DIGITAL ECONOMY'S TRYST WITH COMPETITION LAWS: THE INDIAN VERSION

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Abstract

When the world evolves, so should the rules that guide it thereby preventing anarchy. With the exponential development of technology and the overlapping of several realms which follow a plethora of permutation and combinations, it is necessary to ensure that the law remains relevant. In the yesteryears, competition laws and anti-trust laws have concerned itself only with cigar smoke-filled rooms occupied by magnates who are conspiring to conduct ugly-business. While anti-trust crimes in the past majorly involved human design and actions, they now involve computers and algorithms.

In this article, the authors would be firstly discussing the overlapping of antitrust laws and technology; the increase of sans-human antitrust crimes. Secondly, we would be analysing the major competition regimes across the globe and comparing it with the Indian position. Next, we would be discussing the lacunae and loopholes in the current framework of Indian Competition law. Enforcement that secures 'competition on the merits' in the first stage and anticipates exclusionary lead in the subsequent stage would help guarantee that market members settle on free decisions among contending platforms and that entry and innovation are not inhibited by private rent-seeking. Lastly, the solutions to these loopholes will be discussed.

Keywords: competition law, digital economy, anti-trust regime, loopholes, solution

Introduction

"There is no established jurisprudence on most substantive issues. Any competitive legal regime so young must be considered a work in progress that requires more work to complete."[1]

In the hit American Sci-Fi "Hitchhikers' guide to the Universe", the ultra-genius computer 'Deep Thought' was asked a question about life and the universe and the supercomputer took decades to find the answer. Though computers can't explain cosmic intricacies yet, they can indeed be employed to commit white-collar crimes. With the constant reduction in human involvement, thanks to the ever-developing technology and our constant dependence on the same, artificial intelligence has become relevant in the context of competition law.

Humans today have almost developed a symbiotic relationship with artificial intelligence [hereinafter "AI"]. "*Alexa, update my shopping list", "Hey Google, how's the weather going to be today", "Siri call 911"*, these snippets show how engulfed we are by technology. Additionally, with governments promoting digital economy and online shopping, we are aiming towards a world where people from all spheres are connected to one another through a global network of data.

From an airline ticket booking to planning a trip online, prices are increasingly being decided by computers instead of human beings. Algorithms are determining the customers' demand and which offer is best suited for a company as compared to its competitors. Evidently, algorithms have greater accuracy and can adapt better to market fluctuations because of big data analytics. For example, radio taxi services like Ola and Uber use customised algorithms for setting prices on the basis of a fixed distance travelled by the consumer. We pay online in

[1] *VIII NLSIR Symposium on Competition Law*, 27 NLSIU L. REV. 197 (2015).

a jiffy through UPI friendly apps like PhonePe, Paytm and Google Pay which offer attractive cash backs and coupons.

With decreasing human involvement, there is increased transparency, decreased tyranny of sellers, discount for consumers, and exponential growth in the speed of transactions. Often brick-and-mortar retailers have complained of the online portals' conduct of predatory pricing and market distortion by way of heavy discounts. Despite the fact that these expansions increase clarity for customers in the market and induce competitive pressure to benefit them, the effect could be an enhanced risk of market distortion as a consequence of algorithms involved in interdependent pricing.[2]

Let's take the instance of newly launched technologies. The latest models of smartphones, tablets, smartwatches, etcetera account for around 40% of total sales in our country and are mostly sold through e-commerce platforms. Contrarily, in the context of electronic/electrical appliances and lifestyle related products including clothes and shoes, the online platform acts as a supplementary channel and shop hopping is a more convenient mode of sale.[3]

However, before proceeding further, a dichotomy needs to be established for a better understanding of contemporary antitrust concerns. Either humans concert and indulge in anti-competitive activities by employing algorithms or the AI itself leads to such activities, without human interference. This can be understood by way of these illustrations:

A few years ago, a book titled '*Making of a Fly*' came into the limelight for notorious reasons. The $23 book had been put up on Amazon marketplace by two vendors, one of whom had set the pricing algorithm in such a way that his price for the book would cost 27%

[2] Inge Graef, *Algorithmic price fixing under EU competition law: how to crack robot cartels?*, CITIP BLOG (May 10, 2016), *available at* https://www.law.kuleuven.be/citip/blog/algorithmic-price-fixing-under-eu-competition-law-how-to-crack-robot-cartels/.

