

EFFECTS OF COMPETITION LAW AND POLICY ON DIGITAL MARKETS IN INDIA

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ABSTRACT

The advent of digital markets and E-commerce in India has affected the way competition is assessed. This paper relies on various reports to compare India's position with that of various other countries in the world. This paper also sheds light on Anti-Competitive Market Distortions that are responsible for hindering competitive growth rate in India. Moreover, there has arisen a need to clarify certain aspects of competition law such as the relevant market, exclusive supply agreements, predatory pricing with regard to E-commerce and has been done by placing reliance on various decisions made by the Competition Commission of India in the cases of Ashish Ahuja v. Snapdeal.com and Fast Track Call Cab / Meru Vs. ANI Technologies. These decisions have greatly helped in clarifying substantial questions of law relating to competition law. It has also been observed that various governmental policies and regulations such as the Foreign Direct Investment Policy of 2016 and the draft E-Commerce Policy, among others, that have been or will be implemented by the current government would also have repercussions on competition in general as well as E-commerce-related competition in India. These regulations and policies have also been analyzed along with their possible outcomes.

Keywords: Digital market, E-Commerce, Competition law, Foreign Direct Investment, Competition Commission of India

1. Introduction

Digital market broadly refers to the use of the internet, cellular phones, social media platforms and search engines to reach a broader spectrum of consumers. It includes E-Commerce transactions wherein the suppliers, producers and manufacturers can make their product available for sale to consumers through an online platform. A crucial component of E-Commerce business lies in the fact that actual monetary transactions and exchange of data to execute the said transactions occur resulting in an increase in the total sales of the seller. Digital markets are bound to succeed in a developing economy like that of India essentially because of

its core features of accessibility, outreach, variety, and delivery, rendering a wholesome satisfaction of- quite literally- the whims and fancies of the consumers.

India is emerging as one of the fastest growing economies of the world, and why shouldn't that be the case? We have a large work force, sundry of opportunities for the growth of businesses, and thanks to its booming population, a majority of the consumers happen to be tech-savvy youngsters, which is a cherry on top for those businesses. Currently, around 35% of the Indian population has access to the internet, and this figure is expected to reach above 55% by the end of 2025¹. According to the *Mary Meeker annual Internet trends report for 2017*², India will experience the Golden Age of digital markets very soon.³ It has been further estimated that the spending on digital marketing by Indian businesses in 2018 is set to increase by 30% as compared to the previous year.⁴ Given these facts, one has to wonder what consequences such new trends in conducting business will have on the product market and competition in India.

1.1 So, how competitive *is* India?

The World Bank conducted an 'Ease of doing Business' analysis for the year 2018 through the International Institute for Management Development ("IMD")⁵. The IMD assessed 63 economies of the world and accordingly, ranked them based on their World Competitiveness wherein the economies were ranked from the most to the least competitive. Naturally, the United States bagged the top spot followed by Hong Kong and Singapore in the 2nd and 3rd position respectively. India, however, was placed at the 44th position, indicating progress by a notch higher than her position in 2017 (45). It was noted that India had improved on certain parameters such as bandwidth speed, mobile broadband subscribers and an increase in total health expenditure, among other factors, which led to this progress. It is pertinent to note that as per the said report, India's rankings have been quite stable, hovering more or less in the 44th position, after her ranking fell from the 40th position in 2013 to the 44th position in 2014. Again, India led by the Narendra Modi government made a remarkable amount of progress in a period of two years when her ranking jumped up to the 41st position in 2016, but alas, that has not been

¹Arpita Arya, Digital marketing landscape in India-an overview for marketers and businesses, YourStory.com (2018), <https://yourstory.com/mystory/21b44cd3e6-digital-marketing-land>

²Internet Trends Report 2018, Kleiner Perkins (2018), <https://www.kleinerperkins.com/perspectives/internet-trends-report-2018>

³Supra note 1

⁴Ibid

⁵World Competitiveness Ranking 2018, IMD business school (2018), <https://www.imd.org/wcc/world-competitiveness-center-rankings/world-competitiveness-ranking-2018/>

the case since then and it may have deteriorated by a few points yet again.⁶ Thus, to answer the question, it is perhaps safe to say that for a nation that has merely celebrated only 72 years of independence, India is a nation with an ever-increasing scope for development and on the verge of becoming a competitive force to be reckoned with. For now, though, India has much resemblance to a spider in the corner of a room, silently and industriously engaged in the spinning of her rather tangled web.

