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NETWORK EFFECTS AND DOMINANCE: THE EVOLVING APPROACH OF THE CCI

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ABSTRACT

*The rise of the internet and mobile phones led to the development of platform markets which now play a predominant role in the sale of goods and services. Originally starting as simple business-to-consumer platforms, many platforms have morphed into vast and complex arrays of businesses, intermediaries and customers – commonly known as platform markets. The said markets are characterised by the presence of direct and indirect network effects. Owing to the said network effects, the structure of many digital markets is not conducive to long term competition and they are prone to becoming winner-take-all markets. Many competition regulators including the Competition Commission of India ["**CCI**"] have often grappled with antitrust issues in platform markets. While the CCI had originally adopted a non-interventionist stance, its approach has undergone significant change in recent times, and the CCI is currently investigating multiple instances of abuse in the digital sector. Similar investigations have also been launched globally by various other regulators. There are growing voices that advocate that many platform markets have grown too large and are no longer conducive to a free and fair market. Accordingly, remedial measures such as ex-ante regulations and stronger merger reviews are proposed. However, any intervention in the market must be circumspect lest corrective measures end up causing more harm than they seek to prevent.*

Keywords: Network Effects, Digital Markets, Competition Law.

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INTRODUCTION

Despite being invented in the 1960s, the internet revolution truly took hold in the mid-1990s. With the launch of the Netscape browser and cheap affordable internet, the average household in the developed world could finally access the internet from the comfort of their homes. Since then, the internet has had a tremendous impact in shaping popular culture and the way we do business. E-mails and instant messaging revolutionised the way in which people interacted with one another. Later, discussion forums, social media websites and blogs began acting as platforms where people with similar interests could converge and share ideas.

While the use of the Internet was originally geared more towards professional and personal communications, over time, with the advent of online shopping websites, the internet also became a medium for bringing businesses and customers in direct contact with one other. The rise of smartphones further quickened this development and gave rise to platform markets. Nowadays, the internet increasingly plays a predominant role in the sale of goods and services – the ability to uniquely tailor user experience and advertisements is seen as a strong tool in retaining customers and generating repeat business. Digital marketplaces have completely changed the way in which business is conducted and forming appropriate strategies becomes a key component in ensuring the success of any product or service.

The basic core function of a marketplace is to synchronise demand and supply and ensure smooth flow of information between users.[1] Therefore, at the time of its genesis, it was presumed that the fall of distance barriers between consumers and retailers would bring markets closer to a perfect competition paradigm.[2] Irrelevant searching costs and consumers' ability to compare prices was seen as a catalyst to lower and more uniform prices and increased competition.

DEVELOPMENT AND FEATURES OF DIGITAL MARKETS

However, the development of the internet and its associated marketplaces was not along expected lines. Originally starting as simple business-to-consumer platforms, many digital platforms morphed into vast and complex arrays of businesses, intermediaries and customers – commonly known as platform markets. Characterised commonly by the presence of direct

[1] J. Yannis Bakos, 'Reducing Buyer Search Costs: Implications for Electronic Marketplaces' (1997) 43 (12) INFORMS, 1676.

[2] The Economist, 'Frictions in cyberspace' (20 May 1999) <https://www.economist.com/finance-and-economics/1999/11/18/frictions-in-cyberspace> accessed 23 September 2021.

and indirect network effects, platforms markets are two-sided markets which offer different products and services on each side of the market.[3] As traditional methods of antitrust analysis focus primarily upon single-sided markets, understanding and analysing these multi-faceted markets has proven to be challenging.[4]

At a basic level, digital markets evolve at a fast pace with pressure on market incumbents from new entrants/innovators to continue innovating or risk losing out due to obsolescence of their products/services.[5] These market pressures result in increased expenditure towards research and forces firms to continuously improve their products. However, in the absence of such pressures, incumbents lack the incentive to continuously invest and innovate.

The absence of pressure to innovate is often linked with a lack of competition. The importance of competition in digital markets cannot be overstated. Its impact goes beyond mere innovation and utility. As many platforms in digital markets do not charge users directly for their services, these platforms often compete on quality of service. Lack of competition on any such platform then has a direct bearing on the quality of the services offered.[6] There is a growing body of evidence that there exists a direct correlation between lack of competition and degradation of service.[7]

It has been an observable trend that the structure of many digital markets is not conducive to long term competition and that they are prone to become winner-take-all markets.[8] This is primarily on account of unique features including network effects, switching costs, economies of scale and scope, advantages based on access to data, etc. Consequently, many digital markets

[3] Ralf Dewenter, Ulrich Heimeshoff and Franziska Löw, 'Market Definition of Platform Markets' (2017) ECONSTOR <https://www.econstor.eu/bitstream/10419/184879/1/882821601.pdf> accessed 23 September 2021.

[4] ibid.

[5] Giulio Federico, Fiona Scott Morton & Carl Shapiro, 'Antitrust and Innovation: Welcoming and Protecting Disruption' in Josh Lerner and Scott Stern (eds), *Innovation Policy and The Economy* (Vol. 20).

[6] OECD, 'Quality considerations in digital zero-price markets' (28 November 2018) <https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf> accessed 23 September 2021.

[7] ibid.

[8] Patrick Barwise, 'Why tech markets are winner-take-all' LSE Business Review (16 June 2018) <http://eprints.lse.ac.uk/90847/1/Barwise_Why-tech-markets_Author.pdf> accessed 23 September 2021.

tip in the favour of a particular firm.[9] This is further exacerbated by high entry barriers which further undermine the ability of potential competitors to successfully compete in the market.[10]

COMPETITION COMMISSION OF INDIA'S APPROACH TOWARDS NETWORK EFFECTS AND DIGITAL MARKETS

The CCI has often grappled with the issue of abusive practices in the digital sector. Its jurisprudence has continuously evolved over time to keep pace with this rapidly evolving sector. The CCI was initially of the opinion that the digital markets are at a nascent stage of development and any intervention in such markets needs to be carefully crafted lest it stifles innovation. However, from an initial hands-off approach, the CCI is increasingly taking an interventionist stance keeping in mind the pitfalls of non-intervention at crucial stages and possible tipping points in these markets.

In 2016, in the case of *Deepak Verma v. Clues Network & Ors.*[11] the CCI while dismissing allegations of deficiency in service and unfair trade practices against various e-commerce companies, observed that consumers are not dependent on a single e-commerce player and can switch to another e-commerce player without incurring significant costs in terms of time, money and convenience, etc. It stressed on consumer choice acting as a deterrent preventing e-commerce players from dictating unfair terms and conditions.

Presence of consumer choice was also taken into consideration by the CCI while dismissing abuse of dominance allegations against WhatsApp in the case of *Vinod Kumar Gupta v. WhatsApp Inc.* in 2017.[12] The CCI noted the existence of *multi homing*, low price and minimal switching costs amongst consumer communications app like WhatsApp and observed that while WhatsApp appeared to be dominant in the '*market for instant messaging services using consumer communication apps through smartphones in India'*, the allegations levelled against it had no substance. Notably, an analysis of network effects and their impact on market dynamics was absent in this case.

[9] Competition & Markets Authority, 'Online platforms and digital advertising: market study final report' (1 July 2020) <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf> accessed 23 September 2021.

[10] ibid.

[11] Order dated 26.07.2016 in CCI Case No. 34 of 2016; 2016 SCC OnLine CCI 42.

[12] Order dated 01.06.2017 in CCI Case No. 99 of 2016; 2017 SCC OnLine CCI 32.

For the first time, in 2017, the issue of network effects and their impact on competition was dealt in detail by the CCI in the case *Fast-Track Call Cabs and Anr. v. ANI Technologies Pvt. Ltd.*[13] The CCI observed:

> "*In two-sided markets, network effects may enable a large platform/network to become dominant and insulate itself from potential competition as entrants may find it difficult to challenge the large incumbent "*

The CCI in this case noted that network effects are often corelated to the size of an enterprise. Competition in platform markets during the initial period of development is focused on increasing the size of the userbase. Later, once the market settles in favour of a few enterprises, the strength of network effects becomes a key factor in the determination of dominance. Further, the CCI also noted the likely possibility of cross-side network effects influencing both sides of the market and creating a feedback loop in favour of the incumbent. Furthermore, it noted that network effects may act as an entry barrier in the relevant market depending upon various factors. However, in this case, ability of both customers and drivers to *multi-home* and low switching costs were noted as factors which prevented network effects from acting as entry barriers.

In 2018, the case of *Matrimony.com v. Google & Ors*.[14] is the first case in which a technological giant was penalised by the CCI for abusing its dominant position. The allegation levied against Google stated that Google was running its core business of search and advertisement in a discriminatory manner by incorporating a search bias and displaying Google's native offerings in a preferential manner. Further, it was alleged that Google imposed unfair conditions on its advertisers and restricted competition via its distribution and intermediation agreements. The CCI delineated two separate relevant markets as '*market for Online General Web Search Services in India and market for Online Search Advertising Services in India*' and found Google to be dominant in both on account of its huge scale advantage, prohibitive costs for new entrants, high market shares and technological superiority. The CCI also made certain interesting observations during its analysis, it referred to the 'special responsibility' vested in Google on account of its role as the gateway of the internet for a vast majority of users. It also noted the influence Google exerts in ensuring fairness of the online web search and search advertising markets. Google was found to have abused its dominant position by displaying its

[13] Order dated 19.07.2017 in CCI Case No. 6 & 74 of 2015; 2017 SCC OnLine CCI 36.
[14] Order dated 08.02.2018 in CCI Case Nos. 07 and 30 of 2012; 2018 SCC OnLine CCI 1.

own services prominently in search results and indulging in search bias and imposing unfair terms while negotiating intermediation agreements.

A key takeaway from this case was the deep analysis of the market structure undertaken by the CCI. It noted that particularly in the digital economy, players with a strong market position enjoy a virtual hegemony due to the 'winner-takes-all' phenomena. Further, network effects were recognised as a key contributor in sustaining a positive feedback loop whereby new users are attracted to a platform due to the strength of its existing userbase. These network effects also raise switching costs for users and act as barriers preventing entry of potential competitors. The CCI also noted that online markets now cover an increasingly large spectrum of commercial activities and wield substantial market power over all participants.

Moreover, the CCI also discussed the possible modes in which conducive regulatory intervention in the digital sector may be achieved. It noted that market power in itself is not an antitrust concern; rather, it is the conduct of the enterprises which must be scrutinised. Therefore, only in cases where it is shown that a dominant enterprise is using its market power to stifle innovation and/ or competition require regulatory intervention. Stress was also placed on the fact that intervention should be based on evidence instead of perception.

In 2018, the issue of intervention was also considered by the CCI in the case of *All India Online Vendors Association v. Flipkart & Anr*.[15] The CCI while declining to intervene observed that due to technology driven nature of e-commerce markets, any intervention in such markets must be carefully considered as it has the potential to stifle innovation.

However, in subsequent case laws, the CCI's initial reluctance to intervene gave way to a pro-active approach perhaps on account of increasing concentration of market power in the hands of select few enterprises and a global shift towards stricter antitrust scrutiny and enforcement. For instance, in the case of *Umar Javeed & Anr. v. Google & Anr*.[16] the CCI ordered an investigation against Google's practice of mandating the installation of its apps and services as a bouquet in order to obtain access to Google's proprietary applications and services, tying and bundling its products and preventing smartphone and tablet manufacturers from developing forked versions of Android. While passing its *prima facie* order, the CCI notably observed that via its conduct Google had reduced the ability and incentive of device manufacturers to develop alternate i.e., forked versions of Android, and thereby limited technical development to the

[15] Order dated 06.11.2018 in CCI Case No. 20 of 2018; 2018 SCC OnLine CCI 97.
[16] Order dated 16.04.2019 in CCI Case No. 39 of 2018; 2019 SCC OnLine CCI 42.

detriment of consumers. Further, it noted that mobile search has emerged as a key gateway to access information with Android being a leading distribution channel for the same. Search engines display scale-based data-driven effects as improvements in search algorithms require large volumes of data input. Therefore, Google's conduct was also directly aimed at continuing its dominance in the online search market.

A key takeaway from the *prima facie* order in *Umar Javeed* was the CCI's recognition that a dominant digital enterprise can easily restrict the development of competitors by denying them an opportunity to fine-tune algorithms. Lack of such an opportunity leads to a lower quality of product which directly benefits the incumbents.

Subsequently, two separate investigations have been launched against Google in the year 2020 and 2021 for prominently incorporating Google Pay on its App store to the detriment of competing Unified Payment System ["**UPI**"] apps[17] and for imposing restrictive conditions on prospective licensees of Smart TV operating system.[18] Heavy stress was placed on potential network effects while passing both the said orders. In the case of Google Pay, the CCI observed that the presence of network effects in addition to reduced visibility would lead to reduction in usage, revenue and growth of competing apps and severely restrict their ability to innovate in accordance with the changing needs and preferences of customers. The importance of search and positioning of results in diverting traffic was also highlighted. In the case of Smart TV OS, the 'profound network effects and their ability to attract more users, developers, investment and act as entry barriers was a key criterion used to establish the dominance of Google in the relevant market for 'licensable smart TV device operating systems'.

In 2020, the CCI also launched a probe against Amazon and Flipkart based on allegations of deep discounting, preferential listing, and exclusive launches.[19] The ongoing investigation seeks to analyse whether the two e-commerce giants have acted in a manner to alter the landscape of online commerce to their benefit. A deeper analysis of the potential issues in the e-commerce sector was also undertaken by the CCI via its 'Market Study on E-commerce in India'.[20] Interestingly, the CCI in its study reiterated that network effects combined with even

[17] Order dated 09.11.2020 in CCI Case No. 7 of 2020; XYZ v. Alphabet Inc. & Ors. 2020 SCC OnLine CCI 41.
[18] Order dated 22.06.2021 in CCI Case No. 19 of 2020; Kshitiz Arya & Anr. v. Google LLC & Ors. 2021 SCC OnLine CCI 33.
[19] Order dated 13.01.2020 in CCI Case No. 40 of 2019; Delhi Vyapar Mahasangh v. Flipkart Internet & Anr. 2020 SCC OnLine CCI 3.
[20] 'Competition Commission of India, 'Market Study on E-commerce in India' (2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 23 September 2021.

seemingly small actions have the capacity to neutralise rivals. Further, over time network effects may be difficult to dilute.

A similar stance was taken by the CCI when it highlighted the need for proactiveness while intervening in digital markets in the case of *Federation of Hotel & Restaurant Associations of India & Anr. v. MakeMyTrip & Ors*.[21] In 2021, the CCI passed interim orders under Section 33 of the Act directing MakeMyTrip to relist FabHotels and Treebo on its platform. The CCI in its order observed that exclusionary conduct adopted by MakeMyTrip had the ability to irreversibly alter the competitive landscape.[22] In winner-takes-all platform markets, eliminating abusive conduct at the earliest is utmost importance before network effects take hold. Such effects are difficult to reverse at a later stage and may be futile as the competition may be eliminated long before remedial action is initiated.

The CCI's proactiveness was also demonstrated when it took *suo moto* cognisance of WhatsApp's updated privacy policy and ordered an investigation soon after the policy was announced in March 2021.[23] In particular, the CCI observed that unreasonable data collection may grant a competitive advantage to the dominant player. In contrast to its previous decisional practice in the case of *Vinod Kumar* the CCI noted that due to the presence of network effects, the switching costs for WhatsApp are high. Until and unless all or most of a person's contacts migrate to a different platform, WhatsApp's over-the-top (OTT) services were considered non-substitutable. The lock-in effect of such non-substitutability was also considered responsible for raising switching costs. Imposition of data sharing agreement between WhatsApp and Facebook without any objective justification was held to be detrimental to the consumers and was considered as imposition of unfair terms and conditions.

NETWORK EFFECTS AND THEIR ROLE IN FACILITATING CONSOLIDATION

For some observers, there is a certain sense of inevitability while considering the impact and market power of the five technological giants – Amazon, Alphabet (Google), Apple, Facebook and Microsoft. Together, these five giants have a combined market value of over $5 trillion.[24] The companies are collectively and individually ubiquitous in our day to day lives. Further, the

[21] Order dated 28.10.2019 in CCI Case No. 14 of 2019; 2019 SCC OnLine CCI 37.

[22] Order dated 09.03.2021 in CCI Case No. 14 of 2019 and Case No. 1 of 2020; 2021 SCC OnLine CCI 12.

[23] Order dated 24.03.2021 in Suo Moto Case No. 01 of 202; In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users 2021, 2021 SCC OnLine CCI 19.

[24] Ari Levy, 'Tech's top seven companies added $3.4 trillion in value in 2020' (31 December 2020) CNBC <https://www.cnbc.com/2020/12/31/techs-top-seven-companies-added-3point4-trillion-in-value-in-2020.html> accessed 23 September 2021.

accelerated shift towards virtualisation brought about by the COVID-19 pandemic, has further entrenched their position in our lives and economy.

As the digital economy is increasingly concentrated in select few hands, the role of dominant firms assumes even greater importance. As recognised by the CCI in the case of *Matrimony v. Google*, dominant firms act as gateways and wield control over essential points of access in the economy. Therefore, their conduct is highly scrutinised and their detractors are quick to allege monopolisation and unfair trade practices.

Recently, these dominant firms have been accused of exploiting their power in order to dictate terms and enter into agreements which would not have been possible in an open market.[25] In fact, noted big-tech critic and current chair of the Federal Trade Commission, Lina Khan observes that many businesses now actively avoid conflict with platforms owing to their vast market power which has been utilised in a coercive manner in case of conflict.[26]

Concerns regarding the dominance and growing movement against the same can been seen in the plethora of antitrust investigations currently ongoing or recently concluded against the tech giants in the USA,[27] European Union[28] and worldwide.[29] The investigations initiated by the

[25] Lina M. Khan, 'Sources of Tech Platform Power' (2018) 2 GEO L TECH REV, 325.

[26] ibid.

[27] FTC, 'FTC Sues Facebook for Illegal Monopolization' (9 December 2020) <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 23 September 2021; USDOJ, 'Justice Department Sues Monopolist Google For Violating Antitrust Laws' (20 October 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 23 September 2021; Epic Games, Inc. v Apple, Inc. [2021] 4:20-cv-05640-YGR.

[28] European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector' (22 June 2021) <https://ec.europa.eu/commission/presscorner/detail/hu/ip_21_3143> accessed 23 September 2021; European Commission, 'Antitrust: Commission opens investigations into Apple's App Store rules' (16 June 2020) <https://ec.europa.eu/commission/presscorner/detail/es/ip_20_1073> accessed 23 September 201`; European Commission, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 23 September 2021; European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook' (2 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848> accessed 23 September 2021.

[29] Business Standard, 'Japan to start antitrust probe on Apple and Google' (14 June 2021)<https://www.business-standard.com/article/international/japan-to-start-antitrust-probe-on-apple-and-google-says-report-121061400034_1.html> accessed 23 September 2021; Heekyong Yang, 'S.Korea fines Google $177 million for blocking Android customisation' (15 September 2021) Reuters <https://www.reuters.com/technology/skorean-antitrust-agency-fines-google-177-mln-abusing-market-dominance-2021-09-14/> accessed 23 September 2021; Joyce Lee, 'South Korean watchdog fines Facebook $6.1 million for sharing user info without consent' (25 November 2020) Reuters <https://www.reuters.com/article/us-facebook-southkorea-fine-idUSKBN2850YW> accessed 23 September 2021.

CCI are significant given India's importance in the sheer number of users and potential revenue.