[3] COMPETITION COMMISSION OF INDIA, MARKET STUDY ON E-COMMERCE IN INDIA: KEY FINDINGS AND OBSERVATIONS (2020).

more than the other seller. Finally, the price shot up to $23 million, when someone finally noticed it and manually reduced it to its appropriate price.[4]

In a more recent case involving Google Shopping, the super-platform was fined by the European Union [hereinafter "EU"] for indulging in anti-competitive activities by manipulating internet traffic and promoting sellers on its platform as against other sellers for same or similar products.[5] Google defended itself (unsuccessfully) saying that the algorithm works based on the consumer searches and hits and adapts itself accordingly. Since there is lack of human action, it claimed that the platform can't be held liable. Nevertheless, EU found Google guilty of abusing its dominant position.

While the first illustration is a textbook example of humans using algorithms to benefit their business, leading to antitrust concerns, the second illustration shows how technology itself may result in a breach.

The first kind of crime can be easily established and penalised due to the availability of "meeting of minds"; it is the second type that we need to be wary about.

Machines can become better oligopolists than humans. They have greater precision and lesser reaction time. Machines can study as well as keep better tabs on price changes and market conditions and hence, act accordingly.[6] With greater abilities, machines can certainly be better oligopolists and be equally well at causing antitrust concerns.

The Evolution of Competition Law in India

The first regime- Monopolies Trade and Restrictive Practices Act, 1969

[4] Olivia Solon, *How A Book About Flies Came To Be Priced $24 Million on Amazon*, WIRED (Apr. 24, 2011, 3:35 PM), *available at* https://www.wired.com/2011/04/amazon-flies-24-million/.
[5] European Commission Press Release IP/17/1784, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-1784_en.htm.
[6] Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016).

India's first legislation pertaining to competition law was the Monopolies Trade and Restrictive Practices Act, 1969[7]. As enshrined in the DPSPs, the MRTP Act was primarily based on the socio-economic philosophy. Several amendments were made to the MRTP Act in 1974, 1980, 1982, 1984, 1988 and 1991. Since then, the nature of business, economy, and market chain has evolved in India and hence, a modern legislation was needed to replace the obsolete act. A need for curbing monopolies and enhancing competition in the market was felt. The Indian market was exposed to the world calling for a change in its economic policies.

The Change- Competition Act, 2002

The Competition Act, 2002,[8] [hereinafter "the Act"] came into existence after the Raghavan Committee Report brought the interface between IPR and competition policy and introduced provisions that hoped to give teeth to the regulator to analyze and settle upon anti-competitive practices that emerge from agreements relating to grant of IPR.

The thought of governing artificial intelligence with the help of competition law is not a new concept. Mergers like Yahoo-Verizon, Microsoft-LinkedIn, and Facebook-WhatsApp have reiterated the need for competition laws to govern data collection and processing practices. European Courts have stressed upon the impact of combination of databases on competition and have ruled upon the fact that in the context of merger control, data is an important question in case an undertaking achieves a dominant position through a merger.

Therefore, it wouldn't be incorrect to say that the biggest development in competition law has arrived, following the brick-and-mortar sellers' bid to protect their existence against the rise of online marketplaces like Flipkart and Amazon.

The Mega merger: Walmart and Flipkart

[7] The Monopolies Trade and Restrictive Practices Act, 1969, No.54, Acts of Parliament, 1969 (India).
[8] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

When online shopping made its debut in India in 2000, it didn't have many takers due to people's traditional marketing habits. Though online marketing had a slow beginning, it has become essential for people now, mostly due to the deep discount model of E-commerce giants such as Flipkart and Amazon. The ease of buying goods at the comfort of one's home, tempting discounts and attractive cashbacks, safety of online transactions, etcetera ensures that it's hard to escape the charms of the digital economy.

Most of the stakeholders of the digital economy like consumers, entrepreneurs, logistics companies, retailers, and manufacturers have been riding the prosperity wave; however, there is one group which had to bear the brunt of this change: the brick-and-mortar-sellers.

E-commerce has seen remarkable growth in India after the introduction of press note of 2000 by the Indian Government which permits 100% FDI in B2B (business-to-business) E-commerce activities. However, the government authorities received numerous complaints regarding certain marketplace platforms violating the rules, impacting prices and indirectly indulging in inventory-based model, which is prohibited. The government ergo issued another Press Note (December 26, 2018) to institute certain changes to the FDI Policy in the E-commerce arena. This had an extensive impact on E-commerce chains operating in India, in turn shaping our laws to acclimatize to a neo-digital economy.[9]

According to the report, the shift of business from the physical to the digital mode is taking place at an expeditious rate. A few other small-scale industries' owners have expressed their happiness because the digital platform has helped them widen the ambit of their business.