1.1.1 A study was conducted in May 2016 by a UK-based international think tank known as *Legatum Institute* titled “**Anti-Competitive Market Distortions and their Impact- India case study**”⁷ It explored potential growth areas for the country and quantified the cost of inaction across several key sectors through the focal lens of domestic competition, trade and property rights.⁸ This study defines Anti-Competitive Market Distortions (“ACMDs”) as “*policies or regulations which provide a competitive advantage to some players or a player in the market to the detriment of others. These distortions come in a variety of forms and can sometimes be difficult to identify.*”⁹ According to this report, ACMDs cause inefficiencies and losses to welfare because of the state-owned monopolies which India has favoured for most of its history since independence. “*The diagnostic identifies the economic constraints that are suffered by the Indian economy. We do this by identifying ACMDs in a number of sectors. The ACMDs we identify broadly cover each sector of the economy and fall into three categories: property rights protection, domestic competition, and international competition.*”¹⁰ To summarize the findings of the report in a nutshell, it was diagnosed that:

1. *If India eliminated all its distortions, it would be the fifth-largest economy in the world, and in GDP per-capita terms, it would rise from being ranked 169th to being ranked 67th.*
2. *If India eliminated all its distortions, it would generate over 200 million new jobs, and reduce absolute poverty to zero.*

⁶ FE Online, Is India competitive? Rank improves but 3 challenges may stop Modi from pulling ‘Ease of Business’ like jump The Financial Express (2018), <https://www.financialexpress.com/economy/is-india-competitive-rank-improves-but-3-challenges-may-stop-modi-from-pulling-ease-of-business-like-jump/1179301/>

⁷ Shanker A. Singham and A. Molly Kiniry, ‘Introduction to Anti-Competitive Market Distortions and the Distortions Index’ Legatum Institute (2016) <https://lif.blob.core.windows.net/lif/docs/default-source/publications/introduction-to-anti-competitive-market-distortions-and-the-distortions-index-pdf.pdf?sfvrsn=0>

⁸ Shanker A. Singham and A. Molly Kiniry, ‘Market-friendly or simply business friendly? It depends on how India pushes for real reforms’ Economic Times (2016) <<https://blogs.economictimes.indiatimes.com/et-commentary/market-friendly-or-simply-business-friendly-it-depends-on-how-india-pushes-for-real-reforms/>>

⁹ ‘Anti-Competitive Market Distortions and their impact: A case study of India’ Legatum Institute Reports(2016) <<https://www.li.com/activities/publications/anti-competitive-market-distortions-and-their-impact-a-case-study-of-india>

¹⁰ Ibid

3. *If India improved its insolvency rules, opened up to foreign investment in certain areas and better protected intellectual property rules, the number of people living on less than \$2 per day would be reduced from 770 million to 627 million.*
4. *Simply optimising its regulatory environment with regard to the World Bank's 'Doing Business Index' would lead to a productivity gain of only 0.07%. This is because deeply embedded structural issues hamper India's economic development. Simply improving business registration processes and procedures will lead to some new business creation but will not be sustainable unless accompanied by deeper reforms.*
5. *Improving its insolvency rules, opening up to foreign investment in certain areas and better protecting intellectual property (L2) could lead to a productivity gain of 148%.*
6. *Removal of distortions across the dimensions of trade, competition and property rights protection could lead to a GDP gain of around 650%*
7. *Labour market flexibility is a key driver and accounts for about a quarter of the overall GDP gain possible.¹¹*

The second level of the report suggests further removal of many ACMDs such as allowance of foreign currency bank accounts, improving insolvency measures as mentioned above, and increasing transparency of government policymaking, are some problems, among others, that need to be unravelled. The spider's web *does* seem to be rather tangled and enmeshed in overcomplications, now, doesn't it? This paper shall further delve deeper into what impact the Modi-led government's policymaking decisions and directions have on e-commerce-related competition in India.

2. Laws and policies on E-Commerce and competition in India

Competition in the economy of market creates greater market efficiency, it encourages innovation, development, better quality of products, prompt services and an overall welfare of the consumers. However, due to an increase of competitors in the market, the probability of the market facing failures is higher as the powerful players in the market don't flinch when it comes to exerting their dominant position on smaller players, sometimes further indulging in cartels and bid-rigging. Thus, there persists a need for competition law and policy and a regulatory authority to enforce it. In India, the rudimentary principle that forms the basis of competition law is that market forces and their contracts need to be organized in a competitive manner. Accordingly, the competition authorities intervene when such contracts restrict certain other players in the market promoting unfair competition.

¹¹ Sankalp Sharma, 'India needs to shed anti-competitive market distortions to prosper (Column: Active Voice)', Business Standard (2016) <https://www.business-standard.com/article/news-ians/india-needs-to-shed-anti-competitive-market-distortions-to-prosper-column-active-voice-116071900277_1.html>

The competition policy in India is thus based on Articles 38 and 39 of the Constitution of India¹² under the Directive Principles of State Policy.¹³

The Competition Commission of India (“**CCI**”) was established in 2003 under the Competition Act, 2002 (“**the Act**”). The Commission got its enforcement and regulatory power after the substantive provisions of the Act relating to anti-trust enforcement and regulation of combinations came into force in the years 2009 and 2011 respectively.¹⁴ The Act applies to the E-Commerce arena the same way it applies to other facets of business in various other markets.