Network effects have been attributed as the primary reason behind the continuing dominance and expansion of the tech giants in the digital market. However, while significant, network effects are not the sole factor responsible for such dominance. Strategic acquisitions of potential competitors and disruptive innovators is also attributed as factors responsible for further strengthening their marked power.[30] With the help of these acquisitions, each giant now serves as a platform in itself offering a bouquet of services, aimed at retaining customers within its own ecosystem.[31]

The impact of such consolidation may result in a reduction in consumer choice, innovation and investment in new technologies. Further, the enormous financial resources required to challenge the incumbents have led to formation of so called 'kill zones' wherein dominant platforms are insulated from competition due to enormous financial resources required to challenge them.[32] Accordingly, there are strong economic incentives to avoid competing with dominant platforms in their areas of operations.[33]

Another potential area of concern is related to the collection of data. Firms are increasingly collecting more and more personal data in their quest to personalise the experience of their users.[34] Inadequate data protection laws may leave their users open to increasingly pervasive data collection practices. The CCI while passing its *suo moto* order against WhatsApp for its proposed privacy policy, observed that deterioration of a platform's service quality over time while retaining its userbase is an indicator of dominance – consumers are left with no choice but to either continue with poor privacy safeguards or leave the service entirely.[35]

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[30] Colleen Cunningham, Florian Ederer, and Song Ma, 'Killer Acquisitions' (2021) 129 (3) Journal of Political Economy, 649.

[31] Catherine Fong and others, 'Prime Day and the broad reach of Amazon's ecosystem' (2 August 2019) McKinsey & Company<https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/prime-day-and-the-broad-reach-of-amazons-ecosystem> accessed 23 September 2021.

[32] Raghuram Rajan, Sai Krishna Kamepalli & Luigi Zingales, 'Kill Zone' (2020) University of Chicago, Becker Friedman Institute for Economics Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555915> accessed 23 September 2021.

[33] Chicagobooth, 'Stigler Committee on Digital Platforms' (September 2019) <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> accessed 23 September 2021.

[34] Chase Bibby and others, 'The big reset: Data-driven marketing in the next normal' (25 March 2021) McKinsey & Company <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/the-big-reset-data-driven-marketing-in-the-next-normal> accessed 23 September 2021.

[35] Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 Berkeley Business Law Journal 39.

POSSIBLE LEGISLATIVE MEASURES AND WAY FORWARD

There is a growing chorus of voices which state that traditional forms of ex-post intervention in the market is increasingly becoming inadequate to deal with digital markets. Once the markets tips in the favour of one particular player, it may be nigh impossible to reverse the trend. To counter this, it is proposed that certain ex-ante regulations may be adopted in order to prevent accumulation of market power and curtail abusive practices.

A radical but noteworthy solution proposed by a report of the Sub-committee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, U.S. House of representatives ["**US Report**"][36] is to curtail the ability of dominant platforms from operating in adjacent lines of business. Further, it also recommends imposing non-discriminatory obligations on dominant firms prohibiting them from engaging in self-preferencing, and mandating them to offer equal terms for equal products and services. Additionally, the US Report recommends incorporating requirements of interoperability and data portability, requiring dominant platforms to make their services compatible with various external networks.

A parallel initiative is to broaden the scope of merger review by the CCI. It is argued that antitrust scrutiny disproportionately focuses on mergers of traditional businesses while ignoring the potential long-term harm caused by digital consolidation. The current approach misses out on preventing the acquisition of potential competitors which might in due course of time grow large enough to challenge the incumbents.[37] Deeper analysis of low turnover targets which might escape antitrust scrutiny has also been suggested by the Competition Law Review Committee, constituted by the Ministry of Corporate Affairs, Government of India, in its recommendations.[38]

A digital code of conduct prescribing acceptable conduct has been mooted by the US Report as well as the Digital Markets Taskforce of Competition & Markets Authority, UK.[39] Two

[36] 'Investigation of Competition in Digital Markets', Majority Staff Report and recommendations (2020) <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519> accessed 23 September 2021.

[37] OECD, 'The Concept of Potential Competition' (2021) <https://www.oecd.org/daf/competition/the-concept-of-potential-competition-2021.pdf> accessed 23 September 2021.

[38] 'Report of Competition Law Review Committee July' (July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 23 September 2021.

[39] Competition & Markets Authority, 'A new pro-competition regime for digital markets' (2020) <https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf> accessed 23 September 2021.

detailed Acts to regulate the conduct of online platforms have also been proposed in the European Union.[40] One of the stated rationales for the proposed legislative intervention in the European Union is to maintain fair and open online platform environment. The European Commission notes that a few large platforms control important ecosystems in the digital economy and have emerged as gatekeepers with power to act as private rule-makers. This power is at times exercised in a manner that imposes unfair conditions on businesses and results in less choice for consumers.

To counter the effects of such concentration, the Digital Markets Act firstly define gatekeepers on the basis of a set criteria taking into account the economic, intermediary and entrenched position of the platforms. Once such gatekeepers are identified, it imposes obligations such as prohibitions on gatekeepers from treating their own services in a more favourable manner. Significant fines based on up to 10% of worldwide annual turnover are also proposed in case of non-compliance.

A similar set of regulations are also under consideration in India. As per the draft Consumer Protection (E-Commerce) Rules, 2020,[41] the government seeks to regulate the conduct of e-commerce enterprises. The proposed rules have been criticised for being ambiguous, making compliance difficult. Further, the Consumer Affairs Department which released the said rules has been criticised for overreach – venturing into the domains of other ministries. The said rules are now under review and an updated set of rules is expected to be released. Despite the setback, the movement towards regulation is picking up strength.

The possible impact of any such regulations needs to be carefully analysed. While on one hand, a code of conduct may be beneficial in setting the standards of acceptable behaviour and easily identifying abuse, it may also restrict the free flow of market forces – artificially freezing the market to its current iteration. It must be kept in mind that the developments in digital market while unpredictable have often been beneficial for the consumers. Successive innovations have

[40] European Commission, 'The Digital Markets Act: ensuring fair and open digital markets' (15 December 2020) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 23 September 2021; European Commission, 'The Digital Services Act package' (15 December 2020) <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 23 September 2021.

[41] 'Consumer Protection (E-Commerce) Rules, 2020' <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf> accessed 23 September 2021.

directly improved consumer welfare. In light of this, possible legislative and policy measures must be circumspect and allow the markets enough freedom to determine their own course.

COMPETITION LAW AND COMPULSORY LICENSING: INTERRELATION AND WAY FORWARD

- *MS. ISHITA SINGH[*] AND MR.ANAND VIKAS MISHRA[**]*

ABSTRACT

The research paper attempts to explore the fundamental question: "whether the state under Section 92 of the Patents Act, in view of extreme urgency and national emergency, issue compulsory license for maintaining timely access to affordable emergency medicines and whether the Competition Law intervene in the strategic patenting by the pharmaceutical companies in view of public welfare?" Human nature constantly evolves and so does society. Coupled with the advancement in technology, science, social structure and politics various stigmas that are attached to society put forth certain questions before the legislation.

The paper attempts to elucidate the conundrum of compulsory license and its constitutionality while analysing the evolving jurisprudence of competition law on essential drugs. There has been extensive research on patent rights however the domain of public welfare in competition law has not been explored much.

The research paper also explores the international perspective on compulsory licensing and competition law, scrutinizing bills and legislations, various arguments and contentions made by the jurists and researcher's acute analysis. Further to support the research, the paper will include a comparative study between India and USA's subsequent socio-economic effects.

The methodology of research is doctrinal and sources are secondary in nature. The basic structure of information is publicly available on various legal databases, books, journals, articles, etc. For legal sanctions, help of legislations, case laws and reports are given due consideration.

Keywords: Compulsory License, Essential Drugs, Competition Law.

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I. INTRODUCTION

In the state of law, right to life, and in consequence right to health,[1] receives upmost attention as one of the basic human rights. The unprecedented COVID-19 pandemic has led to an ab-lib shift in society and the economy wherein the conundrum of market supply of vaccine has led to the re-surfacing of fears related to the past-experience of lack of access to vaccines and medicines for life-threatening diseases which may be hindered by patents. Over the last few months, the market has seen an unprecedented increase in prices of essential drugs for the virus. One of the key reasons for the increase in prices is the elasticity of demand of essential drugs in comparison to lack of supply which may be due to strategic patenting by pharmaceutical companies. While the practice of patenting and innovation secures and protects the rights of the innovators and encourages companies to develop more drugs for the benefit of the public, in situations like that of the pandemic, these patent licenses lead to the larger neglect of the general public. The article outlines the current approach of patenting by companies and provides ways by which there can be a balance between the patent holder and public interest.

Intellectual property rights aim to offer a period of exclusive rights to exploit the property in question[2] whereas competition law seeks to maintain effective access to the market.[3] Further, competition law aims at promoting consumer welfare[4] and to maintain healthy competition in the market. The right to exclude which protects the rights of patent holders is considered an essential part of the pharmaceutical development and investment.[5] Moreover, the loss of competition that the patent creates for other companies is considered justifiable for pharmaceutical companies as they need to accumulate price which is above the marginal cost to recoup significant development expenses of the drug which also lead to their incentive to develop more drugs.[6] However, these exclusive rights to patent holders create an unprecedented increase in the prices of essential drugs in rich and poor countries,[7] despite a

[1] Irina Haracoglou, *Competition Law and Patents* (Edward Elgar Publishing Limited 2008).

[2] William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (5th edn. Sweet & Maxwell 2003).

[3] Richard Whish and David Bailey, *Competition Law* (2,2005).

[4] Rita Yi man Li and Yi Lut Li, 'The Role of Competition Law: An Asian Perspective' (2013) 9(7) Asian Social and Science 47.

[5] Chandra Mohan and Others, 'Patents - An Important Tool for Pharmaceutical Industry' (2014) 2 Journal of Pharmaceutics and Nanotechnology 12.

[6] Joseph A. DiMasi and Others, 'Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs' (2016) 47 Journal of Health Economics 20.

[7] Joanna M. Shepherd, 'Biologic Drugs, Biosimilars, and Barriers to Entry' (2015) 25 Health Matrix: Journal of Law-Medicine 139.

global call for access to affordable drugs.[8] In order to create a balance between the public and private profit dichotomy, the governments use tools like compulsory licensing in order to mitigate a concord between intellectual property rights and competition law. The term 'compulsory licensing' refers to the process of granting permission to an enterprise which attempts to use another's intellectual property without the consent of the proprietor,[9] and the same is sanctioned by the government entity. It often relates to the pharmaceutical and other inventions pertaining to public health but can be potentially applied to any patented invention.[10]

The paper attempts to explore the fundamental question: "*whether competition law intervene in the strategic patenting by the pharmaceutical companies in view of public welfare?*" There exists a delicate link between intellectual property rights and competition law wherein too high or too low implementation of either of the two laws may lead to trade distortion and hence, a balance has to be found between the two and such a balance must also ensure fulfilment of rationale and aim of the two laws.[11] Hence, the paper seeks to explore compulsory licensing as a means to create a balance between the two laws with the goal of securing public interest at the forefront.

II. COMPULSORY LICENSING UNDER PATENTS ACT

Through the introduction of compulsory licensing, a state allows third party to practice or use a patented invention without the patent holder's permission wherein the third party pays royalty to the patent holder which serves as a compensation to the patent holder.[12] Under the Indian Patents Act, Chapter XIV deals with compulsory licensing wherein the procedure of granting compulsory licensing comes under Section 84[13] and 92[14]. However, some attributes of Patents Act lack attributes of property wherein the patented subject lacks clear scope and limits, it only provides basic notices and includes right to exclude and not the right to use.[15] Thus, the state chooses to employ liability rule, wherein the patent holder is entitled to get compensation, and

[8] 'Goal 3: Ensure healthy lives and promote well-being for all at all ages', (United Nations) <https://www.un.org/sustainabledevelopment/health/> accessed 15 July 2021.

[9] Jarrod Tudor, 'Compulsory Licensing in the European Union' (2013) 4(2) George Mason Journal of Comparative Law 222.

[10] John R. Thomas, 'Compulsory Licensing of Patented Inventions' (2014) Congressional Research Service 1.

[11] Mansee Teotia and Manish Sanwal, 'Interface between competition law and patents law: A pandora box' (2020) 1(01) E- Journal of Academic Innovation and Research in Intellectual Property Assets.

[12] Cynthia M. Ho., '*Access to Medicine in the Global Economy: International Agreements on Patents and Related Rights'* (2011) Oxford University Press 127.

[13] Section 84, Indian Patent Act, 1970.

[14] Section 92, Indian Patent Act, 1970.

[15] Margo A Bagley, 'Morality of Compulsory Licensing as an Access to Medicines Tool' (2018) 102(6) Minnesota Law Review 2463.

not the property rule wherein the patent holder can preclude use of the invention.[16] This is done via compulsory licensing.

Rationale behind compulsory licensing in India

The inherent tussle between welfare-oriented government, which seeks to ensure cheap and equal access to essential drugs, and the profit driven companies has often occupied the global centre stage.[17] Compulsory licensing, in various foreign jurisdictions, has been issued in cases dealing with abusive refusal to supply in order to correct the anti-competitive practices which are a consequence of exclusive patent rights. Under Section 84 of the Patents Act, any person, regardless of whether he is the holder of the licensing of that Patent, can make a request to the Controller for grant of compulsory licensing on expiry of three years, when any of the following conditions is fulfilled –

1. The reasonable requirements of the public with respect to the patented invention have not been satisfied
2. The patented invention is not available to the public at a reasonably affordable price
3. The patented invention is not worked in the territory of India.[18]

Under Section 92 of the Act,[19] compulsory licensing can also be issued, *sou moto*, by the controller in case of either 'national emergency' or 'extreme urgency' or in case of 'public non-commercial use'.[20]

Natco Pharma Limited v. Bayer Corporation

The relation between competition law and intellectual property rights is described as the 'tale of uneasy bedfellows' wherein the debate between patent laws which grant exclusive rights to the patent holders and competition law, which aims at ensuring competition market, is highlighted. In view of this background, compulsory licensing was enforced in the case of *Natco v. Bayer*[21] for the first time in India. The issue in this case was that the drug sold by Bayer for patients suffering from advanced stages of kidney and liver cancer was highly priced and Natco, an Indian Pharmaceutical Company, applied for voluntary licensing in order to

[16] Guido Calabresi and A. Douglas Melamad, 'Property Ules, Liability Rules and Inalienability: One view of the Cathedral' (1972) 85(6) Harvard Law Review 1089.

[17] Reuters, 'Analysis: India Cancer Ruling Opens Doors for Cheaper Drugs' (*Reuters*, March 2012) <https://www.reuters.com/article/us-india-drugs-idUSBRE82C0IN20120313> accessed 17 July, 2021.

[18] Section 84 (n 13).

[19] Section 92 (n 14).

[20] Nayanikaa Shukla, 'India: Compulsory License in India' (*Mondaq*, January 2019) <https://www.mondaq.com/india/patent/772644/compulsory-licensing-in-india> accessed 17 July, 2021.

[21] *Natco Pharma Limited v Bayer Corporation* Compulsory License Application No. 1/2011.

manufacture and sell the drugs at a much more affordable price. However, this request was not granted and the Natco company appealed for the grant of compulsory licensing. It was found that due to the lack of ability of Bayer to provide the drugs to only 2 percent of the population in India, it was substantiated that Bayer failed to contribute to transfer of technology which resulted in counterbalance of the exclusive patent right and public interest. Hence, compulsory licensing was granted to the Natco Company wherein certain amount of compensation was decided to be paid to Bayer Company.

III. COMPETITION LAW AND PATENT ACT

A. Rationale behind competition law

The competition law is premised upon the principle of economics that desires a free market and the underlying intent of the law is to ensure that the businesses conducted in India are based on merit and not on the anti-competitive agreements or conduct. [22] In the case of Competition *Commission of India v. Steel Authority of India & Anr*,[23] the apex court held that the primary purpose of the Competition Act is to find remedy to situations which may lead to the breakdown of free market system and promote economic efficiency. Further, in *Re: Distribution of Essential Supplies and Services during Pandemic*,[24] the Supreme Court recognized the insufficient availability and supply of vaccines and elucidated the legal framework of issuing compulsory licensing to meet the demand of the vaccines. In this backdrop, it becomes essential to analyse the Competition Act in order to maintain competition and to ensure access to essential drugs in the market to curb the use of anti-competition practices.

Patented drugs and public interest

The use of word 'public' has been made more than forty times in the Patents Act, 1970,[25] wherein it confers power to the government to nullify the recognition granted to the patentee for the invention in communitarian interest.[26] The legislative exception is based on the fact that the exclusive right must be an instrument which protects and promotes the socio-economic interest of the nation, availability of patented products on affordable prices to the public, and

[22] 'Competition Laws in India: An overview' (*Kochhar & Co.*) <http://www.kochhar.com/pdf/Rationale%20For%20Competition%20Laws.pdf> accessed 18 July 2021.

[23] *Commission of India v Steel Authority of India & Anr* [2010] INSC 720.

[24] *In Re: Distribution of Essential Supplies and Services During Pandemic* SMW(C) No.- 000003/2021.

[25] Indian Patent Act, 1970.

[26] Dr. Uday Shankar, 'Prioritising public interest in patent law of India' (*SCC Online Blog*, June 2021) <https://www.scconline.com/blog/post/2021/06/14/patent-law/#_ftn2> accessed 19 July 2021.

mandates that the government can take all necessary measures to protect public health.[27] If the reasonable requirements of the public are not satisfied or if the product is not available to reasonable satisfaction or is available at a much higher price than the controller, after the lapse of three of license grant, can issue compulsory licensing on the ground of public health.[28] Compulsory licensing can be granted to the third party, against the will of the patentee, in the case of a national emergency or extreme urgency such as a pandemic. Further, the controller needs to balance the legitimate expectation to earn a reasonable return on the investment by the patent holder and the capacity to pay for the patented product by the public.[29] The monopoly granted to patent holders through the patent laws can lead to a rise of their market power which is prohibited under the competition law.

As stated above, the social bargain is an inherent part of the patent system. The World Health Organisation report reveals that the average availability of essential medicines across the world is only 51.8 percent in public sector health facilities.[30] This involves developing countries advocating towards allowing government autonomy in endowment of compulsory licensing for public health.[31] It is said that in the law of patents, it is not sufficient merely to have registration of a patent. The Court must look at the whole case, the strength of the case of the patentee and the strength of the defence.[32]

Competition law under Section 4

Section 4 of the Competition Act, 2002 lays down that abuse of dominant position is prohibited and the conditions and scope of the dominant nature of the enterprises is provided.[33] Dominant position is described as a position which is enjoyed by the enterprise which enables it to:

1. Operate independently of competitive forces prevailing in the relevant market; or
2. Affect its competitors or consumers or the relevant market in its favour.[34]

[27] Section 83(d), Indian Patent Act, 1970; Section 83(e), Indian Patent Act, 1970; Section 83(g), Indian Patent Act, 1970.

[28] Section 84(1), Indian Patent Act, 1970.

[29] Section 92 (n 14).

[30] 20 MDG Gap Task Force Report, 'The Global Partnership for Development: Making Rhetoric a Reality', (*WHO,* 2012) <http://www.who.int/medicines/mdg/mdg8report2012_en.pdf> accessed July 18, 2021.

[31]Jayashree Watal, 'Access to Essential Medicines in Developing Countries: Does the WTO TRIPS Agreement Hinder It?' (2000) Center for International Development, Harvard University, Science, Technology and Innovation Discussion Paper No. 8 <https://bit.ly/3nvdkOL> accessed July 23, 2021.

[32] *Franz Xaver Huemer v New Yash Engineers* 1996 SCC OnLine Del 243.

[33] Section 19, The Competition Act 2002.

[34] S.S. Rana and Co. Advocates, 'India: Abuse of Dominant Position An Anti-Competitive Practice' (*Mondaq,* January 2018) <https://www.mondaq.com/india/antitrust-eu-competition-/668306/abuse-of-dominant-position-an-anti8208competitive-practice> accessed June 18 2021.

The rationale of Section 4 of the Competition Act, 2002 is derived from the application of the consumer oriented approach in India wherein, under Section 4, the judicial approach to the granting of compulsory license is dependent on the provision for public welfare.

However, Under Section 3(5) of the Competition Act, such restrictions imposed on the patent holders can lead to violation of their rights and hence, in order to preserve the harmony between the two sections, it becomes essential to analyse the interpretation of 'public interest' in the Act.

