

DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM

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ABSTRACT

The internet realm has grown exponentially over the years and with the advent of digitalization, the increasing audience to the digital economy has resulted in the outburst growth of this sector. As the internet grows, web-based businesses are increasingly becoming the subject matter of competition concerns given the emergence and growth of large internet companies such as Google, Yahoo!, eBay, MySpace etc which have assumed a dominant position in the search engine market, social networking market and e-commerce market. Since this sector is evolving quickly, its contours are beginning to take shape and several globally dominant firms now play significant roles. The Competition Commission of India (CCI) has been facing a number of complaints against e-commerce retailers for abusing their dominant position. Major concerns relating to exclusive supply/distribution agreements and predatory pricing have arisen before CCI. Therefore, there is a growing need for competition authorities and courts to exercise greater care in balancing the protection of consumers from anticompetitive behavior and harm caused from interfering in complex businesses. The concept of 'Competition Issues in the Digital Economy in India' and its shortcomings with respect to the existing framework has been widely debated and discussed in the past. The existing literature has been analyzed to understand the value addition that can be added through this paper. Although the challenges of the present

e-commerce sector have been well established in the multiple studies conducted, the present paper builds on the existing literature by focusing on the contemporary CCI decisions, the 'CCI Market Study on E-commerce' 2020 that have potentially shaped the competition law jurisprudence & posing alternative recommendations to deal with the legislative shortcomings.

Keywords - E-commerce, Competition, Digital Economy, Competition Commission of India

INTRODUCTION

A digital or online economy is an economy based on digital technologies that utilizes communication and data processing for the conduct of its business. India's digital economy generates about USD 200 billion annually from existing digital ecosystems and will increase five-fold to USD 1 trillion by 2025. E-commerce in India is expected to reach USD 200 billion by 2026 from USD 28.5 billion in 2017.¹⁰¹ Recent developments have paved the way for e-commerce to emerge as an eminent market platform all over the world.¹⁰² Today e-commerce has covered almost all the sectors in India and players like Amazon, Flipkart etc have taken an edge over offline market players. E-commerce has given an opportunity to the local businesses to sell their products online while also providing a major threat and challenge for offline retailers to survive. The digitalization of various sectors in the traditional economy has had a dramatic effect on how regular and traditional businesses work.

The Competition Commission of India (CCI) has been facing a number of complaints against e-commerce retailers for abusing their dominant position. Though healthy competition is the need of the present market, there is a superior need to maintain equilibrium and protect the

¹⁰¹ CENTRE FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION, <https://cuts-ccier.org/digital-economy-poses-challenges-to-both-market-participants-regulators-cci-chairperson/> (last visited Apr. 5 2022).

¹⁰² David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 Nw. U. L. REV. Colloquy 285 (2008).

interests of all the stakeholders in the market. The role of CCI as a competition regulator is significant in this regard to ensure a level-playing competitive field and economic efficiency of digital markets thereby incentivizing innovation and facilitating foreign investment in multiple sectors.

This paper intends to examine the challenges posed by digital economy to market participants and regulators, highlight the benefits conferred by the emerging e-commerce businesses, analyze the existing framework under the Indian Competition Act and suggest possible solutions on how to adapt and mitigate one of the greatest challenges of our times. This study also aims at providing a birds-eye view of the web-based economy and understanding the scope of the unique opportunities that e-commerce now presents amid the upcoming technological advancements that have the potential to transform the competition sector.

COMPETITION CHALLENGES IN DIGITAL MARKETS

Competition law in India is currently transforming rapidly and technology based businesses are found to be largely susceptible to issues concerning unfair practices in the market, abuse of dominant market power, predatory pricing and acquisition wherein CCI has played an active role in reviewing such agreements against the backdrop of Section 4 of the Competition Act¹⁰³. Online markets are fundamentally different from offline markets. Digital markets provide decreased search costs, efficient distribution channel and fading of physical boundaries. But there is information asymmetry as the consumer lacks proper information about the product and a delay between purchase and consumption in certain online transactions. Due to these fundamental differences and the dynamic nature of digital markets, it poses peculiar challenges to

CCI while dealing with cases specifically related to the digital economy. These are:

- ❖ **Defining ‘relevant market’** - The dynamic nature of the digitalised economy hinders competition authorities from incorporating a market within defined boundaries. Technological companies continuously create new markets, resulting in an ever-changing nature of digital markets. So it becomes difficult to distinguish ‘relevant market’ under Section 4 of the Act. Relevant market has been defined as the market determined by the competition authorities with regard to the relevant product market and relevant geographic market.¹⁰⁴ Section 19(6) & (7)¹⁰⁵ lays down the factors to be considered by CCI for determination of relevant market. However the digital market comprises of Multi-sided platforms where varied customer groups interact together on a common platform like Microsoft Windows, Amazon, Facebook etc.¹⁰⁶ Therefore competition authorities need to employ additional criteria for the definition of the relevant market in digital sectors.
- ❖ **Identifying Predatory Pricing** - It is difficult to differentiate between predatory and legitimate pricing in a competitive market due to various factors prevalent which determine the market price. Therefore, substantially high standards of evidence are required to punish those who actually engage in such predatory pricing practices. Multi-sided platforms have the privilege to operate at zero costs at one side and recoup losses by highly pricing the users on the other side. They charge multiple prices for different sides of the platform

¹⁰³ Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

¹⁰⁴ Competition Act, 2002, § 2(r), § 2(t), No. 12, Acts of Parliament, 2002 (India).

¹⁰⁵ Competition Act, 2002, § 19(6), § 19(7), No. 12, Acts of Parliament, 2002 (India).

¹⁰⁶ RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 760 (Oxford University Press 2012).

leaving authorities ambiguous as to the prices to be compared.¹⁰⁷

❖ **Online business mergers** – As per Section 6¹⁰⁸ of the Act, any merger or combination which causes or is likely to cause Appreciable Adverse Effects on Competition is void. Mergers and combinations are entered into by technological companies like Facebook's takeover of WhatsApp or Microsoft's acquisition of Skype. This poses a significant threat of Pre-emptive mergers which are aimed by established companies to acquire potential competitors, so as to prevent disruption of one's own business model.¹⁰⁹ This method is contrary to the principles of a competitive market as it will reduce competition as well as innovation. It is difficult to identify the intent of such mergers to distinguish competitive business strategies from anti-competitive motives. In the digital economy, value of data and its control by merging parties are important considerations as opposed to turnover or asset threshold to determine if a merger should be subject to review. Therefore, a newer approach to conduct merger analysis is required.

❖ **Monitoring Exclusivity Agreements** - Exclusivity agreements or restrictive trade agreements are those agreements between two or more parties to purchase goods exclusively from a specified seller in the agreement. The buyer is prohibited to promote, buy or use similar products from any other vendor or provider. Eg - Apple and Amazon's agreement restricting purchase of digital audio books from other suppliers¹¹⁰ and Google's agreements with Mozilla Firefox, Opera and Apple Safari to include Google as the search default in all

these browsers. Dominant companies have accumulated years of user data and easily indulge service providers into exclusivity arrangements due to which they tend to establish a monopoly in the markets with no competition.

❖ **Assessment of Abuse of Dominance** - Digital platform's market power is further entrenched through vertical integration. Dominant platforms like Amazon and Apple seek to expand their businesses vertically into upstream and downstream markets and compete with traders or app developers using their platforms. Such expansion improves their capacity to accumulate more data and boost their competitiveness.¹¹¹ This situation may at any time enable abusive and exclusionary conduct by these dominant platforms. Digital monopolies, barriers to entry in market for new market players, pre-emptive mergers are all an abuse of dominance.¹¹²

The challenges mentioned above are not exhaustive and there are many more that competition authorities are facing with in a digitalized economy. The Indian Competition & Regulation Report 2019 with the theme '**Digital Economy – Hitting the reset button on competition and regulatory governance**', throws light on some very important facets of regulation and competition that are still not settled in the emerging digital economy of India. It examines the growth of the digital economy and its corporate titans globally and in India and evaluates the implications of that growth and dominance for antitrust analysis. It flags the challenges to consumer welfare standard in the antitrust analysis and the importance of data availability across the economic sphere. It recognizes the potential of e-commerce for generating new opportunities for micro, small and medium enterprises (MSMEs) and farmers, analyses various contemporary regulatory and competition concerns that the sector is

¹⁰⁷ Aryan Mohindroo & Rajat Mohindroo, *Digital Economy & Competition Law: A conundrum*, 3 ICLR 83 (2018).

¹⁰⁸ Competition Act, 2002, § 6, No. 12, Acts of Parliament, 2002 (India).