However, the issue arises when the online platform acts as a sweet poison, i.e. when these platforms serve as the marketplace and the competitor on that marketplace. In this way, they

[9] DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, REVIEW OF THE POLICY ON FOREIGN DIRECT INVESMENT (FDI) IN E-COMMERCE (2018), *available at* https://dipp.gov.in/sites/default/files/pn2_2018.pdf

have the power to leverage their control over the platform in "favour of their own/preferred vendors or private label products" to the disadvantage of other competitors/service providers on the platform. The platforms can use a plethora of processes to fulfil their motive like accessing transaction data, ranking of search results, etc. The digital interface cunningly gathers data like pricing, sold quantities, demand, etcetera related to each item, seller and location. Consumers are benefitted as a result of online recommendations regarding products.[10]

The exercise for change in the FDI norms came into effect following the global giant Walmart acquiring 77% shares of Flipkart post a $16 billion deal.[11] The deal provided Walmart a desirable entry into the Indian market and raised an alarm amongst several small retailers which were already struggling to make their existence felt. Therefore, the All India Online Vendors Association, a lobby group representing several such traders, reached out to the Competition Commission of India [hereinafter "CCI] alleging a contravention of §4 of the Act (abuse of dominant position)[12] by Flipkart and Amazon. However, the CCI found the E-commerce companies not being in contravention of the Competition Act. Yet the mega-acquisition by Walmart and fear of small traders of being driven out of the market propelled the Government into passing the new regulation last year via DIPP press note 2.[13]

The new draft strategy for the blossoming e-commerce arena focuses significantly on data localization, improved security protocols and measures to combat the sale of fake items. It also aims for the creation of a "lawful and innovative structure" that can help force

[10] COMPETITION COMMISSION OF INDIA, MARKET STUDY ON E-COMMERCE IN INDIA: KEY FINDINGS AND OBSERVATIONS (2020).
[11] *Walmart-Flipkart Group Investor Presentation*, WALMART, *available at* https://cdn.corporate.walmart.com/5d/11/4968b4d745159149c8e8b0295a3f/walmart-flipkart-ir-presentation.pdf (last visited on July 8, 2019, 5:00 PM).
[12] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[13] DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, REVIEW OF THE POLICY ON FOREIGN DIRECT INVESMENT (FDI) IN E-COMMERCE (2018), *available at* https://dipp.gov.in/sites/default/files/pn2_2018.pdf

limitations on the cross-border flow of information generated by users; moves that may influence internet business stages as well as online networking firms, like Alphabet Inc's Google and opponent Facebook Inc. The new law provides that 100% FDI under the automatic route is permitted only for marketplace model of E-commerce companies, while no FDI for companies with inventory-based models or for organizations with stock-based models is permitted. The new law has also banned these organizations from selling items solely on their online websites, and from offering deep discounts. Consequently, all major online entities currently need to rebuild their business patterns to suit all the outsider merchants where they have no stake. This will cause a huge dip in discounts as costs of the actual item and additional delivery charges may also apply. Similarly, platforms will not have exclusive selling rights; consequently, providing manufacturers the opportunity to sell their items on all commercial platforms.

Any use of antitrust or competition laws to limit data-exploitative practices needs to meet the edge of constructing capacity for a firm to derive market from its ability to sustain datasets which are inaccessible to its competitors. Therefore, there is a need for a greater discussion on data as a source of market power in digital as well as non-digital markets and how this can be used to resist data monopolies, specifically with respect to government backed monopolies for identity verification and transactions in India.

Bird's eye view: Competition Law in India & Abroad

Competition law and its scope, application, and implementation vary widely across various jurisdictions. "Even within a particular national system, the goals of competition law may evolve and transmogrify, often depending upon the state of industrialisation of the economy,

the strength of the political democracy, the power of the judiciary, and the bureaucrats, and the exposure of the domestic firms to global competition."[14]

The Competition Act[15] came into the legislation books in 2003, following the Monopolies Restrictive Trade Practices Act, 1969[16]. Several regulations and concepts such as predatory pricing, existing in the previous act had been borrowed following a makeover. Further, the new Act introduced some new concepts and rules but forgot to define the realm and reach of such rules. Cumulatively, several ambiguities cropped up which had to be subsequently dealt with by the courts.

The Sherman Act[17]was enacted in 1870. The US by recruiting financial experts to the FTC Bureau of Competition and Antitrust Division (DOJ), showed its efficiency in the process of developing and applying competition law. The EU Competition framework originated from the Treaty on the Functioning of the European Union[18]. The Treaty caters to a wide spectrum of subjects, but Articles 101 and 102 are the provisions relevant to competition law. The Treaty doesn't specify any international structure for the implementation of antitrust law. The same was provided by the European Council which ensures compliance of the Treaty provisions at the behest of the member states of the EU.

The competition law structure in India is similar to both the Sherman Act and the Treaty with the working of the CCI being modelled on the relevant provisions of the Treaty and the powers of the EC. However, the Indian black letter and competition regime differs on the grounds of level and standard of implementation.