Consumer Oriented Approach in India

Competition stimulates innovation and productivity which leads to optimum allocation of resources in the economy; guarantees the protection of consumer interests; reduces costs and improves quality; accelerates growth and development and preserves economic and political democracy.[35] However, without a sufficient framework, there might be an increase in adverse distortionary practices and anti-competitive activities which in turn would distort healthy competition in the market. The United Nations Guidelines for Consumer Protection is an international framework which advocates consumer protection policy, and that legislations must be aimed at consumer protection i.e., physical safety, economic interest, standards, essential goods and services, redress, education, health and sustainable consumption.[36]

The nexus between Section 4 and Public Interest

As discussed above, Section 4 of the Competition Act deals with the prohibition of dominant position of a company in the market which distorts the market balance. The nexus of this section with public interest comes while analysing the effect of dominance in the market. The dominant position in the market leads to limited goods and services due to which there is an increase in the prices. This, and a restriction in development leads to the violation of public interest. The weight of public interest in forming links between the investment in research and development and the patent development is critical in India where the whole population is dependent on the essential drugs for survival.

In the recent cases before the Supreme Court, it has been ruled that the provisions against anti-competitive practices in the Competition Act and the compulsory licensing provision in the

[35] Raj Kumar S. Adukia, 'An Overview of Provisions Relating to Competition Laws & Consumers Protection Laws in India' (CAAA), <http://www.caaa.in/Image/competition%20laws.pdf> accessed June 18 2021.

[36] 'United Nations Guidelines for Consumer Protection, (United Nations Conference on Trade and Development), < https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf> accessed November 11, 2021.

Patents Acts are not in exclusion of each other but have to be read conjunctly.[37] The dilemma if a patentee had adopted anti-competitive practices could also be taken into consideration by the controller. However, if the Competition Commission of India["CCI"] finds a patentee's conduct to be anti-competitive and it comes to such conclusion, then the controller could also proceed on the said basis and on the principle akin to issue estoppel, the patentee would be estopped from contending to the contrary.[38] Hence, the judicial approach to the granting of compulsory license is dependent on the provision for public welfare, however, it cannot be used arbitrarily to diminish the rights of the patent holders and should be made on the ground of 'reasonableness'. There must be a balance between the rights of the patentee and using the product for public welfare. The Supreme Court, in the case of *Samir Agarwal v. Competition Commission of India & Ors*,[39] held that 'public interest' is a valid ground for approaching the CCI and the appellate authority NCLAT to subserve the high public purpose of the Competition Act, 2002.

The CCI, in the case of *La Hoffman Roche Biocon Case*, issued an order for an investigation against the pharma giant Roche for unfair business practices in the cancer drug market under Section 4(2)I of the Competition Act, 2002.[40] Hence, if there is violation of the principle of dominance by the company in respect to the patent rights, as in the *Biocon Case*, then the CCI can issue orders for investigation of the same under Section 4(2)I of the Competition Act. A refusal to grant license of IP exclusively held by the dominant enterprise can be considered as a constructive refusal to supply under the Competition Act as it may be construed to limit the 'production of goods or provision of services or market'[41] or restrict the 'technical or scientific development relating to goods or services to the prejudice of consumers',[42] or result in the 'denial of market access',[43] all three of which amount to abusive conduct under the Competition Act.[44]

[37]Nayanikaa Shukla (n 20).

[38] *Koninklijke Philips Electronics N.V. v Rajesh Bansal* 2018 SCC OnLine Del 9793.

[39] *Samir Agrawal v Competition Commission of India* SCC Online SC 1024 (SC).

[40] *Biocon Ltd. & Ors v F. Hoffman La Roche Ag & Ors* CCI Case No. 68 of 2016..

[41] Section 4(2)(b)(i), The Competition Act 2002.

[42] Section 4(2)(b)(ii), The Competition Act 2002.

[43] Section 4(2)(e), The Competition Act, 2002.

[44] Naval Satarawala Chopra and Dinoo Muthappa, 'The Curious Case of Compulsory Licensing in India' (2012) 8(2) Competition Law International.

Decoding Section 3(5) of the Competition Act

Section 3(5) of the Competition Act provides that nothing contained in Section 3 (prohibition of anti-competitive agreements) shall limit any person's right to prevent infringement or to enforce fair conditions, such as copyright, trade marks, trademarks, designs and geographical indications, that may be appropriate for the defence of his/her intellectual property rights.[45]However, some unreasonable conditions imposed by the patent rights can lead to violation of the right to free flow in market like in the case of patent pooling, tie-in agreement, etc. For instance, CCI in the case of *Shamsher Kataria v. Honda Siel Cards India LTD*,[46] rendered the clarification that though registration of an IPR does not automatically entitle a company to seek exemption under Section 3(5)(i) of the Act and the essential criteria for determining whether the exemption under Section 3(5)(i) is available or not is to assess whether the condition imposed by the IPR holder can be termed as *"imposition of a reasonable conditions, as may be necessary for the protection of any of his rights".*[47]CCI also manifests it by extending the provision intending that, the reasonable conditions however be imposed whenever imposing such reasonable condition would be indispensable to protect the right of the IPR holder, otherwise they cannot even impose any condition without being reasonable.[48]Further, the Apex Court has also recognised the need to restrict the anti-competitive behaviour of patent holders.[49]

IV. COMPETITION LAW AND PHARMACEUTICAL SECTION

The Indian pharmaceutical industry is one of the largest industries in the world in terms of value and volume and has grown significantly over the decades. Therefore, no wonder, over a period of time this sector has seen several regulatory interventions that have altered the dynamics of this industry quite substantially. Even when compared to the other pharmaceutical regimes in the world, change in patenting regime (product patenting to process patenting to product patenting), unique nature of competition (for example, branded generics), etc. have

[45]'Anti-Competition Agreements under Competition Act 2002' (Helpline Law) <https://www.helplinelaw.com/business-law/ACAU/anti-competitive-agreements-under-competition-act-2002.html> accessed July 19 2021.

[46] *Shamsher Kataria v Honda Siel Cards India Ltd.* Case No. 03 of 2011.

[47] 'Anti-Competitive Agreements and IPR Exemption under Section 3(5) of the Act', (Rama University) <https://www.ramauniversity.ac.in/online-study-material/law/ballb/ixsemester/competitionlaw/lecture-18.pdf> accessed July 19 2021.

[48] *K. Sera Sera Digital Cinema Ltd v Pen India Ltd* 2017 SCC Online CCI 31.

[49] *Entertainment Network (India) Ltd v Super Cassette Industries Ltd.* 2008 SCC OnLine SC 951.

made the Indian pharmaceutical market unique.[50] The original patents are awarded with the product patent which protects and confers that they will enjoy monopoly profits on the product but once such drug is available in the market the product cost becomes low. The tension between these two leads to the dilemma of finding a balance between need for access of cheap medicines and incentivizing innovation.

The evolution of Indian pharmaceutical industry is divided into three major phases. The first phase come immediately post-independence when the global multinational manufacturers were dominating the Indian pharma industry. Entry in Indian markets, at this stage, was easy for a global manufacturer who came up with new medicines but at high cost. Concerned about such state of affairs, the Government of India (GOI) formed a one-man committee of Justice N. Rajagopala Ayyangar in 1957 to revise the laws of patents and design. In 1970, GOI adopted the recommendations of the Ayyangar Committee and formulated the Patents Act (1970), which allowed only process patent protection for pharmaceutical products for a period of seven years from the date of patent filing.[51] The second stage began with India being the signatory of World Health Organisation in 1995 and it stated to look for a different competition strategy. The third phase saw the change and acceptance of diversity wherein the Indian companies that exist today are a combination of many different types of enterprises that specializes in different aspects of the pharmaceutical industry.

In essence, the Section 3(d) of the Patents Act states that the new form of the existing drug cannot be patented unless it demonstrates increased efficacy. If it does demonstrate increased efficacy, then it is treated as an altogether *"new substance"*. The *"mere new use"* of a known compound cannot be patented.[52]

V. ANALYSING CONTENTIONS FOR AND AGAINST THE CONUNDRUM

A coin has two sides and the dilemma of compulsory licensing as a way to control and promote competition in the market has two contending parties which go for and against it.

[50]Shamin S. Mondal and Viswanth Pingali, 'Competition Law and the Pharmaceutical Sector in India' (*Indian Institute of Management Ahmedabad Working Paper* November 2015) <http://vslir.iima.ac.in:8080/jspui/bitstream/11718/17052/1/Pingali2015.pdf> accessed on July 19 2021.

[51] ibid.

[52] Dr. Shuchi Midha and Aditi Midha, 'Concept of Substantial Similarity In Pharmaceutical Patent Infringement Cases and the Implications of Section 3d of Indian Patent Act' (2014) 2(06) Asian Journal of Pharmaceutical Technology and Innovation 12.

A. Arguments against the implementation

The aim of patent licensing is to protect and encourage incentives to the innovators and hence, the right to exclude which is granted by the patent is widely considered essential for development and investment in the pharmaceutical sector. It is believed that the issuing of compulsory licensing is morally wrong as it is done without the consent of the patent holders and leads to harm in the incentive of the innovator to innovate.[53] For some observers, granting of compulsory licensing is derogatory to the right of exclusion awarded to the patent holder. Further, the pharmaceutical giants demand increased patent protection under stricter intellectual property rights citing to be the 'bedrock of their business'.[54] They contend that the high cost of research and development, due to which it is inevitable that the prices of drugs will increase, makes it essential for companies to be protected in order to get the monetary benefit of their invention. As a result, it is contended that having a short-term compulsory licence would stifle the innovation in the long-term.[55]

Arguments for the implementation

The supporters of implementation of compulsory licensing believe that the right to exclude granted by the patent law does not mean right to use wherein the pharmaceutical companies can use the patent to create a dominant position in the market while violating public interest in the situations of grave urgency. Observers believe that compulsory licensing may serve important national interests such as public health and technology transfer.[56] The contention that the monetary incentive of the innovators will be lost does not hold much ground as it is argued that the biggest driving force for innovation is the market[57] and thus, the point of focus for the drugs companies is on development of more saleable drugs rather than the most needed ones.[58] In fact, studies have shown that except for a few exceptional circumstances, there is no link

[53] Jon Matthews, 'Renewing Healthy Competition: Compulsory Licenses and Why Abuses of the TRIPS Article 31 Standards are the most dangerous to the United Stated Healthcare Industry' (2010) 4(1) Journal of Business, Entrepreneurship and the Law 119.

[54] David W. Opderbeck, 'Patents, Essential Medicines, and the Innovation game' (2005) 58(2) Vanderbilt Law Review 501.

[55] Sara M. Ford, 'Compulsory licencing provisions under TRIPS Agreement: Balancing pills and patents' (2000) 15(4) American University International Law Review 941.

[56] Chris Strobel, 'Wind Power and Patent Law: How the Enforcement of Wind Technology Patents May Lead to Restricted Implementation in the US, and Necessary Solutions' (2013) 19(2) Journal of Environmental and Sustainability Law.

[57] Patrice Trouiller and others, 'Drug development for neglected diseases: a deficient market and a public-health policy failure' (2002) 359(9324) The Lancet 53.

[58] The Wall Street Journal, 'Should Patents on Pharmaceuticals Be Extended to Encourage Innovation' (*The Wall Street Journal*, January 2012) <http://online.wsj.com/article/SB10001424052970204542404577156993191655000.html> accessed July 19 2021.

between compulsory licensing and sluggish innovation rates or a decline in research and development.[59] Further, in recent times, there have been cases where the innovators have even used voluntary licensing in order to provide otherwise expensive lifesaving drugs at a cheaper price.[60] Evidence shows that the level of pharmaceutical patent protection, especially in developing countries, is irrelevant in spurring innovation,[61] which means that the suitability of compulsory licensing is not affected by this concern. Hence, it is believed that the supporters of compulsory licensing as a means to promote competition believe that in long run, the pharmaceutical companies will be better off by accounting for such requirements rather than trying to preserve their patent rights and incurring huge litigation loses.

VI. COMPARATIVE ANALYSIS BETWEEN USA AND INDIA IN COMPULSORY LICENSING AND COMPETITION LAW

The pandemic opened the pandora's box in which the global regime failed to cater to the needs of people and protect their right to health. There were three main issues that arose pertaining to the anti-competitive practices, which are: Firstly, the vaccine drives led to the largest vaccine stocking race and data sharing proposal fails which led to a lack of international cooperation. Secondly, the developed countries further refused to support South Africa and India in their proposal to suspend IPRs for COVID-19 vaccines[62]. Thirdly, the concept of competition has failed in the global regime as there is a lack of system of surveillance of gair competitive rules on global pharma markets.[63]

The courts in United States of America ["USA"] and European Union ["EU"] have held that refusal to license a patent violates competition law but even though these countries are highly advanced in competition law and patents law jurisprudence they lack a clear framework to determine whether such refusal is anticompetitive when it involves IPRs. However, Brazil, under Article 21 of Antitrust Law, enlists that *"non-exploitation or the inadequate use of*

[59] Colleen Chien, 'Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?' (2003) 18(3) Berkley Technology Law Journal 853.

[60] Reuters, 'Analysis: India Cancer Ruling Opens Doors for Cheaper Drugs' (n 17).

[61] *Biocon Ltd. Case* (n 40).

[62] Ann Danaiya Usher, *South Africa and India push for COVID-19 patents ban,* (Lancet) <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32581-2/fulltext>, accessed November 10, 2021.

[63] UNCTAD, 'Eleventh Meeting of the UNCTAD Research Partnership Platform' (2019) <https://unctad.org/system/files/non-official-document/ccpb_RPP_2020_01_Present_Alexey%20Ivanov.pdf> accessed 20 July 2021.

intellectual property rights and technology of a company" as a strong indication that the free competition rules have been violated.[64]

Even though the non-fraudulent acquisition of the right of patent through government is not violative of the anti-trust law, antitrust jurisprudence does hold that when a party aggressively engages in accumulation, non-use, and enforcement of IPRs over the essential inputs in a particular market for the purpose of destroying competition in that market, it may be subject to antitrust liability.[65] Further, as regards to the anti-competitive practices, the Competition Act of Canada, for example, gives the Federal Court power to expunge trademarks, to license patents (including setting all terms and conditions), to void existing licenses and generally to abridge or nullify normal patent or trademark rights where the trademarks or patents have been used to injure trade or commerce unduly or to prevent or lessen competition unduly.[66]

There has been friction between the relationship between competition and IPR in USA wherein the early US cases separate the two domains and concluded that patents were beyond the reach of antitrust law.[67] However, this led to the companies to circumvent antitrust laws via licensing which led to the US courts to progressively restrict that the scope of patent immunity doctrine and held that the antitrust law is free to operate when the patent holders reach beyond the boundaries inherent in the patent grant.[68] Further, in 1988, the US Department of Justice's Antitrust Division formally shifted from absolute opposition to certain licensing practices to a *"rule of reason"* approach that balanced pro- and anticompetitive effects of licensing.[69] The Supreme Court of US has recognised compulsory licensing as a remedy for antitrust cases and violation of market competition.[70] Further, the enforcement of antitrust laws in the US by government entities or private parties on compulsory licensing can be done, when it is found that the enterprise is acting in anti-competitive manner in connection to the patents,[71] under the

[64] Article 21, Brazilian Antitrust Law 1994.

[65] 'Compulsory Licensing and the Anti-Competitive Effects of Patents for Pharmaceutical Products: From a Developing Countries' Perspective (CUTS) <http://www.cuts-citee.org/pdf/Compulsory_Licenses_and_anti-competitive_effects_of_patents.pdf> accessed 20 July 2021.

[66] Section 32, Canadian Competition Act 1985.

[67] *E. Bennett & Sons v National Harrow Co*. 186 US 70 (1902).

[68] *United States v Masonite Corporation* 1942 SCC OnLine US SC 102.

[69] US Department of Justice, Antitrust Enforcement Guidelines for International Operations (Nov. 10, 1988).

[70] *Besser Mfg. Co. v United States* 1952 SCC OnLine US SC 68.

[71] ibid.

circumstances of public health, inadequacy of supply of patented invention and other public interest rationales.[72]

The general rule under the Antitrust Law of US is that there is no general duty which deals with competitors[73] but the liability under the Section 2 of the Sherman Act, which governs the abuse of dominance, will accrue when the refusal by a holder of patent results in violation of dominant position in market. Further, in the Trinko[74] and Linkline[75] judgements, it was held that 'under certain circumstances, the refusal to cooperate with rivals can constitute of anti- competitive conduct' but this must be done only in exceptional circumstances.[76]The Court of Appeals for the Federal Circuit has held that 'in the absence of any indication of illegal tying, fraud in patent and trademark office', the patent holder should be immune from antitrust law but in other circumstances it is under the jurisdiction of antitrust law.[77]

Further, under EU competition law, it was held that competition law can be violated through misrepresentation of patents, thereby artificially extending the life of the patent as in the 2012 case where the Court of Justice of the European Union ruled that AstraZeneca had violated the competition law through misrepresentation to various patent offices.[78]

VII. CONCLUSION AND WAY FORWARD

The *Nacto v. Bayer case* led to the evidence of Bayer's inefficiency to cater to the need of production and satisfy the reasonable requirements of the public. In the absence of such exceptional circumstances' test in India and the consumer welfare and promotion of competition focus of CCI, it is not impossible for CCI to adopt an approach which finds IP rights, in such cases, restricting the production of goods which violated Section 4(2)(b)(i) of the Competition Act. The fact that the Controller of Patents can issue licences in the case wherein the patentee can disseminate the technology leads to the evaluation that the CCI can

[72] Christopher Gibson, 'A look at the compulsory license in investment arbitration: the case of indirect expropriation' (2010) 25(3) American University of International Law Review 357.

[73] *United States v Colgate & Co* 1919 SCC OnLine US SC 177.

[74] *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* 2004 SCC OnLine US SC 2.

[75] *Pacific Bell Telephone Co. v Linkline Communications, Inc., et al.* 2009 SCC OnLine US SC 21

[76] *Masonite Corporation Case* (n 68).

[77]Rita Coco, 'Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and the International Setting', (2008) 12(1) Marquette Intellectual Property Law Review 1.

[78] Richard Eccles, 'Court of Justice Upholds AstraZeneca Abuse of Dominance Decision' (*Twobirds* February 2013) <http://www.twobirds.com/en/news/articles/2012/court-of-justice-upholds-astrazeneca-abuse-dominance-decision0113> accessed July 23 2021.

potentially use such a failure by the dominant company to disseminate technology or to restrict it as a violation to Section 4(2)(b)(i). Further, Section 21A of the Competition Act provides that CCI has the power to refer to the concerned authority wherever the CCI is faced with a decision whose implementation is entrusted in other authority.[79] Section 90 of the Patents Act states that 'in case the license is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, the licensee shall be permitted to export the patented product, if need be'.[80] Hence, this section deals with the anti-competitive practice determined by the judicial or administrative process, but it does not stipulate which specific authority would decide such practice as anti-competitive.[81]

Section 60 of the Competition Act clarifies the position of Competition Act with reference to other acts as stating that Competition Act has an overriding effect over other acts, thus, setting the stage for exercise of jurisdiction of Competition Commission.[82] In the case of *Competition Commission of India v. M/s Fast Way Transmission Pvt. Ltd. And Others*,[83] the Supreme Court held that Section 60 gives the act an overriding effect over other states in case of clash between them, keeping in view the economic development of the country. Also, Section 62 of the Competition Act makes it clear that the act must be used in addition and not in derogation of the provisions of other laws in India.[84]

The CCI can issue the order for investigation in case the patent holder violated the principle of dominance in the market but the remedy for the same is under the patents act. It is an established principle of the patent law and the competition law that they both focus on the goal of innovations and general welfare. Hence, IPRs are covered under competition laws but given special treatment in assessment.[85] Section 3 of the Competition Act exempts reasonable conditions imposed for protection of IPRs and Section 4 relating to the abuse of holding IPRs liable on the account of abuse of dominance considers all the factors under the framework of competition. Hence, the exercise of power vested with the CCI under Section 19 of the Act mandates that if there is violation of Section 4(1) of the Act then under Section 19(4) of the Competition Act, the Commission shall consider an inquiry into the allegations and if there is

[79] Section 21A, The Competition Act 2002.
[80] Section 90, Indian Patent Act, 1970.
[81] Mansee Teotia and Manish Sanwal (n 11).
[82] Section 60, The Competition Act 2002.
[83] *CCI v Fast Way Transmission (P) Ltd* 2018 SCC OnLine SC 111.
[84] Section 62, The Competition Act 2002.
[85] 'Provisions Relating to Abuse of Dominance' (2020) 4 Competition Commission of India, Advocacy Series 1.

prima facie case of abuse of dominance, then it shall direct the Director General to cause an investigation and furnish a report.[86]

However, in order to maintain the balance between the right to health of people and the incentives of the pharmaceutical companies, the CCI can use compulsory licensing as a way to negotiate with the companies to grant a voluntary patent too, wherein the companies will be the ones who would set the amount of compensation they will receive. This will not only be a solution for the increased access to essential drugs but also provide greater room for negotiation and profit making between the firms too.