¹⁰⁹ József Molnár, *Discussion Paper 13 on Pre-emptive Horizontal Mergers: Theory and Evidence*, IOE HUNGARIAN ACADEMY OF SCIENCES (2002), <http://econ.core.hu/doc/dp/dp/mtdp0213.pdf>.

¹¹⁰ Jacob Kastrenakes, *Apple and Amazon end decade-long audiobook exclusivity deal*, THE VERGE (Jan. 19, 2017, 11:04 AM), <https://www.theverge.com/2017/1/19/14323438/apple-audible-exclusivity-agreement-ended-antitrustinvestigation>.

¹¹¹ UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT 2019, https://unctad.org/system/files/official-document/ciclpd54_en.pdf (last visited Apr. 8, 2022).

¹¹² RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW 760* (Oxford University Press 2012).

facing in India. It advocates both ex-ante regulation and ex-post case-by-case competition enforcement in dealing with such concerns. It analyses the challenges of adopting traditional tools to define the market and assess market power in multisided markets, and the adverse effects of erroneous market definition on the competition. Therefore, problems and challenges plague every level of market operations and CCI authorities should focus more on profit and turnover generated by the companies. Further, they should also observe potential competitors who are currently in a position to steal profits and abuse their dominance in the market.

CRITICAL ANALYSIS OF CCI REPORT 2020

The Competition Commission of India conducted a market survey and published its report titled '**Market Study on E-commerce in India: Key Findings and Observations**' on **8th January 2020**.¹¹³ The study covered three broad categories of e-commerce i.e. consumer goods, accommodation services and food services. In its Report, the CCI identified the following five issues in the e-commerce sector which are likely to pose concerns under the Competition Act, 2002:

- 1) **Platform Neutrality** - The dual nature of online platforms as a marketplace and a competitor acts as an impediment to sellers. According to the CCI, this dual role has the potential to incentivize platforms to leverage their control over the marketplace in favor of their own brands/preferred vendors or private label products. Search rankings, customer information such as demand, supply, reviews from users etc. are usually manipulated. User rating and vital information are not shared with the service providers. The introduction of private labels and cloud kitchens coupled with the ability of platforms to manipulate search ranking may affect the ability of business users to effectively

compete with the vertically integrated or preferred entities.¹¹⁴

- 2) **Platform-to-business contract terms** - The CCI's concern regarding highly discriminatory contract terms originates from the potential unfair imposition of such terms by platforms on business users due to their superior bargaining power. Unilateral determination or revision of terms of engagement by platforms are prejudicial to the interest of business users. The CCI also noted that the possibility of multi-homing by businesses does not appear to act as a competitive constraint since all major platforms have similar practices. The CCI noted online food platform's practices of mandatory bundling of delivery service with listing service data masking i.e., data on orders placed by customers not being shared with restaurants.
- 3) **Platform price parity clauses** - The platform parity clause restricts the service providers to offer their products at a 'lower price' on other platforms. Such clauses can be wide or narrow depending on its applicability to seller's own website only or to other platforms prices also. The platform parity clause restricts the service providers to offer their products at a 'lower price' on other platforms. it discourages the entry of any new platform which would have provided low commission to vendors on its platform or platforms may enter into agreements to set a standard of commission. However, these clauses can also generate efficiencies and protect investment incentives by preventing free riding.
- 4) **Exclusive agreements** - The CCI found the existence of 2 kinds of exclusive agreements in digital platforms - agreements where a specific product is launched exclusively on a single online platform and agreements which restricts a platform to list only one brand in a certain product category. While all

¹¹³ COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf (last visited Apr. 12, 2022).

¹¹⁴ ECONOMIC LAW PRACTICE, <https://elplaw.in/wp-content/uploads/2020/01/ELP-Competition-Law-Alert-Competition-Commission-of-Indias-report-on-e-commerce.pdf> (last visited Apr. 12, 2022).

exclusive agreements are not per se anti-competitive, they have the potential to result in anti-trust concerns if utilized as an exclusionary method to foreclose rivals or bar entry.¹¹⁵

- 5) **Deep discounting** - The Report highlighted 3 major concerns regarding discounts offered on platforms. Discounts that vary across goods/service providers are discriminatory since platforms exercise their superior bargaining power which adversely affects the business models of the goods/service providers. Discounts which force prices to fall below-cost levels in certain product categories impair the ability of offline small retailers to compete in the market.