Competition in India is governed by two factors, namely, competition policies and competition law. Competition laws need to be in place because, as stated above, markets can suffer from failures if players in the market resort to activities that hinder competition such as cartels, abuse of dominant position, bid-rigging etc., which have an adverse effect on competition and consumer welfare. Competition laws in India are primarily governed by the Competition Act, 2002. Competition policy is required to promote the competition therefore, these are government measures that “*directly affect the behavior of enterprises and structure of the industry.*”¹⁵ Competition policy involves reforms in certain areas to encourage competition such as a) industrial policy which includes reforms relating to licensing requirements, restrictions on foreign technology tie-ups, guidelines on the location of industries etc., b) Trade policy which involves measures relating to trade restrictions, reduction of tariffs, removal of investment controls etc., c) Disinvestment and Privatization of state-owned enterprises as they receive more benefits and are exempt from stringent rules as subsidies and price regulations.¹⁶ Competition policies are implemented by the government. The impact of government-imposed regulations and policies will be analyzed with relation to E-Commerce businesses and competition law as the paper progresses.

2.1 Regulations and policies for E-Commerce businesses in India

(i) Payment and Settlements Systems Act, 2008

Section 38(1) of the Payment and Settlements Act, 2008 confers on the Reserve Bank of India (“**RBI**”) the power to formulate regulations related to pre-paid payment instruments. The Policy

¹² Constitution of India, Article 38 and Article 39

¹³ All Answers Ltd, 'Competition Law and Policy in India' Lawteacher.net, (2018) <https://www.lawteacher.net/free-law-essays/international-law/the-foundation-of-the-competition-policy-in-india-international-law-essay.php?vref=1>

¹⁴ Competition Commission of India, *Annual Report 2016-2017* https://www.cci.gov.in/sites/default/files/annual%20reports/CCI_AR-2016-17_English.pdf

¹⁵ Competition Commission of India, *Competition Law and Policy*, (June 2004)

<https://www.cci.gov.in/sites/default/files/presentation_document/1vinod_dhall_16june04.pdf?download=1>

¹⁶ Ibid

Guidelines issued by the RBI dated July 01, 2014 (further updated on December 03, 2014) defines “Pre-paid Payment Instruments” as “payment instruments that facilitate purchase of goods and services, including funds transfer, against the value stored on such instruments.” The value stored on such instruments represents the value paid for by the holders by cash, by debit to a bank account, or by credit card. The pre-paid instruments can be issued as smart cards, magnetic stripe cards, internet accounts, internet wallets, mobile accounts, mobile wallets, paper vouchers and any such instrument which can be used to access the pre-paid amount.^{17, 18} Banks must comply with the criteria issued by the RBI Guidelines in order to issue categories of payment instruments. However, only those banks who have been permitted to provide mobile banking transactions by the RBI shall be permitted to launch mobile-based pre-paid payment instruments (mobile wallets and mobile accounts)¹⁹

The guidelines pertaining to Know Your Customer (“KYC”) norms issued by RBI to other banks from time to time, shall apply *mutatis mutandis* to all persons issuing pre-paid payment instruments²⁰

(ii) Payment and Settlements Systems Act, 2007

The Payment and Settlements Systems Act, 2007 regulates all the factors regarding the payment systems in India. It empowers the RBI to formulate all such rules to mete this purpose. The term “Payment System” is defined under Section 2(i) of the Payment and Settlement Systems Act, 2007, “*means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange.*”

The term “System Provider” is defined under Section 2(q) of the Payment and Settlement Systems Act, 2007, as “*a person who operates an authorized payment system*”. The term “System Participant” is defined under Section 2(p) of the act, it means “*a bank or any other person participating in the payment system and includes the system provider*”

(iii) Foreign Direct Investment Policy

- i. FDI Policy Circular dated June 07, 2016, defines ‘E-Commerce’ as “*buying and selling of goods on an electronic network*” and an E-Commerce Entity’ as a “*company incorporated under the*

¹⁷ Reserve Bank of India, Master Circular of RBI – Policy Guidelines on Issuance and Operation of Pre-paid Payment Instruments in India, (Circular No. DPSS. CO. PD. PPI. No. 03/02.14.006/2014-15)

¹⁸ TS Ramani, What are the rules and regulations applied to e-commerce business in India? Quora (2017) <<https://www.quora.com/What-are-the-rules-and-regulations-applied-to-e-commerce-business-in-India>>

¹⁹ Ibid

²⁰ Supra note 18

*Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2(42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business”.*²¹ Further, ‘Inventory based model of E-commerce’ is defined as “*an Ecommerce activity where the inventory of goods and services is owned by that particular e-commerce entity and the goods are sold to the customers directly.*” The FDI Policy also defines ‘Marketplace based model of E-commerce’ as “*providing an information technology platform by an e-commerce entity on a digital & electronic network in order to act as a facilitator between buyer and seller.*”²²

- ii. The aforementioned policy permits a 100% Foreign direct Investment (“**FDI**”) through the automatic route for Business to Business e-commerce for a marketplace model of e-commerce and none for Business to Consumer e-commerce. A manufacturer is permitted to sell its goods manufactured in India through e-commerce platforms. Indian manufacturers must be the owner of the Indian brand and must manufacture at least 70% of its products inhouse.
- iii. FDI is not permitted to inventory-based model of e-commerce wherein the inventory of goods and services is owned by the said entity and is sold to the consumers directly.
- iv. Further, an e-commerce entity is prohibited from permitting more than 25% of the sales through its marketplace from *one vendor or their group of companies*.
- v. E-commerce entities providing marketplace are prohibited from directly or indirectly influencing the sale price of goods or services and are directed to maintain a *level playing field*.²³