[86] Section 19 (n 33).

EXCLUSIVE PRIVATE DOMESTIC LEAGUES AND NATIONAL SPORTS REGULATORS: CHALLENGING THE CCI'S APPROACH

- *MR. DEBAYAN BHATTACHARYA*[*]

ABSTRACT

The commercialization of sports has led to an exponential increase in its value and importance. Private investment has catalysed sport to more prominence than ever before, and this has led to increasing scrutiny by competition regulators. Most cases before the Competition Commission of India involve the creation of exclusive private domestic leagues, where a national sports regulator ties up with a private company to set up a league. Pursuant to this, the regulator guarantees that no other private league in competition with this exclusive league will be recognized.

The legal standard in such cases is the inherence-proportionality test, which requires a balancing of the anti-competitive harms and the pro-competitive benefits. However, the current jurisprudence is primarily concerned with the regulator's intention and whether the regulator was targeting one specific organization during the process. It makes little reference to the pro-competitive benefits that arise from private exclusive domestic leagues. This paper argues that such determination is necessary and lays down these pro-competitive benefits, arguing that it is the only way to attract private investment and ensure the sustained growth of the sport. Such reasoning can also lead to changes in the way cases are decided, as an analysis of the decision in Shravan Yadav vs. Volleyball Federation of India demonstrates. The competition regulator can also incorporate such considerations with the current intention-based approach. Ultimately, there is a vacuum in the existing jurisprudence, and this paper provides a framework to comprehensively deal with the issue.

Keywords: Private Sports League, IPL, Competition, Antitrust, Sports, Competition Law

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INTRODUCTION

Sports have always been an important influence in society as it is an important driver of the economy, a popular source of entertainment, and also contributes to national prestige and pride. The value of sports has risen exponentially due to increasing commercialization and private investment. The Indian Premier League [**"IPL"**] has a brand value of over Rs. 47,500cr[1] and contributes around Rs. 11.5 billion to India's GDP.[2] Clubs in the Indian Super League [**"ISL"**] are worth hundreds of millions of dollars,[3] and players in the Premier Badminton League [**"PBL"**] are paid up to 77 lakhs during player auctions.[4] Given the growing importance of sports, both in terms of opportunities provided to individual players and the enormous entertainment value it provides, it comes as no surprise that regulation of sports is an important aspect of competition law.

The most frequent cases in sports regulation concern the actions of national sports regulators. Their actions represent a unique challenge for competition law since they are perpetually dominant in their respective markets with little chance of displacement: they are granted a monopoly in the selection of athletes, have the ability to regulate sport, and are often affiliated with the sport's international regulators.[5] Thus, their actions are subject to elevated scrutiny, since any decision they take may represent an abuse of market dominance.

Common patterns have emerged across the Competition Commission of India's [**"CCI"** or **"Commission"**] jurisprudence in the context of sports regulators. Most of these cases concern the formation of exclusive private domestic leagues, when the sport regulator ties up with a private organization and forms a league. Consequently, the regulator pledges to not recognize or support alternatives, and incentivize players to participate in the newly-formed league.

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[1] Gaurav Laghate, 'IPL brand valuation soars 13.5% to Rs 47,500 crore: Duff & Phelps' (*The Economic Times*, 20 September 2019) <https://economictimes.indiatimes.com/news/sports/ipl-brand-valuation-soars-13-5-to-rs-47500-crore-duff-phelps/articleshow/71197984.cms?from=mdr> accessed 30 October 2021.

[2] Manas Tiwari, 'IPL economy: What the cash-rich league adds to India's GDP' (*Financial Express* , 22 January 2018) <https://www.financialexpress.com/sports/ipl/ipl-economy-what-the-cash-rich-league-adds-to-indias-gdp/1025063/> accessed 30 October 2021.

[3] Anonymous 'Most valuable club in ISL: Find out what the teams are worth' (*SportsAdda*, 15 March, 2021) <https://www.sportsadda.com/football/features/most-valuable-club-isl-indian-super-league-market-value> accessed 30 October 2021.

[4] ET Online, 'From PV Sindhu To Chirag Shetty, Here Are The Highest-Paid Players In Premier Badminton League' (*The Economic Times*, 27 November 2019) <https://economictimes.indiatimes.com/magazines/panache/from-pv-sindhu-to-chirag-shetty-here-are-the-highest-paid-players-in-premier-badminton-league/let-the-auction-begin/slideshow/72259235.cms> accessed 30 October 2021.

[5] *Department of Sports, Ministry of Youth Affairs and Sports v Athletics Federation of India* 2016 SCC OnLine CCI 17: [2016] CCI 18 [44]; *Surinder Singh Barmi v Broadcasting Cricket Council of India* 2017 SCC OnLine CCI 57 [37]-[43] (Surinder Barmi).

While the IPL is not *per se* such an exclusive league, its dominance renders it the equivalent of such an exclusive league. A number of other leagues have cropped up on the IPL model to replicate its success. For instance, the PBL runs on a contract guaranteeing exclusivity to the league.[6] This guarantee of exclusivity is important for a sport's development, an argument that will be detailed further in the paper.

In such cases, the applicable legal doctrine is the inherence-proportionality standard put forth in the European Court of Justice's celebrated judgement of *Meca-Medina and Majcen v. Commission*[7]. The standard involves weighing the competitive restriction against the development of the sport that the measure would bring about.[8] This standard has been applied by the CCI in a number of cases.[9] Thus, there is a need to assess the pro-competitive benefits has to be carried out. However, in reality, the outcome of the case seems to depend on the perceived *mala fide* intention of the sports regulator as opposed to an actual balancing of the harm to competition versus the pro-competitive benefit.

While there is nothing inherently erroneous with considering the intention of an actor, the CCI's focus on *mala fides* with respect to sport regulators leads to a number of issues. First, the analysis of the actor's supposed intention is used as a replacement for actual analysis of the development of the sport. The inherence-proportionality test requires a balancing of the competitive restriction and the pro-competitive benefit. The CCI's decision demonstrate remarkably little reasoning with respect to the pro-competitive benefit of an exclusive domestic league and the resulting development to the sport. The required balancing is never undertaken comprehensively. In *Surinder Barmi vs. Board of Cricket Council of India* [**"Surinder Barmi"**], the Commission merely argued that the decision to make the IPL an exclusive league was not shown to be in the "interest of cricket", pointedly refusing to undertake its own analysis of whether the move would develop the sport. In *Dhanraj Pillai vs. Hockey India* [**"Hockey India"**]**,** the CCI held that the regulator Hockey India was abusing its dominance to promote its own Hockey League at the expense of alternatives. Thus, it allowed a competitor's World

[6] Ritesh Ranjan, 'Sportzlive wins long-term rights for Premier Badminton League' (*Sportscrunch*, 15 September, 2016) <https://www.sportscrunch.in/sportzlive-wins-long-term-rights-for-premier-badminton-league/> accessed 30 October 2021.

[7] Case C-519/04, Meca-Medina and Majcen v. Commission, 2006 ECR I-6991.

[8] ibid 42.

[9] *Dhanraj Pillay v Hockey India* 2013 SCC OnLine CCI 36 : [2013] CCI 35, ¶10.6.4 (Hockey India) *Hemant Sharma vs. All India Chess Federation* 2018 SCC OnLine CCI 53 [54] (Hemant Sharma).

Series Hockey to be held in competition with the Hockey League. It did not consider the pro-competitive benefits of an exclusive, regulator-backed league.

Second, the CCI's reasoning often assumes that the regulator acts in bad faith whenever an unrecognized organization is restricted. However, there is limited analysis of the importance of commercial investment in a sport spearheaded by the regulator. The sport regulator might actually be acting in good faith by preventing proliferation of private competitions. For example, in *Confederation of Professional Baseball Softball Clubs vs. Amateur Baseball Federation of India*, the CCI merely stated that the baseball regulator's actions had violated Section 4 without any examination of the pro-competitive benefits that may have accrued and without acknowledgement of the possibility of the regulator acting in good faith.[10] Thus, there is almost a presumption of these dominant regulators acting against the competition.

The aim of this paper is to challenge the above-mentioned assumptions. After analyzing the reasoning used by the Commission in two of its earliest cases, it will demonstrate how the CCI's current approach is misguided and unfaithful to the legal standard. Further, the legal analysis required by the inherence-proportionality standard cannot be fulfilled unless there is consideration and assessment of the pro-competitive impacts of such exclusive domestic leagues. The piece will provide a normative basis that will serve as a foundation to alleviate the two issues identified with the CCI's focus on intention. The paper will also demonstrate how the Commission's analysis can evolve by applying these principles to the case of *Shravan Yadav vs. Volleyball Federation of India*. Thus, it will demonstrate how considering the pro-competitive benefits of exclusive leagues can influence the decision in cases. Ultimately, even if the CCI decides to continue the intention-based approach to resolving disputes, the normative reasoning provided can influence the CCI's assessment of whether *mala fide* intention was present in a particular case or not.

ANALYZING THE CCI'S JURISPRUDENCE

One of the Commission's earliest cases was the case of *Surinder Barmi.* The Board of Cricket Control of India ["**BCCI**"] had recently inaugurated the IPL, and to that end, stipulated that it would not support or host any cricket tournament that would compete with the IPL.[11] Given BCCI's presence as a nodal regulator, this meant that the IPL would effectively become the

[10] *Confederation of Professional Baseball Softball Clubs v Amateur Baseball Federation of India* 2021 SCC OnLine CCI 30 [26].

[11] Surinder Barmi (n 5) [41].

only private domestic cricket league.[12] Surinder Barmi had filed a suit against this declaration of the BCCI and some other ancillary issues, arguing that this was an abuse of dominance and violated Section 4 of the Competition Act.

The Commission held that BCCI had abused its dominant position. It stated that a complete ban on any other private cricket league for 10 years was a grave antitrust violation.[13] Further, the BCCI itself had not been able to prove that the move was in the "interest of cricket",[14] and that the only justification for the same had been pressure from investors. Thus, BCCI was held liable.

Though the CCI's reasoning seems acceptable on the surface, the underlying assumptions are problematic. In the case of *Hockey India*[15], it had laid down a number of factors to comprehensively carry out the inherence-proportionality test, including the "*primacy of national representative competition, deter[ring] free riding on the investments by national associations, maintaining the calendar of activities in a cohesive manner not cutting across the interests of participating members, preserving the integrity of the sport, etc*."[16] A plain reading of all these factors makes clear that they are concerned with maintaining the integrity of the powers of national regulators and ensuring that access to and development of sports is possible. Indeed, the standard of 'development of sport' is a standard the Commission itself has utilized.[17] Yet, these have not been considered in the context of exclusive domestic leagues. For instance, the development of the sport that may accrue from leagues, or a regulator's interest in ensuring that the dates of exclusive domestic leagues do not clash with other competitions are all relevant factors that are simply unaccounted for. The Commission simply fails to consider the benefits that exclusive consolidated domestic sport leagues have despite this being a requirement of the test.

For instance, it is undoubted that the IPL has been a splendid commercial success. It has not only increased monetary rewards for players,[18] but has also served as an effective platform for

[12] ibid 44.

[13] ibid 49.

[14] Ibid 45.

[15] Hockey India (n 9).

[16] ibid 10.2.1.

[17] ibid; Hemant Sharma (n9) [53].

[18] Srishti Singh Sisodia, 'IPL pays its players more than any other league. You'll never believe how much' (*Wion*, 28 November 2018) <https://www.wionews.com/sports/ipl-pays-players-more-than-epl-la-liga-nba-179946> accessed 30 October 2021; Cricketnext Staff, 'IPL: Increase in Salary Purse for Teams, Bid for New Franchises on Cards for BCCI' (*News18*, 5 July 2021) <https://www.news18.com/cricketnext/news/ipl-increase-in-salary-purse-for-teams-bid-for-new-franchises-on-cards-for-bcci-3926279.html> accessed 30 October 2021; Kunal

talented newcomers to gain recognition,[19] and has contributed immensely to the popularity of cricket in India.[20] It has a number of other ancillary benefits that only large leagues have.[21] It is to be noted that other sports have successfully benefited from commercialization as well; the PBL has massively increased player salaries[22] and the ISL has escalated the influence and popularity of Indian football.[23] Further, he PBL has not only revived the sport, but also made it a viable career path for aspiring youngsters.[24]

Though the Commission cannot be faulted for not predicting the success of private sports leagues, non-consideration of this aspect in its legal analysis was unexpected. Not only were the benefits of such leagues obvious, but there was adequate capacity in the normative framework to factor in such considerations. Hence, this omission on part of the Commission raises questions.

The increasing commercialization of sport has immense benefit, and domestic tournaments that are guaranteed exclusivity by the national regulator further bolster these benefits. Firstly, it leads to the influx of large amounts of capital to support such sports, especially when the sport may not be very famous and lucrative, a guarantee of exclusivity by the apex regulator can benefit it by attracting large amounts of capital in the sport. This does not only have monetary benefits for businessmen and club owners, but also for players. Players and athletes now have access to better training facilities, more public support, a stable source of income, the

Dhyani, 'IPL New Teams: IPL stars set for mega salary hike as franchises' salary purse to hit Rs 100 crore magical figure' (*Indiesport,* 6 July 2021) <https://www.insidesport.co/ipl-new-teams-ipl-stars-set-for-mega-salary-hike-as-franchisees-salary-purse-to-hit-rs-100-crore-magical-figure/> accessed 30 October 2021.

[19] Sporcial, 'IPL: A Platform For The Youth' (*Medium,* 21 May 2019) <https://medium.com/sporcial/ipl-a-platform-for-the-youth-8961369359f3> accessed 30 October 2019; PTI, 'IPL Gives Unknown Cricketers Platform to Show Talent: Sehwag' (*News18*, 19 January 2018) <https://www.news18.com/cricketnext/news/ipl- gives-unknown-cricketers-a-platform-to-show-their-talent-sehwag-1636995.html> accessed 30 October 2021.

[20] Tristan Lavalette, 'The Billion-Dollar Indian Premier League Has Americanized Cricket' (*Forbes,* 14 April 2019) <https://www.forbes.com/sites/tristanlavalette/2019/04/14/the-billion-dollar-indian-premier-league-has-americanized-cricket/?sh=52796f51702d> accessed 30 October 2021.

[21] Chandralekha Bhogadi, 'The economics of IPL' (*The Times of India*, 4 October 2020) <https://timesofindia.indiatimes.com/readersblog/the-twisted-whisper/the-economics-of-ipl-26767/> accessed 30 October 2021.

[22] Sohinee, 'Premier Badminton League is a major boon financially. Here's why.' (*The Bridge*, 14 December 2018) <https://thebridge.in/badminton/premier-badminton-league-major-boon-financially-here-why/?infinitescroll=1> accessed 30 October 2021.

[23] Tarkesh Jha, 'Marketing, foreign recruitment, strategic partnerships; how ISL is transforming Indian football' (*Khelnow*, 2 July 2020) <https://khelnow.com/football/isl-indian-football-development> accessed 30 October 2021.

[24] Manoj Bhagavatula, 'The improbable success of the Pro Kabaddi League' (*ESPN*, 24 April 2021) <https://www.espn.in/kabaddi/story/_/id/20170469/the-improbable-success-pro-kabaddi-league> accessed 30 October 2021.

opportunity to compete against skilled opponents,[25] and to win acclaim.[26] In the long term, this can also lead to the development of the national team.[27] This is more relevant considering the terrible plight of Indian athletes. Players have to train in reprehensible conditions. They lack access to even acceptable training facilities, and perpetually starve for funds. Even the most celebrated athletes of the country do not have sustained sources of income for regular training,[28] and many have to sell their medals and work in low paying jobs in order to ensure a basic income.[29]

This situation has been created by the inefficiency of state bodies and facilities, which have miserably failed to improve the conditions of athletes despite allocating large sums of money for decades.[30] Even though the government has begun an overhaul of the system, the process is likely to take a massive amount of time and investment.[31] In this backdrop, increasing commercial investment has incredible benefits, and furthermore, it is the only viable method to create real and sustained progress in sports, including the performance boost at a national level.[32]

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[25] Y.B. Sarangi, 'Pro Wrestling League: A launch pad to shine on the bigger stage' (*Sportstar*, 5 September 2020) <https://sportstar.thehindu.com/magazine/pro-wrestling-league-indian-wrestlers-vinesh-phogat-sakshi-malik-deepak-punia-olympics-covid-19/article32530931.ece> accessed 30 October 2021.

[26] Rajender Sharma, 'PBL: Badminton's biggest showbiz and ultimate security for global stars' (*InsideSport*, 21 December 2018) <https://www.insidesport.co/pbl-badmintons-biggest-showbiz-and-ultimate-security-for-global-stars/> accessed 30 October 2021.

[27] PTI, 'Ultimate Table Tennis league will help the sport benefit in India, says Wong Chun Ting' (*Indian Express*, 14 June 2017) <https://indianexpress.com/article/sports/sport-others/ultimate-table-tennis-league-will-help-the-sport-benefit-in-india-says-wong-chun-ting-4703900/> accessed 30 October 2021.

[28] Mail Today Bureau, 'Athletes who brought laurels to the nation are languishing in poverty, thanks to Centre's apathy' (*India Today*, 4 July 2014) <https://www.indiatoday.in/india/north/story/athletes-in-poverty-centre-negligence-159477-2013-04-21> accessed 30 October 2021.

[29] PTI, 'Eight gold medals winner athlete Geeta Kumar forced to sell vegetables in Jharkhand' (*Indian Express*, 30 June, 2020) <https://indianexpress.com/article/sports/athlete-geeta-kumar-forced-to-sell-vegetables-in-jharkhand-6483296/> accessed 30 October 2021; Shreya Verma, 'It breaks my heart to see an Indian international shooter has to sell chips to earn a living' (*The Bridge*, 24 June 2021) <https://thebridge.in/shooting/indian-international-shooter-selling-chips-living-22361> accessed 30 October 2021.

[30] Shreyanshi Singh, 'Why Is India Bad at Sport?' (*The Diplomat*, 21 January 2011) <https://thediplomat.com/2011/01/why-is-india-bad-at-sport/> accessed 30 October 2021; Nyshka Chandran, 'Why is India so bad at sport?' (*CNBC*, 20 August 2016) <https://www.cnbc.com/2016/08/19/lack-of-sporting-culture-institutional-support-and-inequality-blamed-for-indias-poor-olympic-record.html> accessed 30 October 2021.

[31] Hannah Beech and Shalini Venugopal Bhagat, 'Why India Struggles to Win Olympic Gold' (*The New York Times*, 4 August 2021) <https://www.nytimes.com/2021/08/04/world/asia/olympics-india.html> accessed 30 October 2021.

[32] Shamya Dasgupta, 'How Indian Super League can make a positive difference to football in India' (*The Economic Times*, 14 September 2014) <https://economictimes.indiatimes.com/news/sports/how-indian-super-league-can-make-a-positive-difference-to-football-inindia/articleshow/42396993.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 30 October 2021.