Critical Analysis - The regulation of e-commerce markets has been riddled with competition law concerns. The digital space presents new challenges to competition authorities who find traditional methods to be inadequate. In this context, the present report becomes extremely relevant. The CCI identified “bargaining power imbalance” and “information asymmetry” between e-commerce marketplace platforms and their business users as the core issues and suggested certain self-regulatory measures for platforms with a view to increase transparency. The committee has recommended amendments to the law for accommodating instances in new-age markets that are not specifically covered by the traditional definition of a horizontal or vertical relationship, and for accommodating hitherto uncovered acquisitions of small digital companies within the merger control regime. The interim report highlights key competition issues in the e-commerce space like deep discounting, the imposition of unfair terms and conditions, the growing dependence of brick and mortar establishments on online platforms, and opaqueness in search rankings.¹¹⁶ However, the perspective of consumers has not been taken into account in the interim observations since the only stakeholders that have been identified are

online and offline retailers, manufacturers, online marketplace platforms, service providers and payment systems. It is the responsibility of CCI to address the concerns of all stakeholders in the value chain to ensure that consumers have a beneficial experience.

The interim report also considers platforms and marketplaces as a homogenous category without referring to the inter-relationship between the market players of a particular segment which may include predatory pricing to oust competitors from the market and cartelization. The study provides a general perspective and does not seek out specific companies. The plausible implications of the market study on e-commerce companies are yet to be analyzed.¹¹⁷ However, the results of this study may result in identifying potential anti-competitive practices and the CCI’s role in deciding case-specific investigations. Such sectoral inquiries will allow CCI to set priorities in the enforcement of Indian competition rules. There is nothing wrong with being cautiously optimistic about the potential impact of this study on e-commerce in India but since this is purely a market study, it does not act as a probe that could affix responsibility. Although the CCI has commissioned several market studies in the past, its own jurisprudence while adopting regulatory decisions affecting such sectors has not necessarily shown any familiarity with the findings of such market studies.

ANALYSIS OF CCI DECISIONS

The World Wide Web has tremendously changed this sector and has significantly changed the relationship of buyers and sellers. Despite this boom in the e-commerce industry, the sector is still in its nascent stage and therefore often resort to intense competition in order to capture the market share.¹¹⁸ They use ‘price’ as a tool to achieve this purpose.

¹¹⁵ TIMES OF INDIA, <https://timesofindia.indiatimes.com/companies/ci-can-probe-unfair-practices-by-e-comm-cos/73163445.cms> (last visited Apr. 14, 2022).

¹¹⁶ BUSINESS STANDARD, https://www.business-standard.com/article/opinion/how-competition-law-plans-to-regulate-digital-economy-plug-loopholes-119090100618_1.html (last visited Apr. 15, 2022).

¹¹⁷ CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 68 (Harvard Business School Press 1998).

¹¹⁸ PRICE WATERHOUSE COOPERS, <http://www.pwc.in/assets/pdfs/publications/2014/evolution-of-e-commerce-in-india.pdf> (last visited Apr. 19, 2022).

However, it has been noticed that e-commerce has been inciting various anti-competitive issues which calls for the vigilance of the Competition Commission of India (CCI). The CCI has not only dealt with complaints regarding anticompetitive practices and abusive conduct but has also taken proactive steps to understand the working of modern-day market in order to ensure that such tricky situations do not arise further.

In the case of *Matrimony.com Ltd. v. Google LLC*¹¹⁹, the CCI recognised the growing importance of big data in the digital economy and observed that the growth of this new business model is shaping the global market. It almost took seven years for the CCI to analyse the entire issue completely. It was observed that internet search market is a dynamic, fast-changing and innovative market and involves vigorous competition. The respondents (Google LLC) were held to be in violation of anti-competitive laws in India. Google's dominant position in the market in terms of general web search and advertising services was acknowledged by the CCI and it was further held that pre-determining the rankings (of universal results) on the search engine results page was in contravention of the provisions of Section 4(2)(a)(i) of the Act. Further, Google was held liable for restricting the users' choice with regards to commercial flight unit which was prominently displayed on their search engine. By imposing unfair conditions on publishers with regards to search engines, Google did commit an anti-competitive practice wherein it sought to strengthen its position in the market which is a violation of Section 4(2)(c) of the Act. This was one of the first orders wherein the CCI recognised the ongoing debate on big data issues. Over the years, the CCI adopted the view that online and offline retail are two different channels of

distribution and not two different relevant markets.¹²⁰ Recently, in the case of *All India Vendors Association v. Flipkart Pvt. Ltd.*¹²¹, the CCI took a different approach and held that online marketplace platforms which do not have

an inventory of their own form a distinct category as compared to other online stores and held that Flipkart was not in a dominant position. The primary complaint in this case was that Flipkart had abused its dominant position by selling goods at discounted prices and below cost price, resulting in denial of market access to the individual sellers.