(iv) E-commerce (draft) Policy 2018

The government of India promulgated a draft E-commerce policy in July 2018 to be implemented after a lapse of 6 months, as reported by the *Economic Times*.²⁴ It aims at championing “Indian” online enterprises and at “*creating a level playing field for foreign and domestic players in the Indian market*”.²⁵ It further strikes a distinction between Indian e-commerce businesses and foreign e-commerce businesses, wherein the former is defined as firms with a

²¹ Department of Industrial Policy and Promotion, Consolidated FDI Policy, (Circular No. D/o IPP F. No. 5(1)/2016 –FC-1)

²² Ibid

²³ Department of Industrial Policy and Promotion Press Note 3 of 2016 on Guidelines for FDI on E-commerce

²⁴ Kritika Suneja, ‘Draft E-Commerce policy champions India first’ *Economic Times*, (2018)

<<https://economictimes.indiatimes.com/news/economy/policy/draft-e-commerce-policy-champions-india-first/articleshow/65206404.cms>>

²⁵ Ibid

foreign investment of 49% or less, the owner/founder of which is an Indian resident and where the platform company is controlled by Indian management.

“Greater regulatory scrutiny has been recommended for mergers and acquisitions that may ‘distort competition’ and a relook has been suggested on what constitutes entry barriers and anti-competitive practices. The Competition Commission of India has been asked to undertake such exercises.” Further, the draft policy suggests the setting up of a different wing by the Enforcement Directorate to handle matters enshrined in Press Note 3.²⁶ It reiterates that *“Marketplace operators cannot hold inventory and sell products on their platform – they can only facilitate the process for other vendors. Also, an ecommerce entity cannot allow more than 25% of the sales transacted on its marketplace from one vendor or their group companies.”* Furthermore, the policy suggests a sunset clause for deep discounting, laying stress upon the fact that a “maximum duration” time period be set for “differential pricing strategies”, assigning these matters to the CCI as well as the Department of Industry Policy and Promotion (“**DIPP**”) for analysis and dissections.

It is pertinent to note that the implementation of the said policy by the Government of India would potentially affect recent acquisitions such as that done by Walmart with regard to Flipkart if and when it is enforced.

3. E-Commerce and Competition Law

The advent of E-Commerce has aided businesses enhance their market presence and their existing market position by allowing them to provide cheaper and more efficient goods and services. It has lowered entry barriers for local businesses, further widening the choices of the consumers, as reiterated earlier. However, despite of these benefits, E-Commerce has made businesses vulnerable to anti-competitive practices because it has enabled the formation of vertical agreements. *“The vertical restrictions, in the digital market, are not restricted to their traditional forms but have rather moved to more sophisticated measure e.g. usage of software to adjust prices taking into account competitors’ prices, geo-blocking mechanisms, MFN clauses, price parity agreements, advertising restrictions etc.”*²⁷ Therefore, any agreement in the E-Commerce sector which apprehends competition and is likely to cause an AAEC must be perused under Section 3 of the Act which regulates anticompetitive agreements inclusive of vertical restraints. The acts of dominant players in the relevant market also fall under the purview of Section 4 of the Act which governs acts resulting in an abuse of their dominant position. Likewise, if E-Commerce enterprises engage in mergers and

²⁶ Supra note 24

²⁷ Directorate for Financial and Enterprise Affairs Competition Committee OECD, Implications of E-Commerce for Competition Policy- Note by India, (DAF/COMP/WD(2018)52)

acquisitions irrespective of whether they are finalized in India or in any other foreign territory, the extraterritorial jurisdiction of the Act comes into play, thus, Section 5 and Section 6 of the Act are also applicable to such combinations and must be notified to the CCI if they cause an AAEC on the Indian market.²⁸

3.1 Demarcation of the Relevant Market

3.1.1 A quintessential question that needs to be answered is one regarding the demarcation of the relevant market with regard to online markets and traditional retail markets. Some would argue that the online and offline markets are separate markets, thus treating online markets as the relevant market. This has been answered by the CCI through certain cases which shall articulated hereafter. In *Ashish Ahuja v. Snapdeal.com*²⁹, the complainant was prevented from selling SanDisk products on the Opposite Party's portal as it only allowed authorized dealers to use its platform for the sale of products. The complainant alleged that SanDisk Corporation, a renowned supplier of memory storage cards and the E-commerce website Sanpdeal.com were colluding amongst themselves, preventing him from offering competitive prices below that of the market price by compelling him to become an authorized dealer.

The CCI held that the relevant market, in this case, was that of “portable small-sized consumer storage devices such as USB pen drives, SD Memory Cards and Micro SD Cards in India.” It stated that both online and offline markets are not separate markets in spite of having different features such as different discount rates, shopping experiences, credit points etc. Additionally, the consumers are also given the choice to make a conscious decision regarding their preferences due to the increase of prices in one market while there occurs a decrease in another, and vice versa. However, the Commission took cognizance of the fact that both platforms, i.e. online as well as offline, are merely different channels used for distributing the same products of the same enterprises. Even though SanDisk is a dominant player with 35% of the market share, it had not abused its dominant position as it may ensure that its products sold through portal should be sold by authorized dealers only in order to protect the sanctity of its distribution channel. With regards to the conduct of Snapdeal.com, it is a platform for sellers and buyers to hold valid transactions on the sale and purchase of products, therefore, providing special discounts and deals did not amount to collusion as plenty other E-Commerce platforms such as Amazon, eBay and Flipkart thrive on these tactics. Hence, no prima facie case for abuse of dominant position was made against SanDisk.