However, the benefits provided by exclusive leagues are likely to magnify these pro-competitive benefits in a number of ways. First, consumer interest and public support is likely to be enormous for mega-leagues with the best talent. If leagues are fragmented, then the quality of players will be reduced for all leagues, and the viewership will also be scattered. This would mean reduced revenue for the players and the ecosystem in general. For instance, football players can benefit massively if the proposed merger of the I-League and ISL goes ahead, since the ISL is superior at a technical level.[33] Moreover, consumer interest would also be far lesser in such a potpourri of leagues since the primary appeal of sport lies in the ability to see high-quality competition continuously. Having many leagues does not only scatter the competition, but the collective bargaining power available to a single mega-league is also capable of attracting a larger number of international players, who would otherwise have not been persuaded. The PBL[34] and Ultimate Table Tennis[35] have been able to attract foreign talent and helped player growth, while foreign hockey players were split between the Hockey India League and World Series Hockey.[36] If they were all concentrated in one league, there would be a larger number of higher quality, foreign talent. This would promote the popularity of the sport by increasing the quality of the league. This concentration of talent is what has pushed up the popularity of the IPL.[37]

Second, the increased consumer interest can eventually snowball over time and lead to the creation of considerable public interest in the sport that can be channelled in a number of ways. Once the public is exposed to the talent and quality that Indian players demonstrate against top global players, this public opinion can be channelled into lobbying for pouring more state resources into cash-starved sporting facilities at all levels and lead to increased public

[33] Pulasta Dhar, 'It's not just about the money: Why Indian players think ISL is miles ahead of I-League' (*Scroll.in,* 24 July, 2017) <https://scroll.in/field/844828/its-not-just-about-the-money-why-indian-players-think-isl-is-miles-ahead-of-i-league> accessed 30 October 2021.

[34] Ashok Venugopal, 'We get to learn a lot from foreign players: PV Sindhu on PBL' (*The Indian Express,* 22 January, 2020) <https://www.newindianexpress.com/sport/other/2020/jan/22/we-get-to-learn-a-lot-from-foreign-players-pv-sindhu-on-pbl-2092746.html> accessed 30 October 2021.

[35] 'Top foreign stars for Ultimate Table Tennis' (*Outlook,* 5 June, 2017) <https://www.outlookindia.com/newsscroll/top-foreign-stars-for-ultimate-table-tennis/1068484> accessed 30 October 2021.

[36] PTI, 'Over 100 foreign players interested in World Hockey League' (*Times of India,* 14 January, 2011) <https://timesofindia.indiatimes.com/sports/hockey/top-stories/over-100-foreign-players-interested-in-world-hockey-league/articleshow/7286758.cms> accessed 30 October 2021; Jashan, 'Hockey India League: Will it revive Indian hockey?' (*Sportskeeda,* 7 October, 2021) <https://www.sportskeeda.com/hockey/hockey-india-league-will-it-revive-indian-hockey> accessed 30 October 2021.

[37] Mahesh Sethuraman, 'What makes the IPL successful?' (*ESPN Cricinfo,* 6 May, 2013) <https://www.espncricinfo.com/story/mahesh-sethuraman-what-makes-the-ipl-successful-634118> accessed 30 October 2021.

accountability to manage inefficiencies. Thirdly, given the uncertainty that exists in less famous sports, a ten-year guarantee massively alleviates investor concerns.[38] This has become increasingly frequent in many competitions trying to emulate the IPL's franchisee model.[39]

Finally, much of the competition incentive sought by law is fulfilled by the unique structure of the league itself. A number of teams compete in the league, and each is motivated to perform well for monetary benefits and to receive acclaim. Thus, a vibrant market for players is likely to develop within a league. This means the benefits associated with competition, in general, are likely to exist anyway, but while also providing a basic safety net to players participating in the league due to minimum revenue associated with the league's popularity. However, the benefits associated with mega-leagues are exclusive only to such leagues and cannot be attained otherwise. While having multiple leagues in a sport can also lead to competition-linked benefits, the benefits of exclusive domestic leagues seem to exceed these marginal improvements.

The CCI simply does not account for this considerable pro-competitive benefit from regulator-backed exclusive leagues in its judgements. The CCI's reasoning is often restricted to the intent of the regulator. In the case of *Hockey India,* the Commission held that Hockey India did not violate Section 4 of the Competition Act on the grounds that they had not acted against Indian Hockey Federation with prejudice and specific malice but had merely exercised its regulatory powers in general. Further, there was no discussion of the outcome of the proposed Hockey India-backed league and potential benefits that may have accrued. Most importantly, the CCI itself recognizes that this efficiency argument exists,[40] but it still does not account for the same in its decisions.

One final caveat remains, which is that not all leagues will be as successful as the IPL and it is admittedly difficult to predict the success of a league in advance. However, a number of options are open to the Commission in this regard. it can scrutinize the details of the plan, whether previous deadlines have been adhered to, the number of players that can be benefited, the amount of capital involved via broadcasting and sponsorship, and/or other factors that might be relevant. Notably, requiring the disclosure of business information is not barred by

[38] Atul Pande, 'INDIAN SPORT: Private leagues, private capital, and future glory' (*Sunday Guardian Live,* July 2021) <https://www.sundayguardianlive.com/sports/indian-sport-private-leagues-private-capital-future-glory> accessed 30 October 2021.

[39] *Sporty Solutionz Pvt. Ltd. v Badminton Association of India and Anr.* 2020(2) ArbLR35 (Delhi) [2(c)(iv)].

[40] Hockey India at (n 9) [10.6.4].

confidentiality restrictions. Sensitive commercial information does not have to be disclosed to the other party, but only considered by the Commission in its decision-making. This does not cause any confidentiality concerns.[41]

Thus, the possible pro-competitive benefit will depend on the facts of a particular case. This does not excuse the pertinent need to factor in the pro-competitive benefits, since the CCI is experienced in economic analysis. Ultimately, however, whatever the strength of an argument is concluded to be, this additional understanding considerably influences the manner in which the CCI resolves cases.

THE VOLLEYBALL FEDERATION OF INDIA CASE

The previous section detailed the pro-competitive benefits of an exclusive domestic league. Not only is the analysis of such benefit necessary under the legal standard, it can also influence the outcome of cases. The recent case of *Shravan Yadav vs. Volleyball Federation of India*[42] can serve as a clear example of such an impact.

Shravan Yadav dealt with the actions of the national volleyball regulator. In the backdrop of poor performance by the Indian team internationally,[43] the Volleyball Federation of India [**"VFI"**] tied up with a company called Baseline in order to create an IPL-like Volleyball League.[44] To this end, VFI pledged to not permit or vote any other domestic league for ten years.[45] Further, VFI announced that the winners of the Volleyball League would be chosen to represent India at the Asian Championships,[46] and moreover that Volleyball League would receive preference over other international competitions in case the dates of the competition were to clash.[47]

The CCI held that VFI's actions caused an abuse of its market dominance. Specifically, it stated that forcing players to participate in the domestic league as opposed to attending international tournaments was not "necessary for promoting the game or preserving its integrity".[48] It thus

[41] Bhumesh Verma and Shashank Saurabh, 'Making Sense of the Confidentiality Claims under the Competition Law Regime' (*The SCC Online Blog*, 13 March, 2020), <https://www.scconline.com/blog/post/2020/03/13/making-sense-of-the-confidentiality-claims-under-the-competition-law-regime/> accessed 30 October 2021.

[42] *Shravan Yadav vs. Volleyball Federation of India* 2021 SCC OnLine CCI 28.

[43] ibid 6.

[44] ibid 7.

[45] ibid 33.

[46] ibid 11, 34.

[47] ibid 34.

[48] ibid 44.

held that a *prima facie* abuse of dominance was disclosed and directed the Director-General to carry out an investigation.[49] As usual, the Commission did not make even a cursory enquiry into the pro-competitive benefits of an exclusive domestic league. However, had it done so, its reasoning would certainly have changed, and maybe even the outcome would have been different.

Even though the Director-General's investigation is pending, it can be *prima facie* argued that the case should have been rejected. The Indian Volleyball Team had a subpar performance at an international stage,[50] and given that the conditions of the game, they are not expected to undergo a sudden revolution in the near future. It is unclear why the Commission chose to focus on the possibility of not being able to participate in international competitions, especially since VFI had indicated in their submissions that they would not enforce the same.[51] Indeed, without better facilities and competition, repeated participation sets up national teams for failure. As indicated earlier, private investment and the capital influx is the only speedy path to ensure the development of the sport actually occurs. On proportionality, the possibility of success and commercial acclaim for the sport outweighs the foreclosure of competition, especially in the backdrop of a string of disappointing performances and lack of access to adequate resources. Thus, if the CCI had carried out an actual analysis, it would have concluded that on balance, the development of sport would have been better by such restrictions and would not have ordered an investigation.

Lastly, it is well-regarded that state sports regulators are usually marred by corruption, political infighting, and massive inefficiency. In case, the Commission decides to rule that such exclusive leagues are valid from a competition law perspective, one can expect a proliferation of them. Regrettably, that means that some of these deals will be marred by fraud and corruption. This is reprehensible, and nothing in this paper prejudices the CCI from investigating whether the process of allocation has followed due process or not. However, even with such a scenario, tie ups to form domestic leagues are better. First, companies are generally averse to investing unless there is a viable economic plan and a chance of success. Thus, most leagues are only formed when the national regulator has demonstrated some level of competence. Second, the number of competitions propelled by fraud can be mitigated if the CCI investigates them thoroughly. Third, even if a large number of these competitions are

[49] ibid 44-45.
[50] ibid 6.
[51] ibid 43.

corrupt and do not reach massive financial success, there is still some minimal competition which leads to an increase in access to competition and satisfactory training, along with all of the benefits that come from a consolidated, single league. Compared to the current conditions, the pace of commercialization can be boosted by enabling the existence of monopolistic domestic leagues. Some corrupt deals do not take away from the clear benefits enunciated above.

CONCLUSION

Competition law has developed sophisticated systems to determine the legality of actions taken by actors in the field of sports, but in practice, some aspects of the test are side-lined in favour of an emphasis on others. This paper makes a broad argument for the consideration of the pro-competitive benefits of exclusive domestic leagues formed by the tie-up of a sectoral regulator and a private company, as it is faithful to the legal requirements of the current standard. This is pertinent in the backdrop of widespread lack of access for sportspersons and the explosion of media access through the introduction of digital streaming apps.

In order to ensure that the process of forming such leagues itself is fair and not violative of competition law concerns, the Commission should make some modifications in the information it seeks from parties. In cases where the actions of national sports regulators identified above, the CCI should demand that the regulator provides information about the amount of investment that teams currently have, the recent performance or achievement of teams at a national level, or even take cognizance of resources that speak of the issues associated with the sport. Further, the CCI should command the regulator to provide information about the deal, and infer the possible fruitfulness of the proposed league in its decision-making. In such cases, the confidentiality of information is not a bar, since the Commission has vast powers to acquire information. Moreover, since this information does not have to be revealed to the other party, it does not violate any confidentiality provisions.[52] Such considerations are not only required by the legal test, but are also necessary to ensure that sport itself can be viably developed in the long run.

However, even if the Commission chooses to not explicitly incorporate such factors into its decision-making and continues to operate by an intention-based approach, the reasoning

[52] Bhumesh Verma and Shashank Saurabh, 'Making Sense of the Confidentiality Claims under the Competition Law Regime' (*The SCC Online Blog*, 13 March, 2020), <https://www.scconline.com/blog/post/2020/03/13/making-sense-of-the-confidentiality-claims-under-the-competition-law-regime/> accessed 30 October 2021.

provided above can also be valuable there. The problem with the current approach is that the CCI holds that sports regulators are violating their dominant position without much reasoning as to why, and pertinently, what circumstances are required for it to not abuse its position, since most of the case law creates an almost irrebuttable presumption of abuse of dominance. In such instances, the CCI can consider specific benefits conferred by exclusive domestic leagues, then determine their viability in each case, and subsequently judge the possibility of their success. Based on the outcome, the CCI can impute the intention on the regulator; if there is very little chance of success, the regulator may have been acting in bad faith, but if there is a fair chance of success, the regulator was acting in good faith which leads to the development of the sport.

The framework of the Commission requires a fresh perspective. The Director-General and Commission will need to carry out economic analysis in order to determine the feasibility of the plan, and then determine the possibility of success. In conclusion, despite what path it chooses, the Commission's current analysis is flawed and incomplete without full consideration of the legal factors involved. The marginal increase in time taken to process such data is worth it as it creates stability in the application of the law and ensures that the contours of competition are actually protected.

AMAZON'S TRYST WITH THE LAW: THE INDIAN ANTI-TRUST PERSPECTIVE

- *MS. PRAGYA JAIN[*] &MS. AKSHITA SINGH[*]*

ABSTRACT

The popularity of Amazon, as an online marketplace platform operating via various independent sellers, has been sky-rocketing over the years. Since its entry in the Indian market, Amazon has been trying to realise its Great Indian Retail Dream of reaching the consumer directly. Unrelenting in the face of the regulatory obstacles in India, Amazon, over the years has succeeded in dodging every curveball, albeit with increasing difficulty. Its aggressive approach to capture the market has been met with vehement disapproval from sellers existing on its online ecosystem as well as offline brick-and-mortar stores. While the platform has recently faced scrutiny by the Indian Competition watchdog, its partnership with Cloudtail India has been rigorously contested by the opposite parties. However, with the sudden decision of Amazon to cease its partnership with Cloudtail, the road ahead seems blurry at the moment.

Per the authors, the looming end of Cloudtail-Amazon's hand-in-glove act brings in several other core issues that ought to be understood while gauging the overall impact of the decision. The same has been presented in a three-fold fashion. We first trace the events leading up to the present case and the CCI probe into the e-commerce giants and the disintegration of Cloudtail. We next put forth a stakeholder analysis that would enable readers to comprehend the effects of the impugned disintegration from the perspective of the sellers other than Cloudtail. However, to lay down a more balanced view, the analysis is then furthered by an appraisal of the advantages of seemingly "direct" sellers like Cloudtail and how they leverage the economics of scale. The soul of this paper lies in contextualising the long wrought out tussle between the CCI, Indian trade unions, and e-commerce giants and the way forward.

Keywords: **Amazon, Cloudtail, Competition Law, E-commerce, FDI**

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I. GENERAL OVERVIEW

Amazon, a force to be reckoned with in the e-commerce industry, has gained a humongous stronghold over the years, so much so that it is synonymous with online shopping for a major part of the population.[1] In an increasingly digital age, having a user base of over 200 million[2] has rendered it nigh impossible for the e-commerce giant to not attract attention from both customers and sellers. However, it is also true that with more popularity comes greater accountability. Amazon's role as an online marketplace platform has often incited legions of sellers, particularly the one contesting against the highly driven joint-venture between Amazon and Cloudtail India (hereinafter, "Cloudtail").[3] Cloudtail is the wholly-owned subsidiary of Prione Business Services, the outcome of a culmination between Amazon and Catamaran Ventures.[4] The joint-venture, ambitious in its approach, had claimed to transform the e-commerce business in India along with the lives of millions of small businessmen.

At this juncture, it becomes pertinent to acquire a perspective on Amazon's move concerning its stake in Cloudtail. A cursory glance of the definition of 'group company' given under the RBI Policy pertaining to Foreign Direct Investment (hereinafter "FDI") in India, stipulates "*A group company means two or more enterprises, which, directly or indirectly, are in a position to exercise 26% or more voting rights in the other enterprise or can appoint more than 50% of the members of the board of directors in the other enterprise*."[5] So as to ensure that Cloudtail did not fall within the ambit of a group company, Amazon brought down its stake from 49% to 24% in Cloudtail.[6] This allowed Cloudtail to sell on the marketplace and have its independent plans.

While this restructuring of the shareholding may lend legitimacy on paper, the reality is vivid. Allegations regarding Amazon operating via Cloudtail to attain maximum profits have often

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[1] Daniele Palumbo,'Amazon: The unstoppable rise of the internet giant' (February 2021) BBC News <https://www.bbc.com/news/business-55927979> accessed 01 September 2021.

[2]Todd Spangler, 'Amazon Prime Tops 200 Million Members, Jeff Bezos Says' (15 April 2021) Variety <https://variety.com/2021/digital/news/amazon-prime-200-million-jeff-bezos-1234952188/> accessed 02 September 2021.

[3] Digbijay Mishra, 'Seller body files antitrust case against amazon at CCI', (26 August 2020) The Times of India <https://timesofindia.indiatimes.com/business/india-business/seller-body-files-antitrust-case-against-amazon-at-cci/articleshow/77765512.cms> accessed 03 September 2021.

[4] Tarush Bhalla & Suneera Tondon, 'Amazon's top seller Cloudtail to cease ops from May 2022' (10 August 2021) Mint <www.livemint.com/companies/news/amazons-cloudtail-india-to-be-discontinued-from-may-2022-11628524693285.html> accessed 04 September 2021.

[5] Reserve Bank of India, Master Circular on Foreign Investment in India (Circular Number - No.15/2013-14) https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=8104.

[6] ibid.

surfaced.[7] However, with the two companies deciding to cease their seven-year-old partnership, the road ahead may be characterised by an odd turn of events. In what seems like a knee-jerk reaction to deep scrutiny by the Competition Commission of India,[8] ("**CCI**"), the end of this mega saga may just be more than two enterprises simply parting ways. Interestingly, it has also been brought to notice that Cloudtail off-late has brought down its focus on smartphones.[9] The information may not be interesting per se, but the fact that Cloudtail decides to reduce its attention on smartphones at a time when the centre of the allegations in the proceedings against Amazon is the act of selling smartphones via its preferred sellers, i.e., Cloudtail seems slightly queer. Hence, while the short-term goal of Amazon seems to dodge the spotlight which it has been put into before the competition watchdog, its long-term agenda behind the action remains speculative.

In this article, the authors have attempted to furnish an understanding of the looming end of Cloudtail-Amazon's hand-in-glove act in a three-fold fashion. Firstly, we will walk through some crucial events which prompted the CCI to initiate an investigation and caused the e-commerce giant to take the subsequent decision of disintegration of Cloudtail. In the next fold of the research, we shed light on the effects of the impugned disintegration from the perspective of the stakeholders i.e. the sellers other than Cloudtail. In our last fold, we further our analysis by adopting a more balanced view. This entails an appraisal of the advantages of seemingly "direct" sellers like Cloudtail and how they leverage the economics of scale. The crux of the research lies in contextualising the long wrought out tussle between the CCI, Indian trade unions, and e-commerce giants and the way forward.

II. A WALK THROUGH KEY EVENTS

In order to fully appreciate the magnanimity of Amazon's tryst with the Indian competition watchdog, a brief recollection of the turn of events is necessary. These events help contextualise the political environment in which Amazon's Cloudtail was conceptualised in

[7] IANS 'Indian Sellers Collective asks Narayana Murthy to end ties with Amazon' (19 July 2021) Business Standard <www.business-standard.com/article/companies/indian-sellers-collective-asks-narayana-murthy-to-end-ties-with-amazon-121071900531_1.html> accessed 06 September 2021.

[8] In Re: Delhi Vyapar Mahsangh And Flipkart Internet Private Limited and its affiliated entities & Amazon Seller Services Private Limited and its affiliated entities (CCI Case No. 40 of 2019).

[9] Chaitali Chakravarti and Writankar Mukherjee, 'Murthy's Catamaran Ventures and Amazon India decide not to renew JV next year in Cloudtail' (09 August 2021) The Economic Times <https://economictimes.indiatimes.com/tech/technology/et-exclusive-amazons-cloudtail-india-to-stop-operations-from-next-may/articleshow/85179750.cms> accessed 07 September 2021.

India. More importantly, it points to Amazon's undeterred will to jump through Indian regulatory hoops to reach the customer directly, much to the chagrin of other smaller e-sellers and trade collectives in the nation.