Further, the CCI is observed to construe 'relevant market' in a narrow sense when it comes to digital market. However, the CCI delineated the relevant market for instant communication apps and differentiated between instant communication apps and traditional e-communication services based on the device on which they can be used, price of service and ease of use in the case of *Vinod Kumar Gupta v. WhatsApp Inc*¹²² and held that though WhatsApp has a dominant position in the relevant market, its use and conduct is not abusive since the services were offered for free, it was easily downloadable, sharing of data was simplified and information regarding every move was adequately given to the consumers. Similarly, the complaints regarding online cab aggregator platforms focused on predatory pricing, exclusivity arrangements and hub-and-spoke cartel were taken to task by the CCI in the case of *Mr. Samir Agrawal v. ANI Technologies Pvt. Ltd. (Ola) and Uber*.¹²³ The allegation levelled was that the pricing algorithm used by Ola and Uber artificially manipulated supply and demand leading to higher fares to cab drivers. This concerted action led to price fixation and hence was argued to be anti-competitive in nature. However, the CCI rejected the existence of hub-and-spoke cartel in the present case on the fact that there was no collusion between the drivers. It was also emphasised that promotional offers do not amount to predatory pricing and that Ola and Uber were not in a dominant position. Further, in another case, wherein collusion between Ola and Uber was alleged on the ground of both having common investors, the CCI held that presence of common investors was not sufficient to prove collusion and the essence

¹¹⁹ *Matrimony.com Ltd. v. Google LLC*, 2018 CompLR 101 (CCI).

¹²⁰ *Ashish Ahuja v. SnapDeal and Another*, Case No. 17 of 2014.

¹²¹ *All India Vendors Association v. Flipkart Pvt. Ltd.*, 2018 CompLR 1122 (CCI).

¹²² *Vinod Kumar Gupta v. WhatsApp Inc*, 2017 CompLR 495 (CCI).

¹²³ *Mr. Samir Agrawal v. ANI Technologies Pvt. Ltd. and Uber India Systems Pvt. Ltd.*, 2018 CompLR 1114 (CCI).

required to establish the same would be some sort of 'control'.¹²⁴

The CCI has recently looked into allegations of unfair trade practices by some major companies operating in this sector, viz., Flipkart, SnapDeal, Jabong, Myntra and Amazon in the case of *Mohit Manglani v. M/s Flipkart India Private Limited*.¹²⁵ In this case, the informant alleged that Flipkart, Jasper Infotech, Xerion Retail, Amazon and Vector E-commerce (opposite parties) are involved in anti-competitive practices by resorting to exclusive supply and distribution agreements with manufacturers and sellers of goods and services. The informant cited the sale of "Half Girlfriend" written by Chetan Bhagat exclusively on Flipkart as an example to assert his contention of product specific monopoly. The opposite parties contended that the relevant market cannot be construed as product specific for each exclusive dealing agreement and further asserted that they are not in a dominant position. The CCI held in favour of the opposite parties and stated that relevant market could not be product specific as it includes all substitutes of a product. The CCI further noted that the exclusive marketing arrangements do not create any entry barriers in the market, the availability of a large number of substitutable products in addition to the multiplicity of e-portals enhances competition and reduces the scope of dominance.

Recently, in the case of *Delhi Vyapar Mahasangh v. Flipkart Internet Pvt. Ltd.*¹²⁶, the informant alleged that the opposite parties were resorting to anti-competitive acts in favour of their preferred sellers by adopting "deep discounts", using consumer preference data, preferential listing to create a bias and entering into exclusive tie-ups with producers. The CCI ordered an investigation to check the violation of Section 3 and 4 of the Competition Act, 2002 on 13th January 2020. However, this case raised a lot of brows when surprisingly it was stayed by the Karnataka

High Court by virtue of *Amazon Seller Services Pvt. Ltd. v. CCI*.¹²⁷

These cases indicate the problem of inconsistency in the approach of domestic regulators. However, as the precedents have highlighted, it is expected that sooner or later the matter will end up in the hands of the CCI. With the advent of the e-commerce market, the dynamics have significantly changed and the market regulators have been keeping a vigilant eye of the developments. By addressing the grievances and taking proactive steps, the CCI has ensured that the objective is to protect competition and not the competitors.