²⁸ Ibid

²⁹ Ashish Ahuja v. Snapdeal.com, Competition Commission of India (Case No.17 of 2014)

312 Another question regarding Relevant market was answered in the case of ***Fast Track Call Cab / Meru Vs. ANI Technologies***³⁰

The issue arose when the Complainants, both radio taxi service providers, alleged that Ola had been providing radio taxi services at rates so cheap in the Bangalore market that it amounted to predatory pricing as its competitors could not provide the consumers with the same rates. The Opposite Party contended that they were merely offering the platform for their consumers to book taxi services and were therefore only an “aggregator platform”. The CCI held that “*For the end consumer, who is booking a taxi ride through OP’s platform, identity of the driver who owns the taxi is inconsequential. The consumer perceives [Ola] as a service provider of radio taxi service whose service is substitutable with the services provided by other radio taxi service operators, irrespective of the business model followed by them. Thus, substitutability, in the radio taxi industry, is between the operators and not between the drivers.*”³¹ Due to the entry of Uber in the market, Ola was seen to have a competitor with a more aggressive pricing strategy as both functioned on a “below cost pricing strategy”. The DG held that “*the scheme of the Act only attracts the provisions of Section 4 when an incumbent is found to be dominant*”. Therefore, as per Section 2(t) of the Act, the relevant product market as all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use, need to be included in the realm of relevant product market.

3.2 Allowance of Exclusive Supply Agreements

Another controversy surrounding E-Commerce and Competition Law in India is one regarding the trends which allow E-Commerce businesses to blur the line on what constitutes anticompetitive agreements. Exclusive Supply Agreements are those agreements which compel the consumers to purchase a particular product only from one seller or a group of sellers. The distributor is quite likely to sell through a single seller or a certain group of sellers to maximise profits and for the protection of its interests. To prove the anticompetitive nature of such agreements, it needs to be proved that these agreements cause an AAEC in the market. A leading case which satisfies these queries is ***M/s Mohit Manglani Versus M/S Flipkart Private Limited and Others***³² wherein the complainant filed a case against online E-Commerce giants Flipkart India Private Limited, Jasper Infotech Private Limited, Xerion Retail Private Limited, Amazon Seller Services Private Limited, Vector E-Commerce Private Limited under Section

³⁰ Fast Track Call Cab / Meru Vs. ANI Technologies, Competition Commission of India (Case No. 06 and 74 of 2015)

³¹ Ibid

³² Mohit Manglani vs. M/S Flipkart India Pvt. Ltd. & Ors, Competition Commission of India (Case 80 of 2014)

19(1) (a) of the Act. The allegations against these enterprises were that they had indulged in exclusive distribution agreements with the sellers of the good leading to a violation of Section 3 of the Act. The product in limelight was Chetan Bhagat's novel "Half Girlfriend". Further, it was alleged that the E-Commerce websites had abused their dominant position as each portal had a 100% market share for the book as it constituted exclusive dealing further having an AAEC. In the light of the given case, the CCI asserted that "*it seems unlikely that an exclusive agreement between a manufacturer and an e-portal will create any entry barrier and that any of the existing players in the retail market are getting adversely affected.*"³³ The CCI further asserted that new entrants into the market in the E-Commerce sector enhances competition, at the same time, online distributors through e-portals allow the consumers to compare the merits of the product as well as the prices. Keeping in mind the allegations regarding the violation of Section 4 of the Act, the CCI opined that none of the e-tailers were "*individually dominant*" hence, there was no abuse of dominance.³⁴

In order to prove that an exclusive distribution agreement has caused an AAEC, the CCI is obligated to determine the market share of that product. For instance, OnePlus phone series are exclusively available only on Amazon.in. To establish an AAEC, the market share of OnePlus needs to be investigated with comparison to the market share of other smart phones, and the greater it is, the more the chances of it causing an AAEC. Additionally, the substitutability of the product with the other smart phones with similar features needs to be analysed, thereafter, it shall be determined whether the agreement is anticompetitive in nature.³⁵

3.3 Predatory Pricing

Predatory Pricing is the act of pricing a product below the cost of its production in order to eliminate competition, to forgo short-term profits in order to foreclose the market for its competitors³⁶ and is stipulated under Section 4 of the Act. To determine whether an enterprise is engaged in predatory pricing, it must be ascertained if the entity in question enjoys a dominant position and what its intent is when it under cuts its prices. It is commonplace to hear of "End of Season" sales and "End of Reason" sales launched by various E-Commerce giants like Myntra, Flipkart and Jabong among several others. However, the catch lies in the fact that none of them have been held to be *prima facie* dominant entities because of the various competitors