The June 2014 attempt[10] at cementing a Joint Venture between Bezos's Amazon and Indian tech tycoon NR Narayana Murthy's Catamaran Ventures set the ball rolling for Amazon's Indian dreams. This Joint Venture became known as Prione Business Services[11] and it was successful in circumventing the regulatory wall of FDI norms that restrict[12] foreign players from holding a majority stake in e-commerce ventures. This Murthy-led 51:49 joint venture was aimed at onboarding small and medium-sized business services into the online world and boosting their business[13]. The catch, however, revealed itself in August 2014. Cloudtail India, a fully owned Prione subsidiary, made its presence known on the e-marketplace as a seller.[14] However, it was around the same time, India, in the spirit of supporting its small and medium business owners, brought about stricter rules to regulate foreign-backed investments in its e-commerce space.[15] It is crucial to note that this demographic continues to be of dear value in India's political fabric. These rules specifically laid down the scheme of the e-commerce models to disallow FDI in the inventory sold on the marketplace.

From then on, it is worth noting that Cloudtail's market presence and net profits rose promisingly well into FY17[16] at which point, Amazon's alleged malpractices had fluttered

[10] Saritha Rai, 'Amazon Ties Up With IT Billionaire Murthy Of Infosys To Launch E-commerce Joint Venture In India' (27 June 2014) Forbes <www.forbes.com/sites/sarithara i/2014/06/27/amazon-ties-up-with-it-billionaire-murthy-of-infosys-to-launch-e-commerce-joint-venture-in-india/?sh=6efba50df7a6> accessed 04 September 2021.

[11] Priyanka Sahay, 'Amazon's JV with Catamaran is now a seller in its India marketplace' (06 October 2014) VCCircle <www.vccircle.com/amazons-jv-catamaran-now-seller-its-india-marketplace> accessed 04 September 2021.

[12] Nisha Poddar, 'Narayana Murthy to partner with Amazon for e-commerce business in India' (24 June 2014) The Economic Times <https://economictimes.indiatimes.com/tech/ites/narayana-murthy-to-partner-with-amazon-for-e-commerce-business-in-india/articleshow/37267628.cms> accessed 04 September 2021.

[13] Rai (n 10).

[14] Priyanka Iyer, 'As Jeff Bezos and Narayana Murthy end Cloudtail partnership amid CCI probe, here's a timeline on one of Amazon's largest sellers in India' (10 August 2021) Money Control <www.moneycontrol.com/news/business/as-jeff-bezos-and-narayana-murthy-end-cloudtail-partnership-amid-cci-probe-heres-a-timeline-on-one-of-amazons-largest-sellers-in-india-7301081.html> accessed 04 September 2021.

[15] Rajat Mukherjee, Nitish Goel and Akshat Gupta, 'India: Key Changes In The Consolidated FDI Policy Of 2016' (10 June 2016) Mondaq <www.mondaq.com/india/inward-foreign-investment/499690/key-changes-in-the-consolidated-fdi-policy-of-2016> accessed 04 September 2021.

[16] Anushree Bhattacharyya, 'Cloudtail India posts FY17 net profit of Rs 1.59 crore' (01 June 2018) Financial Express <www.financialexpress.com/industry/cloudtail-india-posts-fy17-net-profit-of-rs-1-59-crore/1189235/> accessed 04 September 2021.

quite a few feathers. The All-India Online Vendors Association knocked at the CCI's doors,[17] levelling allegations of predatory pricing against e-commerce giants Amazon and Flipkart, affected through their online sellers Cloudtail and WS Retail, respectively.

As a reaction to the revised e-commerce rules coming into force,[18] a smart restructuring of Cloudtail was necessitated to ensure that it was in compliance with the Indian laws. This move also came in the aftermath of Amazon winding up its marketplace operation in China.[19] After facing stiff local competition in China, Amazon turned its eye to India, a trove of opportunities for growing its business. Being one of the key growth markets, India prompted Amazon to run pillar to post in terms of being compliant with the country's laws. Thus, Amazon Asia diminished its stake in the seller to 24% and Murthy's stake shot up to 76%.[20] This resulted in Cloudtail's status as an Amazon group company being neutralised.[21]

Meanwhile, Cloudtail's revenues and profits continue to skyrocket well into FY19[22] and FY20,[23] further breaking the backs of traders across the country. In January 2020, the Delhi Vyapar Mahasangh knocked on the doors of the CCI and a probe was initiated into the practises of Amazon and the Walmart owned Flipkart.[24] The Competition watchdog initiated an

[17] Shambhavi Anand, 'Online sellers write to CCI alleging predatory pricing by Flipkart's WS Retail and Amazon's Cloudtail' (04 March 2017) The Economic Times <https://economictimes.indiatimes.com/small-biz/startups/online-sellers-write-to-cci-alleging-predatory-pricing-by-flipkarts-ws-retail-and-amazons-cloudtail/articleshow/57456435.cms?from=mdr> accessed 04 September 2021.

[18] Sankalp Phartiyal, 'Explainer: What are India's new foreign direct investment rules for e-commerce' (31 January 2019) Reuters <www.reuters.com/article/india-ecommerce-explainer-idINKCN1PP1XS> accessed 04 September 2021.

[19] Arjun Kharpal, 'Amazon is shutting down its China marketplace business. Here's why it has struggled' (18 April 2019) CNBC <www.cnbc.com/2019/04/18/amazon-china-marketplace-closing-down-heres-why.html> accessed 04 September 2021.

[20] Shambhavi Anand and Chaitali Chakravarty, 'Key Amazon seller Cloudtail returns in a new avatar' (, 07 February 2019) The Economic Times <https://economictimes.indiatimes.com/industry/services/retail/key-amazon-seller-cloudtail-returns-in-a-new-avatar/articleshow/67877172.cms?from=mdr> accessed 04 September 2021.

[21] 'ET Now Digital 'Cloudtail rejigs ownership structure, to be back on Amazon soon' (07 February 2019) Times Now News <www.timesnownews.com/business-economy/companies/article/cloudtail-rejigs-ownership-structure-to-be-back-on-amazon-soon/361666> accessed 04 September 2021.

[22] 'TNN 'Cloudtail's topline up 25% at Rs 8,945 crore' (14 October 2019) The Times of India <https://timesofindia.indiatimes.com/business/india-business/cloudtails-topline-up-25-at-rs-8945-crore/articleshow/71572061.cms> accessed 05 September 2021.

[23] TNN 'Cloudtail profit up 130% in 2019-20' (12 December 2020) The Times of India <https://timesofindia.indiatimes.com/business/india-business/cloudtail-profit-up-130-in-2019-20/articleshow/79686140.cms> accessed 05 September 2021.

[24] IANS 'CCI orders enquiry into business practices of Amazon, Flipkart' (14 January 2020) The Hindu <www.thehindu.com/business/Industry/cci-orders-enquiry-into-business-practices-of-amazon-flipkart/article30564551.ece> accessed 05 September 2021.

investigation under Section 26(1) of the Competition Act, 2002 on the premise of having prima facie evidence.[25] Allegations of indulging in anti-competitive practices, preferential treatment of sellers, deep discounting, and predatory pricing were levelled against these e-commerce giants. The news of the probe's launch coincided with Bezos's visit to India, which was met with protesting traders on the street.[26]

In almost a knee-jerk reaction, the companies were quick to move to the Karnataka High Court[27] seeking its intervention in the probe. The companies seemingly received some relief when the Court granted an interim stay[28] on the CCI's probe into them. After an appeal to the Supreme Court by CCI was redirected[29] to the High Court, the matter grew more contentious. The companies contended that there was a lack of prima facie evidence. While CCI maintained that the factum of a probe did not allude to the guilt of the companies and thus must be allowed, Amazon and Flipkart maintained their stance. Additionally, they claimed that there should have been a consultation between them and the regulator before the initiation of the probe. At this juncture, it is pertinent to note that the law does not provide for such a consultation. Accordingly, the High Court dismissed the plea and cleared the way for the probe,[30] after which an appeal was filed before a division bench of the Court.

Further adding to its woes, a comprehensive investigative probe by Reuters in February 2021 took stock of sensitive internal documents and communications.[31] It was reported that the

[25] Peerzada Abrar, 'Our duty is to ensure fair competition, CCI tells Karnataka High Court' (14 February 2020) Business Standard <www.business-standard.com/article/companies/our-duty-is-to-ensure-fair-competition-cci-tells-karnataka-high-court-120021400043_1.html> accessed 05 September 2021.

[26] Soutik Biswas, 'Why India is greeting Amazon's Jeff Bezos with protests' (15 January 2020) The BBC <www.bbc.com/news/world-asia-india-51117315> accessed 05 September 2021.

[27] Himanshi Lohchab, 'Amazon moves Bengaluru HC, seeks stay on CCI's probe order' (10 February 2020) The Economic Times <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/amazon-moves-bengaluru-hc-seeks-stay-on-ccis-probe-order/articleshow/74063198.cms> accessed 05 September 2021.

[28] Peerzada Abrar, 'Karnataka HC grants interim stay on CCI probe against Amazon, Flipkart' (15 February 2020) Business Standard <www.business-standard.com/article/companies/karnataka-hc-grants-interim-stay-on-cci-probe-against-amazon-flipkart-120021401878_1.html> accessed 05 September 2021.

[29] PTI 'SC asks Karnataka HC to decide CCI plea for vacating stay on probe against e-confirms' order' (26 October 2020) The Economic Times <https://economictimes.indiatimes.com/industry/services/retail/sc-asks-karnataka-hc-to-decide-cci-plea-for-vacating-stay-on-probe-against-e confirms/articleshow/78871112.cms?from=mdr> accessed 05 September 2021.

[30] Digbijay Mishra, 'Karnataka HC dismisses Flipkart, Amazon plea to stop CCI probe' (24 July 2021) The Economic Times <https://economictimes.indiatimes.com/tech/tech-bytes/karnataka-hc-dismisses-flipkart-amazon-plea-to-stop-cci-probe/articleshow/84668622.cms> accessed 06 September 2021.

[31] Aditya Kalra, 'Amazon documents reveal company's secret strategy to dodge India's regulators' (17 February 2021) Reuters <www.reuters.com/investigates/special-report/amazon-india-operation/> accessed 06 September 2021.

massive small business sellers' online onboarding has been but a façade. The 2019 document revealed that behind the veil, despite the supposed 400,000 strong Indian sellers, it was only a smaller cluster of sellers that accounted for a third of sales in the marketplace.[32] Further, Reuters also reported that of these sellers, Amazon had indirect equity stakes in two: Cloudtail and Appario.[33]

In July 2021, a crushing blow was then received by the companies when the division bench dismissed the pleas[34] by the e-commerce giants. The final death knell was delivered in August 2021 when the last recourse of the companies, a three-judge bench of India's Apex Court allowed CCI[35] to continue its investigation. The Bench, led by the Chief Justice of India, called upon the companies to uphold their stature and facilitate such probes instead of showing resistance.[36] It is at this point the Bezos-Murthy relationship was laid to rest. The Supreme Court's order followed the release of a statement by the companies which announced that the Joint Venture partnership will not be renewed from May 2022.[37] The non-renewal thus put the final nail in Cloudtail's coffin. In light of this seemingly unending saga, the authors have attempted to put forth both sides of this debate in the next section, to lay out the stakes involved.

III. DAVID V. GOLIATH: THE INDIAN E-COMMERCE MARKET

A. David: The Small and Medium Business

Being an online marketplace platform operating via various independent sellers and with a significant number of registered users and customers, Amazon has been flourishing over the years. Its very popularity as an online marketplace has made it a crucial part of every independent seller, be it big or small, who seek to earn revenue by selling products online. That said, it must also be noted that the impugned joint venture between Amazon and Cloudtail has

[32] ibid.

[33] Kalra (n 31).

[34] Mishra (n 30).

[35] Krishnadas Rajagopal, 'Won't intervene in CCI probe against Amazon, Flipkart: SC' (09 August 2021) The Hindu <www.thehindu.com/business/wont-intervene-in-cci-probe-against-amazon-flipkart-sc/article35825108.ece> accessed 08 September 2021.

[36] Dhananjay Mahapatra, 'SC upholds CCI probe into Amazon, Flipkart' (10 August 2021) The Times of India <https://timesofindia.indiatimes.com/business/india-business/sc-upholds-cci-probe-into-amazon-flipkart/articleshow/85197369.cms> accessed 08 September 2021.

[37] 'Amazon, Catamaran to end Cloudtail joint venture next year' (09 August 2021) The Times of India <https://timesofindia.indiatimes.com/business/india-business/amazon-catamaran-to-end-cloudtail-joint-venture-next-year/articleshow/85181383.cms> accessed 09 September 2021.

often browned-off sellers both on and off the platform.[38] Prior to the disintegration of the two, various issues concerning the ill-effects of such a partnership havebeen flagged by sellers and traders all across the globe. To paint a clear picture of the issues, these sellers can be further categorised into two groups. The first group will include all the other independent, yet small, sellers who sell their products on Amazon alongside Cloudtail. The second group will comprise all the conventional traders of the country who feel threatened by the presence and power of Amazon as a platform.

The first group of sellers were always irked by the presence of gigantic sellers such as Cloudtail and their apparent treatment by Amazon. Their contentions have always been premised on the idea that Amazon has always catered more to its renowned sellers and has given what was called preferential treatment to them. The cornerstone of the entire edifice on which these arguments are based is the upper hand which the sellers believe is given to the preferred sellers. The favouritism is evidenced by alleged exclusive launches and deep discounting via and to the preferred sellers respectively, one of which being Cloudtail itself.[39] This, as per the sellers, deprived them of a fair chance to grow and earn revenue on the platform and essentially violating section 3(1) read with section 3(4) of the Act.[40]

Belonging to the second group of sellers are the ones who sell through the brick-and-mortar set-up.[41] To them, the opportunity cost resulting from the practise of Amazon in the name of innovation has been rather high. The increased power of Amazon and Cloudtail as a single entity has had a direct bearing on their lives and livelihoods.[42] By the virtue of their set-up, not only are these sellers devoid of a Pan-India reach, unlike Amazon, but they are also bound by fixed costs. Having sufficient backing, Amazon has always resorted to deep discounting, a tactic far-fetched for any small seller or trader to afford, via sellers such as Cloudtail. Piling

[38] Jay Greene, 'Amazon Sellers Say Online Retail Giant Is Trying to Help Itself Not Consumers' (01 October 2019) The Washington Post <www.washingtonpost.com/technology/2019/10/01/amazon-sellers-say-online-retail-giant-is-trying-help-itself-not-consumers/> accessed 10 September 2021.

[39] Mihir Dalal, 'The Amazon, Flipkart Antitrust Case Files' (04 March 2020) Mint <www.livemint.com/industry/retail/the-amazon-flipkart-antitrust-case-files-11583250005881.html> accessed 10 September 2021.

[40] ibid.

[41] Rebecca Bundhun, 'Why Small Traders in India Fear the Amazon Effect' (19 January 2020) The National News <www.thenationalnews.com/business/economy/why-small-traders-in-india-fear-the-amazon-effect-1.965981> accessed 11 September 2021.

[42] Mihir Dalal and Suneera Tandon, 'E-commerce Boom Hurts Brick-and-Mortar Retailers' (17 March 2014) Mint <www.livemint.com/Industry/f6eARBcJOWrTZTzuDcZZzI/Ecommerce-boom-hurts-brickandmortar-retailers.html> accessed 11 September 2021.

onto their agonies are other benefits given to sellers such as Cloudtail, including, inter alia, promotion of private labels and preferential listing by the e-commerce giant.

While the sellers have been patently vocal about their agonies, it is also true that the disintegration of Cloudtail and Amazon will at least be a breather for the first group sellers. It could be a first, yet significant step in the direction of fair play and ensuring sufficient opportunities to all sellers alike. However, the story does not end here.

Amazon and the sellers stand at an immensely different juncture.While Amazon reserves its role as a mere intermediary between the customer and the seller, it is these sellers who are counting on Amazon for their daily bread and butter. What Amazon does now to fill the vacuum will decide the road ahead for them. As for the second group of sellers, amazon now has a greater need than ever before to balance its profit motive while respecting the competitive boundaries.

B. Goliath: Foreign Investment-Backed Cloudtail

Since its conception in 2014, Cloudtail has been a regulatory hot potato. As previously mentioned, it was launched as an independent seller and was, for the lack of a better term, the love child of Amazon Asia and Indian tech mogulMurthy's Catamaran Ventures. With Indian laws shrouding the customer in a regulatory cloak fashioned out of stringent regulation of foreign investments, the vision of direct sales became increasingly difficult for the e-commerce giant to overcome.

Cloudtail's presence in this regard came as a round-about way of de-cloaking the customer. The JV began its operations in August 2014, and as revealed by a Reuters report based on sensitive internal Amazon documents, was referred to as a Special Merchant ("**SM**").[43] The document in question, an Amazon India report from February 2015, stated that Cloudtail was accountable for a large slice of the cake, accounting for up to 40% of sales in the marketplace. n[44] Further, much to the woes of trader associations across the nation, it has also been uncovered in the aforementioned report that Amazon facilitated key relationships with major tech companies, thus skyrocketing the product offerings and credibility of Cloudtail.[45] While

[43] Kalra (n 31).
[44] ibid.
[45] ibid.

the e-commerce giant has maintained that no preferential treatment has been accorded to Cloudtail or any of its sellers, the reality proves otherwise.[46]

Curiously, the Bezos-Murthy partnership's death knell was announced in a statement on August 9, noting that it will not be renewed and as such Cloudtail will cease operations in May 2022.[47] Despite undergoing strategic restructuring over the years, the end of Cloudtail brings a reality check for Amazon's direct sales fantasy in India.

In an arguendo, the extent of foreign investment in India did not threaten the livelihood of countless traders and did not contradict India's socialist worldview, Cloudtail's presence in the e-commerce market was a wonderful feat. Viewed from a kinder eye, Cloudtail served a cocktail of fine logistics, cheaper prices, and a wide range of product offerings resulting from observed customer and seller behaviour in the marketplace.[48]

Cloudtail's presence skyrocketed[49] as it was able to leverage the economics of scale by deep discounting, and offering faster pan-India deliveries for its wide range of products.[50] This added to the woes of other sellers both on the e-marketplace (comprising SMBs and other sellers) and in mom-&-pop stores, for whom the sheer volume of products, profit margin, and fast countrywide deliveries were beyond their ken.

Further, Cloudtail, allegedly backed by Amazon, was able to obtain favourable deals[51] from other tech giants, thus adding to its credibility in the marketplace. Furthermore, it alleviated the fears of even the older sceptics of e-commerce by providing them with a credible option and reduced the risk of online scams in the product offering. This credibility came in handy

[46] ibid.

[47] 'Amazon to end controversial JV with Narayana Murthy's Catamaran Ventures' (09 August 2021) Mint <www.livemint.com/companies/news/amazon-to-end-relationship-with-indian-seller-cloudtail-11628518408828.html> accessed 09 September 2021.

[48]'Amazon brings back offers, fast deliveries' (08 February 2019) The Times of India <https://timesofindia.indiatimes.com/business/india-business/amazon-brings-back-offers-fast-deliveries/articleshow/67892509.cms> accessed 09 September 2021.

[49] 'How Amazon used Cloudtail, Appario to snowball its India sales' (18 February 2021) Business Today <www.businesstoday.in/latest/corporate/story/how-amazon-used-cloudtail-appario-to-snowball-its-india-sales-288714-2021-02-18> accessed 09 September 2021.

[50] Priyanka Sahay, 'How the Likes of Amazon have Circumvented India's FDI Laws' (17 November 2020) News 18 <www.news18.com/news/business/how-the-likes-of-amazon-have-circumvented-indias-fdi-laws-3088847.html> accessed 09 September 2021.