[14] Eleanor M. Fox, *Anti-Trust Law on Global Scale: Race up, down and sideways*, 75 N.Y.U. L. REV. 1781, 1783 (2000).
[15] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[16] The Monopolies Trade and Restrictive Practices Act, 1969, No.54, Acts of Parliament, 1969 (India).
[17] Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2020).
[18] Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

§3(1)[19] of the Act prohibits agreements having an appreciable adverse effect on competition (AAEC) in India. Similar provisions exist in §5(1) of the Sherman Act[20] and Article 101 of the Treaty[21]. The phrase AAEC has not been defined in the Competition Act, however §19(3) provides a clear indication as to what can be considered as AAEC[22]. The legislative intent is understood vide the articulation of §19, i.e. the CCI has to undertake a comprehensive evaluation of anti-competitive as well as pro-competitive justifications of an agreement. This comprehensive perspective is similar to the rule of reason analysis found in competition jurisprudence of the US and the EU.[23]§4(1), Article 102 and §2 of the Competition Act, the Treaty, and the Sherman Act respectively talk of preventing the abuse of dominant position. Similar to its contemporaries, determination of relevant product and geographic market is a pre-requisite and the starting point of investigation under Indian law.

Conventional competition law ideas like 'relevant market', 'market power', 'abuse of dominant position', 'predatory pricing', etcetera are interpretational issues in the current setting of digital markets across global regimes. For example, the customary instruments of market determination and setting up abuse of market dominance may not be relevant for digital markets, particularly in situations when the organizations give zero-value services to purchasers in exchange of data.[24] Yet such behemoths emerge as market dealers giving rise to 'data-opolies'.

[19] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[20] Sherman Antitrust Act of 1890, 15 U.S.C. §5(1) (2020).
[21] TFEU art. 101.
[22] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §19(3).
[23]Payel Chatterjee & Shashank Gautam, *Competition In India Vs USA And EU*, LEGALERA, *available at* http://www.nishithdesai.com/fileadmin/user_upload/pdfs/New_Competition_Law_in_India_vs_USA_and_EU.pdf.
[24] Vedika Mittal Kumar, Shehnaz Ahmed, Param Pandya, Joyjayanti Chatterjee & Ritwika Sharma, SYSTEMATIZING FAIRPLAY: KEY ISSUES IN THE INDIAN COMPETITION LAW REGIME, SYSTEMATIZING FAIRPLAY: KEY ISSUES IN THE INDIAN COMPETITION LAW REGIME, VIDHI CENTRE FOR LEGAL POLICY, *available at* https://vidhilegalpolicy.in/wp-content/uploads/2019/05/SystematizingFairplay-KeyIssuesintheIndianCompetitionLawRegimeNovember2017.pdf

Moreover, the Indian competition regime is a green field of competition laws, when compared with other jurisdictions, and clearly falls short on certain parameters.

Further, the variables at play in the working of an online domain empower these companies to operate in a manner which may have anti-competitive effects. In such regard, one may allude to the ongoing choice of the EC to fine Google €2.42 billion for disregarding EU antitrust rules by abusing its dominance as a search engine. Additionally, similar claims relating to abuse of dominance by Google, by taking part in practices like search inclination, search control, web crawling, etcetera to benefit its own entities (like YouTube, Google Maps, etc.), have been raised before the CCI.[25]

These examples merely form the tip of the iceberg. Is the Indian Competition law regime ready for such exponentially challenging issues? While the developed jurisdictions like the US, the EU and Canada have already recognised antitrust concerns of the digital economy, India seems to be struggling. But all hope is not lost, with cases such as *Samir Agrawal v ANI Technologies*,[26] the CCI has started assessing cases involving issues such as algorithmic collusion and robot cartels in India. Though Indian law may still be lacking, it can catch up with its contemporaries. In fact, countries like the UK and Germany too are revamping and fine tuning their laws to cater to the digital market.

The Elephant in the Room

Technological improvements empower corporations in the digital markets to gather data and exploit personal information. While collecting such information and preparing for business purposes has traditionally been an issue of privacy law and/or consumer protection laws, ongoing prominent mergers and acquisitions (a valid example being the Facebook/WhatsApp

[25] European Commission Press Release IP/17/1784, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-1784_en.htm.
[26] Samir Agrawal v ANI Technologies, (2018) SCC OnLine CCI 86 (India).

merger) in the digital market have brought up issues of a probable competition concern of taking over huge datasets. In such a merger, it may so happen that neither of the parties qualify under the conventional 'assets' and 'turnover' limits, however they might be in a position to distort competition owing to possession of a large amount of data.