COMPARATIVE STUDY WITH U.S & E.U

The last few decades have seen an unprecedented growth in the e-commerce industry in India. Several reasons can be attributed to this growth such as mushrooming of internet, growth of start-ups and evolution of customer behaviour.¹²⁸ The efforts of the CCI would become all the more commendable if it appreciates and adopts practices from global markets such as U.S & E.U. Therefore an in-depth understanding of how these countries have dealt with anti-trust issues in the digital market is necessary.

UNITED STATES - The majority of disputes that reach U.S courts pertain to jurisdictional aspects. In the case of *U.S. Bazaarvoice*¹²⁹, which involved a merger of online product review platforms, the Court held that this dispute inescapably adds fuel to the debate over the proper role of antitrust law in rapidly changing high-tech markets. It operates in a dynamic and evolving field but it did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects.

¹²⁴ Meru Travel Solutions Pvt Ltd v. ANI Technologies Pvt. Ltd., 2018 CompLR 694 (CCI).

¹²⁵ Mohit Manglani v. M/s Flipkart India Private Limited and Others, Case No. 80 of 2014.

¹²⁶ Delhi Vyapar Mahasangh v. Flipkart Internet Pvt. Ltd., Case No. 40 of 2019.

¹²⁷ Amazon Seller Services Pvt. Ltd. v. CCI, W.P. No. 3363 of 2020 (Kar HC).

¹²⁸ ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, <http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf> (last visited Apr. 25, 2022).

¹²⁹ United States v. Bazaarvoice Inc., No. 13-CV-00133-WHO, 2014 WL 203966.

Some digital platform markets may therefore be more susceptible to monopoly power including where there are lock-in effects and first mover advantages. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹³⁰, it was found that a website operator will not normally limit its viewers or customers to those residing in a certain state so jurisdiction should be determined based on the level of interactivity and commercial nature of the exchange of information that occurs on the web site. It divided websites into fully interactive sites, fully passive websites and sites with limited interaction. Here, the Pennsylvania court found that it had jurisdiction over the out-of-state vendor from California since the latter's website sold 3,000 passwords over the Internet to Pennsylvania subscribers and entered into seven contracts with Pennsylvania access providers.

In the case of *U.S v. Apple Inc.*¹³¹, the DOJ pursued a horizontal theory alleging that the MFN clauses in the agreements were facilitating devices for a hub-and-spoke conspiracy with Apple at the centre and the publishers serving as the spokes. The court found that Apple had consciously orchestrated a horizontal conspiracy among the publishers and used the MFN clauses to effectively force each publisher to adopt an agency model with other retailers or they otherwise would have been stuck with both the lower prices set by Amazon and less revenue from each book sold through Apple.

EUROPEAN UNION - The European Commission decision pertaining to Google's acquisition of the advertising platform DoubleClick¹³² is essential as the EC analyzed the concern that the combination of Google's and DoubleClick's assets could put the merged parties into a position of strength, unmatched by their competitors. The European Commission, as well as the United States' FTC found that none of the alleged scenarios were likely to be implemented or distort competition.

Even before the CCI investigated into the conduct of Google, it had already faced several antitrust challenges around the world, including three government lawsuits filed in the U.S., though, the European Commission was the first to lead the operation. The Commission has already levied billions of dollars in fines against Google in three separate competition cases, which Google has appealed. EC found the company violative of antitrust rules by allegedly abusing its dominance in search to advantage its own shopping comparison product over competitors. Regulators also fined Google the equivalent of \$5 billion for allegedly abusing its dominance in Android to unfairly favor its own services. The Commission claimed Google did so in part by forcing smartphone makers to pre-install its apps exclusively. It also condemned the exclusive contracts Google allegedly had with publishers using its AdSense tool that restricted them from showing ads from its competitors.¹³³

Similarly in the case relating to acquisition of WhatsApp by Facebook¹³⁴ a narrow definition was adopted by the European Commission while approving the acquisition. EC's ultimate analysis was undertaken in three narrower markets namely market for consumer communication services, social networking services as well as online advertising services keeping in mind the narrow markets which may be effected in light of this merger.¹³⁵

SUGGESTIONS & CONCLUSION

India is a prominent market where both domestic and foreign tech firms are jostling for dominance. Antitrust issues that have arisen globally have resonated in India as well. While the CCI is playing an important role in ensuring fairness and facilitating competition in digital markets, there is a growing need for some form of regulation. The

¹³³ Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 4 UTAH. L. REV. 1434 (2008).