[51] Kalra (n 31).

during the COVID 19 pandemic when brick and mortar shops had to be shut and even the biggest naysayers of e-commerce had to resort to it.[52]

As we near the disintegration of what some may characterise as the greatest thing to happen to e-commerce in the country, several questions remain unanswered. The non-renewal of the Bezos-Murthy partnership also cast aspersions on Amazon's other JV arrangements such as Appario.[53] It remains to be seen what the future holds for Amazon's operational blueprint in India and what becomes of the innovation-policy balance in the Indian context.

IV. CONCLUSION - THE WAY FORWARD

Radical steps such as effecting disintegration or demerger of two enterprises are not just confined to the borders of our country. As competition concerns escalate across the globe, regulators have started to examine the practices of burgeoning enterprises far more strictly. For instance, in December 2020, Facebook came under fire for its acquisition of Instagram Inc. and WhatsApp Inc. in 2012 and 2014 respectively.[54] The acquisition led to alarms being raised as it had consolidated Facebook's monopoly in the social networking space. At this juncture, the Federal Trade Commission of the United States of America questioned Facebook's moves on the precipice, saying that they enabled the tech giant to maintain its social networking monopoly by neutralizing any possible competitive threat. In a similar vein, the mega Facebook-Giphy deal has also been brought under the lens of the competition watchdog in the United Kingdom.[55] Given Facebook's aggressive market power, the authorities worry that the subsuming could result in denial of access to GIFs by other social media companies, thereby affecting the competition negatively.

While on the surface, the end to the Cloudtail-Amazon saga seems like a benevolent move by a tech giant endeavouring to comply with domestic laws of the country, the waters run deeper. The disintegration of Cloudtail comes as a symptomatic treatment of a much deeper ailment.

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[52] Brian Dumaine, 'Amazon was built for the pandemic—and will likely emerge from it stronger than ever' (18 May 2020) Fortune <https://fortune.com/2020/05/18/amazon-business-jeff-bezos-amzn-sales-revenue-coronavirus-pandemic/> accessed 09 September 2021.

[53] Kalra (n 31).

[54] *Federal Trade Commission v. Facebook* Incorporation (Case No: 1:20-cv-03590) (US).

[55] 'Facebook's Takeover of Giphy raises competition concerns' (12 August 2021) Competition and Markets Authority <www.gov.uk/government/news/facebook-s-takeover-of-giphy-raises-competition-concerns> accessed 14 September 2021.

As Amazon's long-standing quest remains to capture the direct sales market in India,[56] this move only reeks of being pursued by the need to prevent a much graver governmental backlash. Thus, characterising it as an appeasement and damage control would not be entirely out of order. While the authors' opinions converge on the point of Amazon's continued act of toeing the line, their opinions seemingly diverge on the utility of mega sellers such as Cloudtail, as laid out in the previous section of this article. One of the authors laid out the turf war between deep pocketed sellers such as Cloudtail and other smaller sellers (including brick and mortar ones). The author underlined the harm that presence and undeniable preferential treatment of these players causes to other traditional sellers (both online and offline). The next subsection was dedicated to understanding the utility of the mega sellers such as Cloudtail and how the economics of scale was leveraged to serve finer logistics. The situation today stands at an interesting junction. The challenge in the e-commerce space remains stark: finding the middle ground between the two viewpoints so as to balance innovation and survival and what the future holds for Amazon's Indian dreams.

Thus, with every passing day, a question that now plagues the authors is whether Bezos's quest to directly make it in the Indian e-commerce market will meet with the same success as his space quest.[57]

[56] Kalra (n 31).

[57] 'Jeff Bezos is going to space on first crewed flight of rocket' (08 June 2021) CNN <https://edition.cnn.com/2021/06/07/tech/jeff-bezos-space-blue-origin-new-shepard-flight-scn/index.html> accessed 14 September 2021.

TACKLING BIG TECH'S DATA ADVANTAGE: IS THE INDIAN REGULATORY FRAMEWORK GEARED UP?

- *SHUBHA OJHA*[*]

ABSTRACT

The realm of data-driven digital markets has widened its domain to a great extent and takes within its fold every strand of our experience in contemporary society. Globally, the term 'Big Tech' refers to the technology giants operating in the digital space, including mainly the 'Big Four' - Google, Amazon, Facebook and Apple ["**GAFA**"]. *Sometimes the term also includes Microsoft, thereby making it the 'Big Five'. The Big Tech engages in the creation of innovative products and services with phenomenal advantages for their users. However, in relation to competition law, there are concerns all across the globe over rising anti-competitive threats as a consequence of the conduct of the Big Tech in the digital space. The recent scholarly expositions and arguments reflect the distortion of the natural flow of market forces through monopolisation by the Big Tech. In the absence of healthy competition, consumers would be deprived of the bounties of a thriving digital economy. Through this discourse, the author seeks to analyse the anti-competitive repercussions triggered by the GAFA effect and suggests regulatory/policy measures for India after comparatively analysing the legal frameworks across foreign jurisdictions.*

Keywords: Big Tech, Big Four, Monopolisation, GAFA Effect.

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I. INTRODUCTION

Successful economies of the world are characterized by robust competition. Competition is a key engine of economic activity driving innovation, technological advancement, investment in research and development, and improvement in business processes. Apart from productivity and innovation, competitive buoyancy in the digital markets can further propel competition amongst the firms along the lines of privacy and data protection because digital market entities usually compete on quality.[1] In this context, a digital market devoid of competition would be a 'kill zone'[2], and this lack or absence of competition would erode the privacy and data protection of users.[3]

A digital economy is tainted by sophisticated anti-competitive manoeuvres that involve digital platforms collecting and using the consumers' data to drive out competitors and establishing their dominance in the market. There are increasing competition concerns over the Big Tech's dominance in the digital markets. The competition regulators across different jurisdictions need to address these concerns urgently to safeguard their economies from the looming threat posed by the Big Tech. In light of these concerns, the competition regulators globally have been analysing the digital markets and scrutinizing the factors that enable the tech giants to exclude competition. The Indian antitrust regime is as susceptible to these troubles of the new technological age as any other domestic regime. The Indian competition regulator needs to grasp the business models of digital platforms to extenuate any anti-competitive risks.

The Organisation for Economic Co-operation and Development [**"OECD**"] defined the term 'Digital Economy' (also known as 'Internet Economy' or 'New Economy') as:

> "*The Digital Economy incorporates all economic activity reliant on, or significantly enhanced by the use of digital inputs, including digital technologies, digital*

[1] 'Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary' (2020) <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/10/investigation_of_competition_in_digital_markets_majority_staff_report_and_recommendations.pdf> accessed 3 July 2021.

[2] There is a growing worry that digital platforms (multi-sided markets that offer digital services to customers, often for free, in exchange for data) might be gaining market power, distorting competition, and slowing innovation. A specific concern is that such platforms might acquire any potential competitors, dissuading others from entering, and thus preventing innovation from serving as the competitive threat that is traditionally believed to keep monopoly incumbents on their toes. In a sense, such platforms create a "Kill Zone" around their areas of activity Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, 'Kill Zone' (*Harvard Law School Forum on Corporate Governance*, 2020) <https://corpgov.law.harvard.edu/2020/03/26/kill-zone/> accessed 29 October 2021.

[3] ibid.

infrastructure, digital services and data. It refers to all producers and consumers, including government, that are utilising these digital inputs in their economic activities."[4]

The online or digital platforms form an integral part of the Digital Economy. These digital platforms and marketplaces have an advantage in the form of a developed customer base and logistics infrastructure. However, the recent anti-competitive attacks by the Big Tech have overshadowed the benefits conferred by these platforms.

The article advances on this discourse through five parts. The first part touches upon the essential characteristics of digital markets. In the second part, the authors analyse the anti-competitive repercussions of data collection by the Big Tech. The third part delves into the India-specific discussion on regulatory mechanisms and decisions by the Indian competition regulator ["**CCI**"]. In the fourth part, the authors comparatively evaluate the legal frameworks across various foreign jurisdictions. Lastly, the article concludes the discussion through the suggestions regarding the prospects for ensuring healthier competition in India.

II. CHARACTERISTICS OF DIGITAL MARKETS

'Data': An Economic Asset

A new realization has dawned upon today's economies, comprising the Big Tech telecom companies and even other industries that collection and monetization of personal data of the consumers serves as an important economic asset that has the potential of producing cash flows over a period of time.[5] The advent of Artificial Intelligence ["**AI**"] marked the achievement of a significant milestone in the contemporary technology-driven world. Data serves as a critical resource in AI and other data-driven technologies and the tech giants continue their relentless quest for data collection. They collect every component of a user's personal data that includes identity, behavioural, and network data. For instance, in precision marketing, the companies analyse the user data to send targeted advertisements to potential customers based on certain

[4] 'A Roadmap Toward a Common Framework for Measuring the Digital Economy, Report for the G20 Digital Economy Task Force, Saudi Arabia' (*OECD*, 2020) <https://www.oecd.org/sti/roadmap-toward-a-common-framework-for-measuring-the-digital-economy.pdf> accessed 3 July 2021.

[5] 'Hearing on Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition, Written Testimony of FTC Commissioner Rohit Chopra Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law' (*USA Federal Trade Commission,* 18 October 2019) <https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-Wstate-ChopraR-20191018.pdf> accessed 5 July 2021 [hereinafter *Rohit Chopra*].

characteristic labels given to them such as 'makeup lover', 'travel lovers', 'sports enthusiast' etc.[6]

However, data is distinct from other kinds of assets. Rohit Chopra, a former commissioner of the Federal Trade Commission ["**FTC**"] distinguished data from other economic assets on the following pointers:

i. Infinite Resource:

Data could not be regarded as a finite resource. Personal data increases with every passing second.

ii. Non-consumable:

Data could not be consumed in the traditional sense. If raw materials are employed in the manufacturing process, they could not be used for any other purpose. Data, on the other hand, can be copied and shared. In case, an entity collects and monetizes personal data, the value from such data could be extracted by other entities as well.

iii. Increasing Marginal Returns of Data:

As the collection of data increases, it leads to an equivalent increase in its value. The collection of data from more people facilitates gaining new perspectives of individuals or businesses and other entities interacting with them. For instance, Amazon Fresh and Whole Foods relies on big data analytics to comprehend the consumer's purchasing behaviour and their interactions with the suppliers and the grocers.[7] This data proves to be instrumental when a need arises to implement changes in the business operations. Netflix, an over-the-top content platform, employs big data analytics for advertising movie suggestions based on the users' search history.[8] In this manner, the marginal returns of data increase in the context of Big Data.

Extraction of Data: Price for the Online Services

Online services are usually misconceived as being 'free'. However, the companies providing these digital services like Facebook, Google, etc., have well-established, highly lucrative behavioural marketing and advertising businesses that collect massive volumes of data from their users. Therefore, the users pay for these services by providing their data, unlike a dollar.

[6] Winston Ma, 'Breaking the Big Tech Monopoly, Horizons' (2020) 18 J. of Int'l Rel. & Sustainable Dev. 166.
[7] Rohit Chopra (n 5).
[8] ibid.

Multi-sided Platforms

Digital platforms are multi-sided platforms that bring a multiplicity of users under one place to interact with each other. In such a scenario, one set of users increases the platform's value for the other set of users.[9] For instance, customers, as one set of users representing one side of the platform, may use the search engine to find products or content, while businesses, as another set of users representing the other platform side, may seek to advertise to attract the audience.[10]

Network Effects

The uniqueness of data, as an economic asset, significantly impacts the nature of competition in the digital markets. The digital market players comprise data-intensive platforms connecting different kinds of transaction partners such as riders and drivers, buyers and sellers etc. In such cases, an unregulated market would possibly tip in favour of a few platforms or even a single platform.[11] With more users joining the platform, the value of the platform also increases. For instance, the ability of the Uber platform to attract more riders attracted more drivers to the platform, resulting in increased availability. Riders tend to choose the platform that everyone in their network is using and this phenomenon showcases the network effects.

Other Characteristics

i. Varying Prices

Online platforms charge different prices for different sets of customers. The rationale is that it would be pro-competitive to "subsidize one side of the market when its presence is very valuable to the other side".[12]

ii. Economies of Scale

In the absence of territorial barriers, it is easier for online platforms to build a huge customer base and thereby, achieve economies of scale globally.

III. DISRUPTING COMPETITION IN THE DIGITAL ECONOMY - THE GAFA EFFECT

Earlier, it was quite easy for an entity to enter the digital market due to low entry barriers. However, this scenario has changed in today's times. The Big Four (or the Big Five) have laid

[9] 'Digital Platforms Inquiry: Final Report', (Australian Competition and Consumer Commission (ACCC), June 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> accessed 4 July 2021.

[10] ibid.

[11] Rohit Chopra (n 5).

[12] Nimisha Tailor, 'Competition in the New ASEAN Economy' (2020) 37(3) J. of Southeast Asian Econ. 313.

their roots all across the digital space. The main Big Tech players in India also involve companies like Flipkart and Reliance Jio. These entities have formed a huge web by integrating across different dimensions - vertically, horizontally, and diagonally - in an elusive and pernicious manner resulting in the dilution of competition. These entities utilize their position both as the providers as well as the participants of digital platforms to further their commercial interests and enter new product markets. It has also been found that their interests are often over-represented in policy discourses.[13] Evils of price discrimination, self-preferencing, and predatory pricing thrive where there is a proliferation of data collection practice by the Big Tech entities. The time is ripe for India to identify the anti-competitive impact of the Big Tech and accordingly safeguard its economy.

A. Price Discrimination

Price discrimination by the Big Tech is facilitated owing to the tracking of user data. Digital platforms allow their users access to maps, search engines, musical/video-streaming services, columns, blogs, etc. These platforms could now monitor the digital footprint of a user by tracking their location, shopping basket, browsing history, etc.[14] Further, these online platforms enable companies to carry out 'demand experiments'. For instance, eBay was found to be indulging in 'seller experiments' by listing an identical item several times at varying prices.[15] Such practices may give rise to controversies. This is evident from the complaint that about 2000 users filed against Amazon for carrying out price tests and charging different prices for the same DVD and the resultant apology by Jeff Bezos indicating that the tests were random and promising that such tests would never be resorted to by the company.[16]

Tech companies also undertake the practice of 'steering' wherein they identify various demographic groups and offer the same product to different groups at varying prices. Behavioural targeting and personalized pricing are other practices wherein user-specific data is used to target advertising or tailor prices for a set of products.[17] Such differential pricing

[13] 'The Promise and Peril of Big Tech in India' (*Big Tech India*, 2020) <https://bigtechinindia.com> accessed 8 July 2021.

[14] 'Big Data and Differential Pricing' (*Executive Office of the President of the USA*, 2015) <https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf> accessed 8 July 2021 [hereinafter *Big Data and Efficient Pricing*].

[15] Liran Einav, et al. 'Learning from Seller Experiments in Online Markets' (*National Bureau of Economic Research Working Paper No. 17385*, 2011) <http://www.nber.org/papers/w17385> accessed 9 July 2021.

[16] 'Bezos calls Amazon experiment 'a mistake'' *(Puget Sound Bus. J., 28 September 2000),* <https://www.bizjournals.com/seattle/stories/2000/09/25/daily21.html> accessed 9 July 2021.

[17] Big Data and Efficient Pricing (n 14).

makes competition law frameworks susceptible to frauds or scams that take undue advantage of unwary customers. Benjamin Reed Shiller's 2014 study on Netflix reveals interesting data about differential pricing. It revealed that Netflix's annual variable profits would have increased by about $8 million, or 12.18% of total profits, if Netflix had tailored price based on web browsing data and variables; if personalized prices were based only on demographics, the increase in total profits would be merely by 0.79%.[18]

However, another spectrum of scholarly opinion posits that price discrimination instils discipline and efficiency in the market and it benefits the consumers – it is suggested that under competitive conditions, price discrimination can further intensify competition and reduce individual firms' market power, thereby disciplining the market.[19]

Self-Preferencing

Tech giants often indulge in the practice of showing their products at more prominent places in the online search engines. Such preferential search results, by way of visual prominence, increase the chances of customers opting for their products. Self-preferencing is also done by restricting rival companies' promotional and marketing activities thereby restricting access to essential functionalities, '*sherlocking*' (monitoring success and strategies of rival entities), using default settings to steer consumers towards their products, etc.[20] The overall impact of self-preferencing tactics is to raise rivals' costs because they would be forced to resort to other forms of advertising.[21] Due to this practice of Apple, Spotify initiated a complaint against it, and legal proceedings are underway before the European Commission ["**EC**"].[22] Similar investigations have been undertaken by the Dutch, the Russian and the Chinese regulators against Apple.[23] The Competition Commission of India ["**CCI**"] was confronted with this issue of self-preferencing in *XYZ v. Alphabet Inc. and Ors.*,[24] where the CCI ordered a detailed

[18] Benjamin Reed Shiller 'First-Degree Price Discrimination Using Big Data' (25 April 2014) < https://www8.gsb.columbia.edu/faculty-research/sites/faculty-research/files/finance/Industrial/Ben%20Shiller%20--%20Nov%202014_0.pdf> accessed 31 October 2021.

[19] Rajat Kathuria, Vatsala Shreeti, Parnil Urdhwareshe 'Too much fexi-pricing these days?' (*The Hindu Business Line*, 14 March 2016) <https://www.thehindubusinessline.com/opinion/too-much-flexipricing-these-days/article8352867.ece> accessed 9 July 2021.

[20] Bapu Kotapati et al. 'The Antitrust Case Against Apple' *(Yale Uni. Thurman Arnold Project, Digital Platform Theories of Harm, Paper Series: Paper 2,* May 2020*)* <https://som.yale.edu/sites/default/files/DTH-Apple-new.pd> accessed 10 July 2021 [hereinafter *Bapu Kotapati*].

[21] ibid.

[22] 'Antitrust: Commission opens investigations into Apple's App Store rules' (*European Commission*, 16 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 10 July 2021.

[23] Bapu Kotapati (n 20).

[24] XYZ v. Alphabet Inc. and Ors, Competition Commission of India, Case No. 07 of 2020.

investigation into the abuse of dominant position by Google. One of the issues raised pertains to the preferential positioning and treatment of Google Pay on the Google Play Store.

Predatory Pricing

The evil of predatory pricing has long haunted the competition law regimes globally. This already looming threat becomes even more complex in light of the advanced information and communications technologies ["**ICT**"] that fall within the domain of two-sided platforms. Amazon was found to be involved in outrageous data exploitation in the aftermath of the launch of its home brands such as Amazon Basics and Solimo selling generic products for lower prices thereby eliminating their competitors (third-party sellers).[25] Big Four's Google and Facebook are also facing the heat in multiple jurisdictions, with strict investigations being carried out into their predatory behaviour and 'killer acquisitions' (acquisition of entities in the same industry to wipe out competition).[26] There are also ongoing deliberations about breaking off WhatsApp and Instagram from Facebook and imposing restrictions on their future deals.[27]

The US Justice Department has also accused a few Big Tech like Google of illegally protecting their monopoly over search and search advertising. Google's dominant market share is the result of the agreements that it enters into with Apple, mobile carriers, and other handset makers to make its search engine the default option for users.[28] Hence, the digital landscape has been monopolized as a result of the GAFA effect by the Big Tech. Their anti-competitive attacks have limited consumer choices, jeopardized innovation, and eroded user privacy. However, they have been escaping antitrust scrutiny under the garb of consumer welfare.

IV. THE INDIAN COMPETITION POLICY FRAMEWORK

A. Regulations

There persist sluggish regulations in the area of digital space currently, and the tech companies are thriving by exploiting this vulnerability. The competition regulators worldwide are trying to ensure that anti-competitive behaviour is not left unpunished. They have even imposed huge

[25] Lavanya Gupta, Aaditya Mishra 'Data Accumulation by Big Tech: Is the Indian Competition Regime Ready?' (*The Indian Rev. of Corp. & Comm. L. (IRCCL)*, 29 October 2020) <https://www.irccl.in/post/data-accumulation-by-big-tech-is-the-indian-competition-regime-ready> accessed 11 July 2021 [hereinafter *Lavanya Gupta*].