Artificial Intelligence – the mischief monger

The improved capacity of computers to process huge amounts of information at other-worldly speeds has certainly helped achieve Herculean feats but this can't bypass the fact that the same are in fact enabling in and expanding tacit collusion. With time and experience, AI will be preferred to develop significantly complex calculations and algorithms. This gives us an ideal picture of virtual competition from the digital perspective.[27]

With AI and Big Data being the norm, firms, industries, and, competitors in the market are adopting the big guns. These changes are bringing up issues with regard to the extent of regulation of the implementation of competition law. The prime question- 'Whether this is a competition issue'?- has turned out to be a regular even with new business techniques, new types of collaboration with customers and the amassing of enormous information. To be sure, new market substances and business strategies bring up issues with regard to the ideal utilization of competition law, its adequacy, and more comprehensively, its objectives.[28]

The question of utmost pertinence therefore is- 'Can competition law also govern the utilization of comparative algorithms to distort competition without the proof of any unlawful agreement'? Indian competition laws need a human element (which can be a body corporate), but don't allude to AI, data analytics and the like. Therefore, if there's no entity at the other end of the legal system, how can the burden of such liabilities be discharged?

[27] Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition*, 7 J. EUR. COMP. L. PRAC. 585 (2016).
[28] Ariel Ezrachi & Agustin Reyna, *Enforcing European Competition Law in a Global Digital Economy*, BUSINESS LAW BLOG (May 1, 2019), *available at* https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/enforcing-european-competition-law-global-digital-economy.

Such cases come under the tag of 'unfair trade practice'. Concerning this, 'anticompetitive intent' is a strong ground for setting up of a cartel like development, an enactment to counter excessive transparency can do its bit when the rivals in the market misuse this transparency. Hence, the vital test before the experts in India is to include under its ambit such technologists who design machines to singularly bolster tacit connivance. The Competition law authorities in India need implementation devices to conduct such practices.

The Algorithms have landed!

Another challenge is posed by the algorithm-driven cartels (such as hub-and-spokes model or the messenger model) wherein firms are able to indulge in tacit collusion and other anticompetitive activities since it is anything but difficult to set up the presence of an agreement without physically indulging in one.

Conscious parallelism and AI make it difficult to establish the existence of any kind of human agreement. It is therefore appropriate for competition regulators to investigate for anti-competitive intent in such circumstances. Regardless, it is problematic if there is finished separation of human component with algorithms; wherein even essential decisions are taken by algorithms. With no anticompetitive agreement or human interference, can there be any implication of competition law on AI?

Someone once said that big data is not really a thing and compared it to a doctrinal cheese soufflé while dismissing the possibility that algorithms and technology as a whole would ever be a competition concern.[29] But as evident as it can be, the rise of algorithms aren't mere conjectures any more.

First war against Robot- cartels: Samir Agarwal v ANI Technologies

[29] Thibault Schrepel, *Here's why algorithms are NOT (really) a thing*, CONCURRENTIALISTE (May 15, 2017), *available at* https://leconcurrentialiste.com/2017/05/15/algorithms-based-practices-antitrust/.

In *Samir Agarwal v ANI Technologies*,[30] the CCI had passed an order under §26(2) of the Act[31] declaring that the taxi aggregators Ola and Uber didn't indulge in collusion or cartelisation by way of using the same algorithm to determine the cab fare. One of the major issues was if there was a case of hub-and-spoke cartelisation amongst the taxi aggregators and the cab drivers. It was contended that the interaction amongst the drivers and the application while fixing fare was a cooperation orchestrated by Ola and Uber, which would fall within the ambit of "concerted practice" under §3(3)(a)[32] read with §3(1)[33] of the Act.

The CCI observed that the hub-and-spoke arrangement referred to the facilitation of exchange of commercially sensitive information between competitors by way of a third party to indulge in cartelistic behaviour. Thus, to establish a hub-and-spoke conspiracy it's essential to prove the existence of a third-party platform to serve as a hub amongst the drivers who served as the spokes.

Since the algorithmically determined prices by Ola and Uber didn't involve any agreement amongst the drivers to coordinate the taxi fare, the CCI found Ola and Uber to not have violated the Act. The estimation of fare was based on a set of variables and large datasets; hence this situation cannot be equated with the traditionally understood meaning of a hub-and-spokes arrangement.