³³ Ibid

³⁴ Sayoni Chaudhuri, 'Analysis of competition cases in India', CUTS International, (2017) <http://www.cuts-ccier.org/pdf/Edition-2-Analysis_of_Competition_Cases_in_India.pdf>

³⁵ Divye Sharma, 'Competition law and E-Commerce: a concern for the future', Mondaq (2015) <<http://www.mondaq.com/india/x/400368/Antitrust+Competition/Competition+Law+And+ECommerce+A+Concern+For+The+Future>>

³⁶ DotEx International Ltd. and Omnesys Technologies Pvt. Ltd. 2011 CompLR 129 (CCI).

each of them face in the market as well as the fact that the CCI has outlined the scope of relevant market as it refused to distinguish between the online and offline retail markets considering it to be collectively under the ambit of the retail market.³⁷ In 2014, Flipkart was brought under the scrutiny of the CCI for the act of predatory pricing when its Big Billion Day Sale rendered a 100 million dollars for the Company in less than 10 hours of its launch.³⁸ Lucky for Flipkart, its rivals like Amazon and Snapdeal also introduced irresistible offers and discounts at the same time as its own.³⁹

It all boils down to the main question, *is Predatory Pricing illegal?*

No, pricing below cost seems to be perfectly acceptable as long as there are several other competitors in a particular market wherein the entity that sells below cost isn't "dominant". It must be proven that the said entity is attempting to eliminate competition, which is a bit of a task. To prove predation by an entity, the following four elements need to be factored in, this is also known as the *Four-Part Test*:

- a) that the entity indulging in predation has a dominant position in that relevant market.
- b) that the entity must dominate the relevant market in which the product is sold, based on product basis or a geographical basis.
- c) that the entity in question acts independently of other players in the relevant market.
- d) that the said entity has abused its dominant position by creating barriers to entry for new entrants in the market or is pricing below cost to drive them out of the existing relevant market.⁴⁰

It is pertinent to note that the CCI has also relied on the 'Test of Recoupment'⁴¹ to determine predation by an entity. As per this test, the CCI must assess the probability of whether the entity in question will hike its prices in the future to make-do the short-term losses it incurred while selling its products at undercut prices.

³⁷ Ashish Ahuja v Snapdeal and SanDisk Corporation, Competition Commission of India, Case No.17 of 2014)

³⁸ Nivedita Mookerkji, 'Big Billion Day sale cost Flipkart big; govt takes notice', Business Standard (2014) <https://www.business-standard.com/article/companies/billion-day-sale-cost-flipkart-big-govt-sits-up-114100900029_1.html>, See also: Pankaj Doval, 'E-sales may not fall afoul of CCI', Times of India (2014) <<https://timesofindia.indiatimes.com/Business/India-Business/E-sales-may-not-fall-afoul-of-CCI/articleshow/44765232.cms>>

³⁹ 'How Flipkart's Big Billion Day turned out to be the tipping point for Indian e-tailers', Firstpost, (2017) <<https://www.firstpost.com/business/corporate-business/how-flipkarts-big-billion-day-turned-out-to-be-the-tipping-point-for-indian-e-tailers-1998795.html>>

⁴⁰ Re: Johnson And Johnson Ltd.(1988) 64 Comp Cas 394.

⁴¹ H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd. Gurgaon and Oil & Natural Gas Corp. Limited, New Delhi, Competition Commission of India, Case No. 80/2012, 2013.

There are circumstances which may be mistaken for predatory pricing however, it isn't actually an act of predation. Firstly, as stated in *Ashish Ahuja's case*⁴² and also reiterated earlier, the CCI has stated that E-Commerce entities are not the actual sellers in the market but merely provide a platform for those sellers to sell their goods and services. Secondly, in India, there is a plethora of E-Commerce players unlike that of the United States wherein Amazon is most definitely a dominant player. The normal threshold to determine dominance is if the entity has more than 50% of market share, however, due to the number of players in the said arena, there are plenty of players such as Amazon, Flipkart, Yebhi, Junglee.com, Ajo, etc., competing amongst themselves and are dominating the market regardless of the position of their competitors. Thirdly, as also reiterated earlier, E-Commerce is not a separate market in itself, e-tailers and retailers all form part of the same market. Fourthly, selling discounted and under-priced products did not hamper competition in anyway. On the contrary, in Flipkart's situation, most of its competitors were offering similar discounts on the same products which only provided the consumers with a deluge of options to choose from, furthering healthy competition. Lastly, because of the risks and competition involved in the E-Commerce market, it is inevitable for the entities to incur at least some short-term losses. This does not prove that the entity was engaging in predation by incurring short term losses for long term profits.⁴³

4. Repercussions of governmental policies on E-Commerce and Competition Law

The year 2014 witnessed a massive dominance of Narendra Modi in the political scenario which led to his government obtaining power as a result of a free and fair election. However, as reiterated earlier, India's ranking in the World Competitive Index fell from the 40th position in 2013 to the 44th position in 2014 merely in a span of one year, again hiking by a few points in the succeeding two years to the 41st position. The study conducted by the Legatum Institute on ACMDs in India stipulated certain suggestions that would boost the Indian economy as well place India at par with its competitors. Does the '*acche din*' propaganda actually hold true?