¹³⁴ Facebook/ WhatsApp, Case No. Comp/M.7217 (Oct. 3, 2014) (European Commission).

¹³⁵ MAHER M. DABBAH, *EC AND UK COMPETITION LAW: COMMENTARY, CASES AND MATERIALS* 201 (Cambridge University Press 2004).

¹³⁰ *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119.

¹³¹ *US v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

¹³² *Google/DoubleClick*, Case No. Comp/M.4731 (Mar. 11, 2008) (European Commission).

recent 2020 e-commerce market study highlights CCI's need for marketplace platforms to adopt self-regulation to ensure transparency concerning search ranking, collection, use and sharing of data, user review and rating mechanism, revision in contract terms and discount policy. However, there is so much more that CCI can inculcate in light of the preemptive ex-ante regulation that the European Union has suggested in its proposed Digital Markets Act for 'gatekeeper' platforms. Consequently, India should also adopt binding ex-ante regulations for digital platforms to ensure market contestability for businesses including new entrants and fairness for existing players. It is therefore an interesting time for the CCI to be looking into the different types of business practices being undertaken by online firms.

Search engines, E-commerce and social networks constitute the majority of India's data driven economy. In the present scenario, it is apparent that only a handful of companies dominate all these spheres of the online economy. In this background, there is bound to be skepticism among the competition authorities worldwide towards the modes and methods adopted by the leading firms to retain their leader position in the market. When an attempt is made to conduct an analysis of these firms, issues and challenges arise that are beyond the scope of traditional tools and methods utilized for market analysis. Competition laws in India are still at a nascent stage which provides it with ample opportunities for numerous tests and tries in this area of law. The rise of digitalised economy worldwide has been met by India contributing significantly to this economy. This field of Indian economy is one of the fastest growing ones and so it requires constant checks and balances. Further, the possibility of firms in the digitalised economy engaging in anti-competitive practices is just as likely as in the brick and mortar or the traditional economy. Contrary to the traditional economy, the benchmark tests and techniques defined fail implication in the modern digital economy. This is a result of numerous factors, like the dynamic nature of the market, indirect network effects, multi-sided economy and zero-priced products.

These factors among others result in making a numerical assessment of the market harder as well as increase the area of market assessment to a significant extent. Online markets in India have many examples where players with access to significant capital resources resort to deep discounting tactics in order to derive long-term benefits of scale and network effects. Vast amounts of capital which could otherwise be utilised for innovation and development is therefore being systematically used to achieve these benefits. In many cases, these practices are not necessarily limited to firms that are in the early stages of their business but have become an integral part of their business model, prompting a race to the bottom. Leading firms will attempt to employ numerous methods to maintain their dominant position in the market. At times when activities which are anti-competitive or unfair emerge, the competition authorities are faced with challenges to analyze them in a proper manner & identify their anti-competitive nature. The digitalized economy is developing rapidly so more tests and means to analyze such anti-competitive practices should be discovered and implemented for the benefit of the consumers and the market as a whole. The CCI should rely on the essential facilities doctrine to facilitate interoperability between a dominant player that is found to be indulging in the abuse of its position and other operators in the market.

There should be a milieu of cooperation between competition authorities from various nations/continents as the digital economy and the relevant geographical market has become worldwide in scope. This paves the way for plenty of challenges and a need for change in the approach and techniques used by competition authorities worldwide. There is a growing need for competition authorities to change the way cases pertaining to digitalised economy are dealt with. Focus should be shifted towards business models to determine the mode of profits of the firms under scanner. Changes may also be brought to the present thresholds for notifications etc. Further, many key aspects of actions and steps taken by foreign competition authorities can be adopted with certain changes to apply them in the Indian

markets. The transition of approach towards a dynamic, digitalised economy is a gradual process and shall keep requiring change with changes in economy of a dynamic nature. By making transparency one of the core parameters in interactions with online platforms, a level playing field for competitors and platform providers can be guaranteed to a greater extent than it is being guaranteed now.

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