However, this understanding of algorithms and algorithmic collusion may not be the most accurate. It has been well established that algorithms can be used to limit competition through subtle means.[34] It is equally possible that algorithms employed for profit maximisation and increased efficiency can very well lead to anti-competitive behaviour. A traditional hub-and-

[30] Samir Agrawal v ANI Technologies, (2018) SCC OnLine CCI 86 (India).
[31] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §26(2).
[32] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §3(3)(a).
[33] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §3(1).
[34] Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 2017 U. ILL. L. REV., 1775 (2017), *available at* https://illinoislawreview.org/wp-content/uploads/2017/10/Ezrachi-Stucke.pdf.

spoke cartel arrangement involves exchange of strategic information between horizontal competitors (spokes) by way of a common contractual partner (hub) active at a different level of the distribution chain that contributes as a stabilizing agent in the cartel.[35] But in an online setup, a cartel would arise when various competitors engage the same algorithm to determine the price.[36] While a single vertical agreement doesn't give rise to competition concerns but multiple agreements can give rise to a classical hub-and-spoke arrangement whereby the developer, i.e. the hub can orchestrate an industry-wide collusion leading to increased prices.[37] The use of a common intermediary to determine the prices increases the possibility of the existence of a hub-and-spoke structure.[38] For this structure to exist it's necessary that each spoke provides the hub data and pricing authority, knowing that its rivals will do the same.[39] Using data from rivals to determine price shows the existence of practical cooperation amongst the competitors, thereby establishing a hub-and-spokes cartel.[40]

Ola and Uber consider themselves to be technology aggregators providing a link between the customers and taxi drivers. Even the CCI refused to acknowledge these aggregators as intermediaries or the hub that connects the drivers. Since the drivers are separate entities entering into an agreement with a common intermediary for the same cause, i.e. fixing of cab fares, it indeed gives rise to a hub-and-spokes structure.[41]

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[35] Iga Małobęcka, *Hub-and-spoke cartel - how to assess horizontal collusion in disguise*, 8 THE CRITIQUE OF L. 64 (2016), *available at* http://www.krytykaprawa.pl/api/files/view/571208.pdf.

[36] Maurice E. Stucke & Ariel Ezrachi, *Two Artificial Neural Networks Meet in an Online Hub and Change the Future (of Competition, Market Dynamics and Society)*, CPI (Apr. 2, 2017), *available at* https://www.competitionpolicyinternational.com/two-artificial-neural-networks-meet-in-an-online-hub-and-change-the-future-of-competition-market-dynamics-and-society/.

[37] *Id.*

[38] Peter Picht & Benedikt Freund, *Competition (Law) in the Era of Algorithms*, 39 EUR. COMP. L. REV. 403 (2018).

[39] Diego Hernandez, *Drawing the boundaries between Hub-and-Spoke Cartels and Vertical Agreements: Lessons from the United Kingdom and the United States to Chilean Competition Law*, 41 WORLD COMP. L. ECO. REV. 275 (2018).

[40] Jan Blockx, *Antitrust in Digital Markets in the EU: Policing Price Bots*, RADBOUD ECONOMIC LAW CONFERENCE (June 9, 2017).

[41] Julian Nowag, *The UBER-Cartel? UBER between Labour and Competition Law*, 3 LUND STUD. E.U. L. REV. 13, 14 (2016).

The ambit of the word 'agreement' is very wide under the scheme of the Act and includes both understanding and action-in-concert. The drivers using a common agent to fix prices knowing that the rest of the drivers would be consenting to the same can be considered anti-competitive in reference to §3(3)(a)[42]. The CCI by declining to acknowledge the aggregators model and failing to apply the principles of competition law to these disruptive innovators has given leeway to algorithmic antitrust activities. Existing literature aptly describes that hub-and-spokes model can apply to digital economy which uses algorithms to determine prices. Ignoring literature and applying traditional concepts to new age problems of the neo-economy serves as bad precedent.[43]

While the case is now due to be heard in the NCLAT, we have to await to see whether the law would evolve or even the NCLAT ends up taking the same approach as the CCI. We don't need a conservative approach if we intend the law to catch up with the problems at hand. But here arises another moot point – 'is NCLAT, with its current resources capable of dealing with a technical issue like this'?

The Conundrum- dissolution of COMPAT

Following the NCLAT-COMPAT merger, the Competition Appellate Tribunal was diluted and all its functionalities passed over to the NCLAT and all the cases to be heard before COMPAT were heard afresh before the NCLAT. COMPAT was a technical tribunal with experts as panellists who were adept at economics and competition law which is not necessarily the case with NCLAT.

[42] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §3(3)(a).
[43] Basu Chandola, *Algorithms and Collusion: Has the CCI got it wrong?*, KLUWER COMPETITION LAW BLOG (Feb. 28, 2019), *available at* http://competitionlawblog.kluwercompetitionlaw.com/2019/02/28/algorithms-and-collusion-has-the-cci-got-it-wrong/.