To answer the question, it is imperative that the relevant government policies imposed during this time period be analysed to determine its effects on E-Commerce and competition. Here's how the policies and governmental decisions affect competition in India:

⁴² Supra note 37

⁴³ Esha Shekhar, '[Are deep-discounts in e-commerce anti-competitive? Flipkart's Big Billion Day Sale and the way forward](https://blog.iplayers.in/are-deep-discounts-in-e-commerce-anti-competitive-flipkarts-big-billion-day-sale-and-the-way-forward/)' iPlayers, (2014) <<https://blog.iplayers.in/are-deep-discounts-in-e-commerce-anti-competitive-flipkarts-big-billion-day-sale-and-the-way-forward/>>

- i The enforcement of the Goods and Service Tax (“**GST**”) from 1st July 2017 has enabled India to convert into one large market. It was reported during the BRICS Summit held in China in 2017 by a Chinese think tank called Anbound that China was at a threat of facing an increased amount of competition from India. Another private think tank estimated that the Modi government was successful in increasing India’s competitive profile from Chinese companies such as Huawei and Alibaba. Ernst and Young conducted a global survey wherein it was discovered that India attracted 60% of investors from multinational corporations as they preferred to invest in India as against China.⁴⁴ The implementation of GST has made it simpler for Small and Medium Enterprises (“**SME**”) to start their business due to the fact that VAT registrations do not need to be made separately for each and every state as GST has centralized all of it. This enables these enterprises to provide a better outreach and efficiency of their products, making entry into different relevant markets easier, further facilitating healthy competition. GST provides SMEs with a *level playing field* against large enterprises.
- ii Flagship projects like “Make in India” which was promulgated in 2014 and “Digital India” launched in 2015, also promote and further competition as the Indian market is one where labour is abundant and cheap. Therefore, there will be a deluge of foreign investors that aid in furtherance of “Make in India” by manufacturing goods within the territory of India due to the availability of labour and other resources. This doesn’t merely apply to retail markets but also encourages growth in the e-commerce market. For instance, food delivery platforms such as Swiggy, (operated by Bundl Technologies Private Limited incorporated in 2013 and based in Bangalore) are flourishing as well as acquiring companies like Scootsy. The success of such companies is effortless thanks to the abundance of personnel available to help them reach their target of flourishing as a food delivery platform. They also face healthy competition from other platforms and companies such as FoodPanda, a German company (now acquired by Ola), and Zomato (which is well renowned for its service and is very much Indian) after having acquired Runnr in September 2017, to name a few prominent ones.⁴⁵

⁴⁴ Dharmendra Kumar and Avirup Bose, ‘Shock for China as Indian economy rises as Modi government pushes its competitive profile; here is why CCI matters’, Financial Express (2017) <<https://www.financialexpress.com/opinion/shock-for-china-as-indian-economy-rises-as-modi-government-pushes-its-competitive-profile-here-is-why-cci-matters/851114/>>

⁴⁵ Ananya Bhattacharya, ‘India’s food-delivery startups are back in business, but there’s still reason to worry’ Quartz India, (2018) <<https://qz.com/india/1347865/what-indian-food-delivery-startups-like-swiggy-and-zomato-need-to-do/>>

- iii. The Finance Bill of 2017 eliminated the Competition Appellate Tribunal and directed all the matters regarding appeals from CCI orders to the National Company Law Appellate Tribunal (“**NCLAT**”) which avoids multiplicity of forums and vitiates any confusion regarding jurisdiction created by the existence of many parallel forums.
- iv. The Cabinet recently decided to downsize the CCI from its previous seven members to only four. This was done to minimize the chances of chaos due to the fact that once an order is passed, all members must sign on it individually under the CCI Act which was a hinderance to the process of quick decision making. This move by the Cabinet was pursuant to the Annual Report of the CCI for the year 2016-2017 which witnessed a lesser number of cases being taken up or resolved by the CCI for that year (78) as compared to the 127 cases which were heard in the year 2015-2016.⁴⁶ Additionally, it has been reported that several positions in the CCI and the Director General’s office had become available for appointment. *“Having a fully-functioning, effective and predictable competition regime facilitates the flow of foreign investment by providing a transparent regulatory environment and predictable interpretation that reduces the scope of regulatory arbitrage by incumbent firms.”*⁴⁷
- v. The enforcement of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) has supplemented to the involvement level of the CCI in the insolvency proceedings faced by many debt-ridden companies. Insolvency proceedings of such companies directly affects competition, because in many cases the debt-ridden entities are acquired by massive corporations at the price of a song. For instance, in cases such as that of Videocon Industries where the creditors have filed a claim of almost Rs 590 billion, even though it isn’t explicitly an E-Commerce giant, its products are sold on E-Commerce platforms such as Amazon. Since it avails the online platform to sell its products, it would directly affect the competition if it were to be acquired by another giant. The CCI’s approval is usually sought in such matters under Section 6 of the Act which requires such acquisitions to be notified to the CCI and cannot be furthered until its approval is granted or 210 days have lapsed since the notification.⁴⁸

