accessed 28 June 2021.

[136] ibid 9.

[137] ibid Foreword.

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mergers among telecom service providers in these countries.[138] However, given the complicated political relationships across South Asia, this proposal is unlikely to be realised anytime in the near future.

9.5 POSSIBLE IMPLEMENTATION STRATEGIES FOR SOUTH ASIAN COUNTRIES

The importance of appreciating the growth and development promise of competition law and keeping abreast of regional developments notwithstanding, it is essential that South Asian governments and such competition authorities as have been established, develop competition enforcement strategies that are aligned not only with their core economic objectives but also, and more importantly, take into consideration their resource and capacity limitations.

Given the positive correlation between competition enforcement and investment and productivity growth, South Asian governments and competition authorities need only to meaningfully enforce their competition legislations to attract investment and encourage growth. However, achieving sustainable and inclusive economic growth and alleviating poverty through competition enforcement may require a re-interpretation or even an expansion of the scope of most South Asian competition legislations. Given the compatibility and legitimacy deficit of competition legislations in most of these countries and the considerable resource limitations of their governments and by extension of their competition authorities, it may be more appropriate that in the early stages of enforcement, these governments and authorities prioritise competition advocacy and mainstream competition enforcement. Focusing on these two core areas would not only generate of their operations visibility and thereby enhance the legitimacy of their competition legislations but also start levelling the economic playing field which, in turn, would set the stage for economic growth and development in their contexts. The combination of these factors is likely to generate understanding and experience of enforcing competition principles which is further likely to pave the way for more complex enforcement actions going forward.

In focusing on mainstream competition enforcement, South Asian governments and authorities may also consider the areas of enforcement and sectors that need to be prioritised. In terms of areas of enforcement, these governments and authorities may be advised to focus on detecting and sanctioning cartels not only because of the preponderance of cartels across the region (particularly cartels for rigging bids made to public authorities) but also the harm the cartels cause to consumers particularly given the levels of poverty in South Asian countries.[139] Focusing on the by object or per se anti-competitive cartels is also likely to be within the somewhat limited

[138] ibid.
[139] ibid 323.

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resources and capacities of South Asian governments and competition authorities. In nearly all South Asian competition legislations cartels are included in the category of horizontal anti-competitive or prohibited agreements and may be established by demonstrating the existence of an 'agreement' or concerted practice and without requiring complex economic analysis.[140] The governmental bodies and competition authorities responsible for enforcing competition laws may further enhance the impact of their enforcement actions by focusing on cartels in the food and pharmaceuticals sectors that have the most direct and immediate impact on a wide range of consumers.[141]

South Asian governments and competition authorities may also consider recognising the harm that their enforcement orders might cause to the 'poor' employees of the entities that may be the subject of these orders, without going so far as to make poverty alleviation an objective of their enforcement actions. To this end, these governments or authorities may obtain a no-harm commitment from the entity subject to a competition enforcement order. They may also consider the possibility of penalty reduction in exchange for such commitment along the lines traditionally offered in leniency regulations, thereby simultanously preserving the soundness of the legal analysis of the competition violation and addressing the social welfare concerns arising from the matter.

In time, South Asian governments and competition authorities may also consider proceeding against buyer-side cartels and dominant buyers that abuse their position against their smaller suppliers.[142] Buyer power, whether exercised unilaterally by a

[140] For a detailed discussion see Aditya Bhattacharjea, 'Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis' in D Daniel Sokol, Thomas K Cheng, Ioannis Lianos (eds) *Competition Law and Development* (Stanford University Press 2013), 61.

[141] Cheng (n.26) 315. For instance, the CCP and its operations became topics of public discourse when its first chairman took action against an alleged sugar cartel: <https://tribune.com.pk/story/25343/ccp-to-take-sugar-mills-to-court> accessed 15 February 2021. Similarly, in Nepal there appeared to be widespread demand for action against a transport cartel even though this demand was made of the Supreme Court of Nepal rather than to the board or market protection officer appointed under the Nepalese Act. Although the Nepalese Supreme Court issued an order directing the government to ensure that the transport cartel was duly sanctioned (*Jyoti Baniya v The Federation of Nepali National Transport Entrepreneurs and Others*, Nepal Law Report 2068 (2011/12), Volume 4, Decision No 8598, Decision Date 10-19-2067 (12-5-2010 AD)), there is no information whether the board or the market protection officer played any role in this regard.

[142] There is considerable debate among competition scholars as to whether buyer cartels are appropriately a subject of competition enforcement. However, the CCI has considered these in certain judgments and the concept has been included in the draft Competition Bill 2020 (Priyanka Barik, Bariq P, 'India: Buyer's Cartels Have Now Taken the Driver's Seat in India' (Mondaq 2020) <www.mondaq.com/india/cartels-monopolies/919282/buyer39s-cartels-have-now-taken-the-driver39s-seat-in-india#:~:text=The%20CCI%20observed%20that%20the%20aspect%20of%20the,US%20recognizes%20buyer%27s%20cartel%20as%20anti-competitive%20in%20nature> accessed 13 November 2021. Given India's considerable direct and indirect influence in the region, other competition regimes, may consider moving in a similar direction.

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single entity or in conjunction with other buyers, has the potential to cause considerable harm in the labour intensive, relatively unsophisticated South Asian economies that are dependent on their income on large multi-nationals purchasing factors, raw materials, and other inputs from them. In addressing buyer power these countries will also be able to safeguard the interests of the small entrepreneur or the small individual supplier – as, for instance, in the small farmers supplying agricultural produce to the large food processing companies. However, proceeding against buyer power poses considerable challenges, the most significant being the questions of the appropriate welfare standard that may be applied to assess the anti-competitive harm caused by buyer cartels and of extraterritoriality. This is likely to be particularly complicated in situations in which buyer cartels do not lead to increased prices in consumer markets of the country enforcing the competition legislation. At present, due to having adopted their competition regimes on the persuasion of multi-lateral agencies, the majority of South Asian competition regimes also espouse the consumer welfare standard which judges harm primarily on the basis of the price offered to intermediate or end-consumers. However, there is increasing realisation among competition scholars that price does not always capture the harm caused by anti-competitive activities, which creates the possibility for South Asian countries to consider welfare standards more appropriate for their enforcement priorities. A broader conception of consumer welfare is likely to help these authorities establishing anti-competitive effects in their economies rather than seeking extra-territorial application of their laws.

As South Asian competition regimes gain more experience, confidence, and legitimacy in their contexts, they may graduate to addressing the more complex objectives of poverty alleviation, equitable distribution, and enhancing the social, non-economic welfare in their countries. To ensure that in pursuing these complex social objectives the competition regimes do not sacrifice economic efficiency at the altar of populism, it is important that the multi-lateral agencies engaging with them in ongoing trainings provide support on issues ranging from the design of competition authorities, to developing performance and enforcement plans tailored to context, and sanctioning strategies that will punish the offender but not eliminate competition. It is also important that these multi-lateral agencies work with the governments and competition authorities to design trainings in such a way that South Asian countries are able to benefit from each other's enforcement experiences rather than only looking to developed jurisdictions that are distant not only geographically but also institutionally and do not share their economic concerns. Doing so will help develop a pool of tacit competition knowledge in these countries that will not only gradually plug the compatibility and legitimacy deficit left over from the adoption stage, but in time will form the foundation of South Asian competition regimes that not only have competition expertise but also the conviction and the flexibility necessary for realising the all facets of the goals of economic progress for which these countries had adopted these laws in the first place.

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