NCLAT was formed under the Companies Act, 2013[44] for penalising and determining the liabilities of companies. According to the 272nd Law Commission Report[45] appointments to special tribunals should comprise people of proven ability, integrity and standing having special knowledge and professional experience or expertise of not less than 15 years in the particular field. Evidently, this is not the case since the profiles of present NCLAT members indicate that there is no technical member who has prior experience in the domain of competition law and economics.[46]

With this merger the burden has only burgeoned and the purpose of this merger, i.e. cutting costs and increasing efficiency, falls null and void.

The Competition Law Review Committee constituted by the Ministry of Corporate Affairs, India has submitted a report consisting of 220 pages to the Ministry suggesting changes to the functioning of the CCI (Competition Commission of India) and changes in the Competition Act, 2002. The report suggests that NCLAT (National Company Law Appellate Tribunal) which hears appeals related to corporate bodies and from the CCI, should have a separate bench for appeals regarding matters of Competition Law. Competition law, as a subject is highly esoteric and complex and requires competence in matters regarding corporate biggies.[47]

What can be done?

[44] The Companies Act, No.18, 2013, Acts of Parliament, 2013 (India).
[45] Abhimanyu Singh Yadav & Anubha Singhal, *Rationalisation of Competition Appeals: A Way Forward?*, INDIACORPLAW, *available at* https://indiacorplaw.in/2018/03/rationalisation-competition-appeals-way-forward.html.
[46] *Id.*
Maurice E. Stucke & Ariel Ezrachi, TWO ARTIFICIAL NEURAL NETWORKS MEET IN AN ONLINE HUB AND CHANGE THE FUTURE (OF COMPETITION, MARKET DYNAMICS AND SOCIETY)(July 2, 2019, 5:05 PM),https://www.competitionpolicyinternational.com/two-artificial-neural-networks-meet-in-an-online-hub-and-change-the-future-of-competition-market-dynamics-and-society/. (Not been marked as a footnote in the mainbody) (confer with the author and mark the same as given under footnote no. 36)
[47] Nikhil Sud, India's Competition Law Report Is A Mixed Bag For Investment And Innovation, MEDIANAMA (Aug. 27, 2019), *available at* https://www.medianama.com/2019/08/223-india-competition-law-report/.

Competition law and its interpretation is path dependant and deeply rooted in ideology.[48] It forms an integral part of a polity's legal, political and social fabric and cannot be pursued in isolation as an end in itself.[49] What may solve the problems of one society may not be equally fruitful for another. It's easy to analyse and compare one country's law to that of another and point out the lacunae. However, the impending quest here is to determine as to what should be done to address the "elephant in the room".

Competition law is an effective tool, if it is kept sharp at all times. It can effectively address one of the hallmarks of online dystopia- stealth and data theft-a feature that pertains to the growing means for targeting unsuspecting users, harvesting their data, and using it to target and manipulate user behaviour. For instance, Facebook's business model has enabled data harvesting companies to gain access and use data of thousands of Facebook users worldwide. This activity may also capture wider considerations like fairness, plurality, democratic values and freedoms- the manipulation of the market for ideas and a threat to individualism being the notable aspects of the modern digital landscape.

With such a versatile instrument, focus naturally shifts to the measure of intervention, chilling competition, leading to optimal results. Enforcement should be measured, proportionate and effective. Similarly, competition law cannot be the panacea for every policy concern. The limiting principles which safeguard competition environment and narrow economic perspectives, ignore distribution of wealth and disregard the normative aspects of Indian law, may provide valuable insight but these cannot be mistaken to the end-all and be-all on which the Indian competition law can depend on.

[48]Ariel Ezrachi & Agustin Reyna, *Enforcing European Competition Law in a Global Digital Economy*, BUSINESS LAW BLOG (May 1, 2019), *available at* https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/enforcing-european-competition-law-global-digital-economy.

[49] *XXIInd Report on Competition Policy*, COMP. REP. EC (1992), 13-19, *available at* https://op.europa.eu/en/publication-detail/-/publication/d406e5bd-53a6-4642-b7f9-00c2abb4d01b/language-en.

Some valuable and innovative inputs can however be borrowed from the EU regime and US competition jurisprudence, since the Indian competition machinery is based on these.

Broader application of economic principles

There is a need to inch away from price-centric tools. Particularly, the narrow economic approach fails to encompass the dynamic aspects of consumers and their interaction with the digital economy. The effects of digitisation on many aspects of our society and the nature of human interaction imply that it's not always appropriate to think of consumers as economic units or digital firms as efficient actors, immune to enforcement oversight. In line with the growing effects of digital economy, there is room for greater emphasis on consumer and privacy protection and behavioural sciences.