⁴⁶ Abhishek Waghmare Ishan Bakshi & Subhomoy Bhattacharjee, ‘Rightsizing’ Competition Commission of India: costs may outweigh benefits’, Business Standard (2018) <https://www.business-standard.com/article/economy-policy/rightsizing-competition-commission-of-india-costs-may-outweigh-benefits-118040800029_1.html>

⁴⁷ Supra Note 44

⁴⁸ Riya Agicha, ‘Paradox of Regulatory Approvals in CIRP’ Mondaq, (2018) <<http://www.mondaq.com/india/x/701446/Insolvency+Bankruptcy/Paradox+of+Regulatory+Approvals+in+CI+RP>>

- vi. The FDI Policy of 2016, as mentioned above, will have remarkable effects on E-Commerce as well as competition as it invites a 100% FDI in the field of the marketplace model. In this instance, foreign investors or any investors, for that matter, would jump at this opportunity because it would be as simple as merely providing the platform for sale of goods of other entities while at the same time, expanding business due to its outreach. An example of this is BigBasket. Further, an e-commerce entity is prohibited from permitting more than 25% of the sales through its marketplace from *one vendor or their group of companies*. E-commerce entities providing marketplace are prohibited from directly or indirectly influencing the sale price of goods or services and are directed to maintain a *level playing field*. Such reforms can only mean that the competition in India would be on a roller coaster that only goes up.
- vii. Lastly, if the draft E-Commerce policy does get implemented, the government will first and foremost, impose the sunset clause for E-Commerce giants like Flipkart and Myntra which would set a time period for which they can offer deep-discount sales. This will prevent any flimsy claims from being launched by retailers and unnecessary scrutiny against such companies while at the same time allowing the retailers to have their moment in the limelight as these deep-discounted sales will be more time-bound than they usually are- basically facilitating a win-win situation. Greater importance will be placed on regulating mergers and acquisitions that would have the capacity to distort competition. Other aspects of this policy mirror the provisions stated in the FDI Policy aforementioned.

5. Conclusion

The E-Commerce market and its trends are truly fascinating, and the current government is doing considerably well in promoting E-Commerce and all the avenues leading to the usage of E-Commerce (eg- Digital India). The only bone of contention to be delved into would be the ACMDs caused by government exemptions granted to certain entities under Section 54 of the Act as it would cause some imbalance in market trends if this power isn't exercised cautiously. Another controversial matter that is bound to arise by default is the Flipkart-Walmart merger⁴⁹ in the light of the FDI Policy 2016, draft E-Commerce policy and the CCI's decision pertaining to the same. Walmart Inc cleverly chose to notify the Commission of the merger -which is patently bound to tip the scales of competition in its favor- under the provisions stipulated in Section 6(2)

⁴⁹ Competition Commission of India (Combination Registration No. C-2018/05/571)

of the Act.⁵⁰ In this regards, the CCI's order is confounding in the sense that it seems to have disregarded the subtly- anticompetitive acts which might take place in the future by the merged entity. Flipkart already had a market share of 34.3% in the E-Commerce sector surpassing Amazon's (26.6%) and Snapdeal and other entities' collective share (36.5%)⁵¹ While overlooking the less than 0.5% of horizontal overlap and declaring the non-existence of a vertical overlap, the CCI has failed to take into account the 'Big-Billion Day Sales'-like discount offers made by Flipkart in the past and the fact that Walmart also engages in similar discounting offers by selling their products at extremely affordable prices, mainly targeting the American middle-class and wholesale purchasers. Walmart Inc's funds and market power combined with that of Flipkart, would drastically increase the penetrating power of the merged entity in the market enabling it to indulge in predatory pricing activities- much like the strategy implemented by Amazon in the U.S- leading to the elimination of their competitors as they would not have the power to offer their goods and services at prices so undercut. Moreover, Walmart will now be able to sell its products through Flipkart itself- something that the former has been itching to do in the past- granting it a wide window of opportunity to enter the Indian market. These acts would create barriers to new entrants in the market and would potentially lead to the abuse of its dominant position. The government's folly in this regard was its inability to implement the E-commerce policy promptly, where as the Commission's folly was how it blatantly failed to take cognizance of the potential effects this merger would have on competition in India. The draft Policy could probably end the discount wars or at least put a time-limit on the same, *"prohibiting e-commerce marketplaces from offering discounts and capping total sales originating from a group company or one vendor at 25%. However, this only remained in files while e-commerce companies continued to offer heavy discounts, much to the anger of offline retailers"*⁵² It would have resulted in allowing a level-playing field for both online and offline markets as the CCI refuses to distinguish between the two in any case. With its ups and downs, the Indian economy's progress in E-commerce related competition remains to be seen.

⁵⁰ Competition Act, 2002, Section 6

⁵¹ Rani Molla and Jason Del Rey, 'Why Walmart bought Flipkart — in five charts' Recode.net,(2018) < <https://www.recode.net/2018/5/11/17335708/walmart-flipkart-india-ecommerce-charts> >

⁵² Asit Ranjan Mishra, 'What draft e-commerce policy means for India's retail sector' Livemint (2018) < <https://www.livemint.com/Industry/DjRaxows878f4ZP22TxiaP/What-draft-ecommerce-policy-means-for-Indias-retail-sector.html> >