Rise of the online giants

Next concern is regarding rising market power. In the digital economy, market characteristics, network effects, gatekeepers, and data monopolies may give rise to market power below traditional levels of dominance. Firms may benefit from significant power due to direct or third-party data tracking and harvesting while not triggering traditional antitrust scrutiny.[50] This may enable key data holders to engage in exploitative behaviour, below the "antitrust radar". The implications of refusal to supply, possible compulsory data sharing orders, as implemented by the government following the DIPP press note are helping prevent concentration in the hands of few.

Taking care of the consumers

The appropriate nature and scope of consumer-facing remedies needs to be determined. An emerging trend is the creation of ex-ante measures in the form of *erga-omnes* obligations

[50]Ariel Ezrachi & Agustin Reyna, *Enforcing European Competition Law in a Global Digital Economy*, BUSINESS LAW BLOG (May 1, 2019), *available at* https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/enforcing-european-competition-law-global-digital-economy.

complementing case-by-case approach. Legislative solution is our best shot in the current system where harmful behaviour is systemic and common among several undertakings and where industry interests are not aligned with consumer interests. It would be worthwhile to note the opinion of Nobel laureate Prof. Jean Tirole, i.e. the new challenges for regulators in the digital economy noting that "public and State intervention is unavoidable" in the form of combination of antitrust enforcement and regulation.[51]

Evidently, competition policy cannot effectively provide all of the answers immediately, it needs time to evolve. But it can certainly address some of the problems we face today, or at least help define them, steadily and comprehensively. The legislature can draw on India's own cyber and economic laws or get inspiration from the mature regulations from all around the world on data protection and privacy regulations. However, such an approach will unquestionably need time to set in and be fruitful. Until the time we receive the ultimate revamp that we need and deserve, certain quick fixes can be made.

Survival of the fittest: Incorporate, amend, adapt

Taking cues from writings of scholars and developed competition jurisprudences, we can work towards expanding the existing laws to include concepts like algorithmic collusion, tacit collusion and robot cartels. The legislature had tried to bring in an amendment in 2013 wherein it wanted to include collective dominance in the realm of single dominance. However, the bill never saw the light of the day and died its own death. Therefore, we need to be diligent and prudent to switch up our laws and not be hanging on to a conservative approach. While a major overhaul is not advisable or practicable, we certainly need to bring in requisite amendments so that we can try to fill in the burgeoning gap to a certain extent.

[51]Ariel Ezrachi & Agustin Reyna, *Enforcing European Competition Law in a Global Digital Economy*, BUSINESS LAW BLOG (May 1, 2019), *available at* https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/enforcing-european-competition-law-global-digital-economy.

The e-commerce sector should

- Promote transparency to create incentive for competition and to reduce information asymmetry.
- Ensure the sustainability of business relationships between all stakeholders.

The economics of these markets work in a either "take it all" or "go home" way, where the winner takes all or most, eliminating competitors which further deters entry into the market. Strong network effects empower these platforms to exclude and marginalise rivals, and further strengthen these effects that may be difficult to dilute. Hence, any potentially anti-competitive unilateral conduct of platforms or platforms' vertical arrangements with sellers/service providers should receive enforcement attention.

These e-commerce platforms should be made to adopt self-regulatory measures as indicated below:

1. Search ranking

- The main criteria include the probability to influence sorting against any direct or indirect allowances paid by businessmen, setting out an elaboration of those probabilities and the consequences of such allowances on sorting.
- However, these attributes should not require revelation of algorithms or any such detail that may facilitate exploitation of search results by third parties.

2. Collection, use and sharing of data

An explicit policy needs to be laid down with respect to data that is accumulated on the online platform, usage of the data by the platform and the potential and actual sharing of such data with third parties or related entities.

3. User review and rating mechanism

- Explicitness is needed regarding user reviews and rating processes for maintaining information symmetry, which is a must for fair competition.
- This clarity is necessary to maintain in publishing and sharing user ratings and reviews with the businessmen. Fraudulent reviews and ratings can be prevented by monitoring and publishing reviews of verified purchasers.

4. Revision in contract terms

Business users need to be notified regarding changes in terms and conditions. These changes should not be implemented before the expiry of the desired notice period, which is reasonable and proportionate to the nature and extent of the predictable changes and to their results for the business user concerned.

5. Discount policy

The discount policies should be clear, including the basis of providing discounts funded by the e-retailers for various items/suppliers and the implications of participation in such discount policies.

Ultimately it is for us – consumers, businesses, enforcers and policy makers – to work together and design a regulatory and enforcement landscape in which businesses flourish, while protecting consumer welfare, where business interests are aligned with consumer interests and technology helps protect the economy instead of providing leeway to online behemoths to corrupt competition and crush the brick-and-mortar sellers.