[26] Anisha Chand, Soham Banerjee 'Breaking Trust: Is Big Tech in Big Trouble' (*Mondaq*, 11 January 2021) <https://www.mondaq.com/india/antitrust-eu-competition-/1023920/breaking-trusts-is-big-tech-in-big-trouble> accessed 11 July 2021.

[27] ibid.

[28] Cecilia Kang, David McCabe, Daisuke Wakabayashi, 'U.S. Accuses Google of Illegally Protecting Monopoly' (*The New York Times*, 20 Oct. 2020) <https://www.nytimes.com/2020/10/20/technology/google-antitrust.html> accessed 12 January 2021.

penalties and asked for changes in business structures and models. It is yet to be seen whether such attempts suffice.[29] The lag in these inquiries is due to the absence of the simple aspect that businesses build market power at the expense of people either by eroding their basic labour rights or by unscrupulously collecting and processing user data and imposition of certain products on consumers. This happens due to the impact of these companies and their size on the market. With such competition concerns arising for adjudication before the CCI, the same regulatory concerns before the EU and the US take on a new colour because of the sheer volume of users and the untapped potential that big tech companies see in the Indian market.[30]

The merger control framework[31] requires the parties to obtain the CCI's approval if they cross a certain limit of thresholds of assets and turnover. However, what needs to be noted is that technology firms are asset-light,[32] and may also not earn revenue for many years if they aim to increase their user base. Thus, the high-value transactions may escape scrutiny. Usually, in digital markets, large tech firms acquire smaller tech firms, engaging in similar work, to reduce competition, which may plausibly lead to an appreciable adverse effect on competition. Such issues exist in other countries as well. Other nations have approached this issue by allowing the regulators to open non-notifiable transactions or by having merger thresholds based on the deal's value or the transaction's size. Calculating the deal value requires in-depth analysis. Striking a balance between capturing transactions and managing the regulatory burden would be a significant challenge.

Since the *Consim Info* decision in 2018, the CCI has been actively investigating transactions in the digital space. Other regulators are also investigating the business of Big Tech in India, owing to which major changes have taken place in consumer protection law, taxation law and foreign direct investment ["**FDI**"] law. Additionally, the Personal Data Protection ["**PDP**"] Bill is under the final stages of review by the legislature. Furthermore, entities operating in the tech space are held liable under the provisions of the Information Technology Act and the rules and regulations thereunder for any violations of user privacy and data security.

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[29] Shrinidhi Rao, 'The growing clout of Big Tech companies and the regulatory need to prevent their abuse of power' (*Hindu Frontline*, 4 December 2020), <https://frontline.thehindu.com/the-nation/reining-in-the-big-tech-companies-through-regulators-to-protect-users-and-prevent-corporate-abuse-of-power/article33085144.ece> accessed 13 January 2021.

[30] Ibid.

[31] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

[32] Nicholas Kachaner & Adam Whybrew 'When "Asset-Light" is Right' (*Boston Consultancy Group*, 30 September 2014) <https://www.bcg.com/publications/2014/business-model-innovation-growth-asset-light-is-right> accessed 14 January 2021.

The philosophy underlying the Indian competition law and policy in a way supports the dominance of firms. Our competition legal framework problematizes only 'abuse of dominance' i.e., imposition of unfair/discriminatory conditions or prices in the purchase or sale of goods. However, adopting this strategy may not be the correct way to investigate digital platforms for their anti-competitive behaviours. The following are some lacunae that the authors would like to highlight:

i. Unique features of digital space are not captured

The relevant provisions under the Competition Act, 2002 ["**Act**"] lays out various factors that must be considered while conducting an inquiry into the dominant nature or position of an entity.[33] However, these factors fail to take into account the unique features of entities operating in the digital space, such as network effects, data aggregation effects and multi-sidedness. Such factors could not have been envisaged at the time of the formulation of the statute. WhatsApp imposing the 'take it or leave it'[34] policy to its users, in relation to the recent privacy policy update, stems from its dominant position amongst the other messaging apps. The company is well aware that almost all the users would mostly accept the updated privacy policies because their communication networks also comprise of WhatsApp users. This is a glaring example of network effects. Therefore, a prime focus on the abuse of dominance may cater to achieving short-term ends by curbing monopoly power 'then and there', but such a strategy will remain a mere reactionary quick-fix in the absence of a lack of clear understanding when the object of regulation as well as the big tech platforms themselves are not well understood.

ii. No regulation of boundary-less markets

The existing Act understands the term 'market' traditionally: that is, the understanding of a "relevant" market.[35] However, the digital medium, which is boundary-less, is a kind of space that has recently emerged. Businesses of technology platforms focus on dynamic innovation,

[33] Competition Act, 2002, § 4.

[34] WhatsApp Privacy Policy 2021 <https://faq.whatsapp.com/general/security-and-privacy/were-updating-our-terms-and-privacy-policy?campaign_id=12619934302&extra_1=s%7Cc%7C509623924212%7Cb%7C%2Bwhatsapp%20%2Bpolicy%7C&placement=&creative=509623924212&keyword=%2Bwhatsapp%20%2Bpolicy&partner_id=googlesem&extra_2=campaignid%3D12619934302%26adgroupid%3D128540813748%26matchtype%3Db%26network%3Dg%26source%3Dnotmobile%26search_or_content%3Ds%26device%3Dc%26devicemodel%3D%26adposition%3D%26target%3D%26targetid%3Dkwd-1116964500370%26loc_physical_ms%3D9061884%26loc_interest_ms%3D%26feeditemid%3D%26param1%3D%26param2%3D> accessed 15 January 2021.

[35] Competition Act, 2002, § 2(r).

and accordingly, their market boundaries continuously change.[36] For example, defining WhatsApp's relevant market is impossible. Initially, WhatsApp was merely a messaging platform, but now it has many other products, including the recent WhatsApp Pay service for money transfer. All these varied products and services are merged into one big platform i.e., WhatsApp.

iii. Monitoring the apparatus

The CCI needs to monitor big tech's technical apparatus. The shrewdness of the digital space has been accentuated by the development of algorithmic systems that envisage new kinds of anticompetitive harms with each passing day. The CCI needs to be in sync with such developments and must conduct comprehensive studies into them.

Recent investigations

i. XYZ v. Alphabet Inc. & Ors.[37]

The informant alleged that Google was leveraging its dominant position in the market for licensable mobile operating system ["**OS**"] for smartphones and the market for Android OS Play Store to protect its position in the market for Apps facilitating payments through UPI. Further, multiple instances of abuse of dominant position were alleged against Google in the relevant markets under Section 4:

1. Mandatory use of Google Play's payment system for paid apps & in-app purchases.
2. Pre-installation and prominence of Google Pay on android smartphones.
3. Prominent placement of Google Pay on the Play Store
4. Privilege to Google Pay by displaying it as the first ad when a user searches for another app facilitating payment through UPI.
5. Exclusivity requirement imposed by Google resulting in unfair terms being imposed on Users

After a detailed analysis, the CCI was of the *prima facie* view that the Opposite Parties had contravened various provisions of Section 4 of the Act. The DG was directed to cause an investigation into the matter under the provisions of Section 26(1) of the Act.

[36] Archana Sivasubramanian, 'To regulate WhatsApp and Big Tech, India's competition panel needs more teeth – and fresh thinking' (*Scroll*, 11 April 2021) <https://scroll.in/article/990939/to-regulate-whatsapp-and-big-tech-indias-competition-panel-needs-more-teeth-and-fresh-thinking> accessed 16 January 2021 [hereinafter, *Archana Sivasubramanian*].

[37] XYZ v. Alphabet Inc. and Ors, Competition Commission of India, Case No. 07 of 2020.

ii. Satyen Narendra Bajaj v. PayU Payments Private Limited & Anr.[38]

The Informant alleged that PayU is dominant in the market for 'e-payments gateway in India' and Wibmo is dominant in the downstream market of 'risk-based authentication and payment security services in the e-payments gateway in India'. It is further alleged that after the acquisition of Wibmo by PayU, PayU's market power would enhance in the market of e-payment processing gateway services in India. There were also allegations related to the foreclosure of competition and the creation of entry barriers for new players. CCI observed that the Informant's allegations were premised only upon the fact that the combined entity has become dominant in the market. CCI held that the mere existence of a dominant position, without prima facie evidence of its abuse, is not recognized as anti-competitive conduct under the Act, and the complaint was dismissed.

iii. Harshita Chawla v. WhatsApp Inc.[39]

The Informant alleged abuse of dominance against WhatsApp and Facebook in light of the introduction of the online payments service, WhatsApp Pay, in the Indian market, thereby acting in contravention with Section 4 of the Act. Additionally, it alleged that by enabling automatic installation of payments service in the main messaging app, WhatsApp could take advantage of its vast user base to popularize its newly launched WhatsApp Pay. Concerns related to data security of personal information was also raised before the CCI. However, the CCI dismissed the allegations of abuse of dominance, which were levelled against the opposite parties holding that there's no threat to competition with the launch of the said app. Moreover, it was stated that the mere existence of an App on the smartphone does not necessarily convert into transaction/usage. The matter was closed under Section 26(2) of the Act.

iv. Other Investigations

With the launch of Reliance Jio in India, several strategies had made their way into the Indian digital spectrum that came to be associated with 'Big Tech'. During the initial three months, free services were offered to its users and this strategy was opposed by other competitors like Bharti Airtel arguing that Jio engaged in predatory pricing, i.e., lowering prices to a point where other firms are unable to compete and are forced to leave the market. [40] However, the CCI

[38] Satyen Narendra Bajaj v. PayU Payments Private Limited & Anr., Competition Commission of India, Case No. 23 of 2019.

[39] Harshita Chawla v. Whatsapp Inc., Competition Commission of India, Case No. 15 of 2020.

[40] Sarayu Natarajan & Astha Kapoor 'Is India Adequately Prepared to Regulate Big Tech' (*The Wire*, 17 July 2019) <https://thewire.in/tech/india-regulation-big-tech-data-protection> [hereinafter *Sarayu Natarajan*] accessed 17 July 2021.

negated this claim by holding that by virtue of the fact that the new firm is not dominant, provision of free services could not be held to be anti-competitive.[41] Ever since that episode, Jio has moved up the ladder to become India's second-largest telecom provider. It is increasingly seen to be abusing its position by violating not just net neutrality but also consumer choice by the way of blocking chat services such as Telegram, and several proxy websites.

A prohibition was imposed by the Ministry of Trade and Commerce on FDI in business to consumer (B2C) enterprises (except on the fulfilment of specific conditions) by Flipkart and Amazon. It was alleged that Flipkart and Amazon had violated the said prohibition. In 2019, the Enforcement Directorate ["**ED"**] began investigating the said violations. On submission of a complaint filed by Delhi Vyapar Mahasangh, in 2020, the exclusive online sale of certain smartphones came under the scrutiny of the competition regulator. Merit was found in the allegations related to abused of dominance in the e-commerce sector and acts of deep discounting, preferential listing and exclusivity. Sometime later, the Karnataka High Court stayed the CCI investigation into Amazon and Flipkart and ordered the ED to investigate the FDI violations. Recently, the CCI's application to vacate the said stay and to proceed with the investigation into DVM allegations was rejected by the Supreme Court.

V. LESSONS FROM COMPARATIVE MAPPING OF FOREIGN JURISPRUDENCE

Section 19 of the Act empowers the CCI to inquire into anti-competitive agreements and abuse of dominant position that contravenes Sections 3 or 4 of the Act by listing certain that the CCI shall consider while conducting the inquiry. However, these factors are not in consonance with the complexities of the so-called 'data-opolies' or data-monopolies. Section 20(4) also does not differentiate between traditional and tech companies while setting down its parameters. Therefore, the Act is not well equipped to carry out different scrutiny for data-driven entities.

German regulatory authorities have amended their competition law to lend consideration to the goods or services provided free of charge.[42] Following course, the recent Report of the Competition Law Review Committee ["**CLRC**"] has recommended widening of the ambit of the 'price' definition under Section 2(o) of the Act to include even non-monetary

[41] In Re. C Shanmugam et al., Competition Commission of India, Case No. 98 of 2016.
[42] Acts against Restraints of Competition, § 18(2)(a).

considerations such as personal data in case of digital markets.[43] The new kinds of agreements emerging from the digital markets have led the CLRC to recommended enlarging the scope of Section 3(4) to include 'other agreements that do not strictly fall under the heads of vertical and horizontal agreements'.[44]

German law has further added 'access to competition-relevant data' as one of the relevant factors for assessing market power.[45] On these lines, Section 19(4)(b) of the Act expressly refers to 'resources of the enterprise' as a relevant factor. The CLRC noted that Section 19(4) read with Section 19(4)(b) is broad enough to include control over data as a determining factor.[46] Section 19(4) is also broad enough to include network effect as a relevant factor. In light of the new merger control thresholds for digital markets in Germany, the USA ('size of transaction test') and the UK ('transaction value threshold'), the CLRC recommended the Indian merger control regime to go beyond the existing asset and turnover thresholds.[47] However, it is yet to be seen to what extent the CCI would approve these recommendations. Limiting scrutiny of tech companies owing to consumer welfare (price and output benefits) can prove to be fatal. The consideration of 'consumer welfare' under the current framework needs to undergo a paradigm shift. The CCI must employ a 'presumption-based approach' to presume predation when there is prima facie evidence of platforms in below-average cost pricing.[48]

Recently, the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary released a report titled "*Investigation of Competition in Digital Markets*" that dissects the entire gamut of anti-competitive repercussions of data collection by the Big Four.[49] India can learn important lessons from the detailed recommendations made by the Committee, which can be broadly and succinctly summarized in the following points:

1. Restoring Competition in the Digital Economy by:
    - Reducing Conflicts of Interest, Thorough Structural Separations and Line of Business Restrictions

[43] 'Report of Competition Law Review Committee' Chapter 8: Technology and New Age Markets (*Ministry of Corporate Affairs Government of India*, July 2019) <https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf> last accessed 18 July 2021 [hereinafter *CLRC Report*].

[44] ibid para 2.12.

[45] 10th amendment to the German Act against Restraints of Competition [hereinafter *ARC Digitalization Act*].

[46] CLRC Report (n 43) para 2.15.

[47] ibid at para 2.20.

[48] 'Investigation of Competition in Digital Markets' Majority Staff Report and Recommendations <https://www.documentcloud.org/documents/7222836-Investigation-of-Competition-in-Digital-Markets.html> last accessed 31 October 2021.

[49] ibid.

- Implementing rules to prevent Discrimination, Favouritism, and Self-Preferencing
- Promoting Innovation Through Interoperability and Open Access
- Reducing Market Power Through Merger Presumptions
- Creating an Even Playing Field for the Free and Diverse Press
- Prohibiting Abuse of Superior Bargaining Power and Require Due Process

2. Strengthening the Antitrust Laws by:
    - Invigorating Merger Enforcement
    - Rehabilitating Monopolization Law
3. Strengthening Antitrust Enforcement

A. U.S. Strategy to Tackle Price discrimination

A report of the Executive Office of the President of the United States suggests that, taking into account the rapid evolution of technology along with that of business practices, commercial applications of big data must be under consistent scrutiny – this becomes even more crucial in cases where companies may be utilising sensitive information in a way that is non-transparent for users, and that encroaches upon the boundaries of existing regulatory frameworks.[50]

Need to adopt definite tests for Self-preferencing

In the Indian context, questions over self-preferencing have been argued before the CCI previously. The allegations associated with self-preferencing arose against Google in *Umar Javeed and Ors. v. Google LLC and Ors.*[51] and *Matrimony.com Ltd. v. Google LLC and Ors.*[52] Despite several opportunities, the CCI has failed to provide any definitive test related to self-preferencing and has also been unable to clarify the legal standards associated with it.[53] This issue has given rise to a two-sided debate where one side argues self-preferencing to be anti-competitive *per se* while the other one argues self-preferencing to be anti-competitive only when it has exclusionary effects.

The EC has tackled this debate in the *Google Shopping* case,[54] where it held that it is not necessary to prove the occurrence of anticompetitive effects. Mere suspicion of foreclosure effects as a result of self-preferencing would give rise to a *per se* presumption. However, the

[50] Big Data and Efficient Pricing (n 14).

[51] Umar Javeed and Ors. v. Google LLC and Ors, Competition Commission of India, Case No. 39 of 2018.

[52] Matrimony.com Ltd v. Google LLC and Ors, Competition Commission of India, Case no. 07 of 2012.

[53] Manjushree RM 'The New Antitrust Probe into Google' (*Vidhi Centre for Legal Policy*, 12 November 2020) <https://vidhilegalpolicy.in/blog/the-new-antitrust-probe-into-google/> accessed 20 July 2021.

[54] Case AT. 39740 — Google Search (Shopping) (European Commission, 27 June 2017) <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740> accessed 21 July 2021.

decision of the EC in the case of *Tabacalera v. Filtrona*[55] acknowledged preferential treatment to own products as a valid commercial strategy. A requirement on part of dominant entities to share competitive advantages with rivals can negatively impact firms' incentives to invest and innovate. This would be at odds with the very objective of competition law and policy. Considering that self-preferencing can create synergies and enhance consumer welfare, CCI must assess the issue on a case-by-case basis depending on the ultimate effects of the practice.

There exists considerable doubt over the Indian regulator's approach towards cases associated with self-preferencing, on account of the inconsistent approach of the CCI towards cases related to abuse of dominance. CCI has inconsistently held practices under Section 4 of the Act to constitute a 'per se' restriction in some cases and an 'effects-based restriction' in others. Therefore, formulating relevant thresholds and a clear legal test for prohibiting self-preferencing only in cases of anti-competitive effects are extremely necessary. The CCI must distinguish between the practices using a competitive advantage from those creating anti-competitive exclusionary effects to clarify the threshold on self-preferencing.

Predatory Pricing

In the US, legal discourse on the practices of the Big Tech is in the interim. Investigations are being conducted to understand how the antitrust laws must be evolved to meet the challenges posed by the threat of Big Tech. An antitrust specialist, Lina Khan, believes that to ensure a competitive landscape, platforms and commerce should be separated.[56] This proposition bears a resemblance to the suggestions for India's e-commerce policy, which curbs platforms like Amazon and others forming part of the big tech from leveraging the marketplace to learn from customer demand and produce similar products; however, these are not enough to keep a check on the growing monopolistic tendencies of technology companies.[57]

VI. CONCLUSION

While the panacea of antitrust law is the magic potion to address market failures in other markets, the intricacies and complexities of the digital markets seem to defy easy prescriptions.

[55] 'Commission Decides not to Oppose the Production by Tabacalera of its own Cigarette Filters' (European Commission, 8 May 1989) <https://ec.europa.eu/commission/presscorner/detail/en/IP_89_330> accessed 21 July 2021.

[56] Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119(4) Col. L. Rev 973 [hereinafter *Lina Khan*].

[57] Sarayu Natarajan (n 40).

A. The Way Forward for India

Market distortion effects, invasion of privacy, manipulation of choice-formation through data aggregation, and misinformation are commonplace. There is a lack of sufficient data protection laws and the absence of a nuanced understanding in the context of digital markets.[58] This may bring an imbalance to the level-playing field in the market because network effects produced by the big-tech cause a surge in the costs for entering the market for other players. Dismal levels of enforcement capacity in India[59] further aggravate the existing situation.

The scope of measures for exploiting consumers by the Big Tech has widened and is no more limited to merely predatory pricing and negatively impacting consumer's choices. The concept of digital space has opened up new forms of anti-competitive effects and consumer exploitation resulting from measures other than price, such as wrongful use of personal data. Therefore, consumer welfare needs to be understood through issues like limited accountability, lack of choice, and most importantly, privacy invasion through *(mis)use* of personal data.[60]

The CCI needs to understand that access to data on the part of big tech, in turn, strengthens entry and access barriers to digital markets for the other players. It is also imperative that Indian regulation of the big tech must consider privacy concerns as well as data safety and protection.[61] India must also maintain its perception of big tech in consonance with the socio-political realities. Such discernment will reflect concerns that are specific to India.

The Indian legal framework, as it stands today, needs to undergo evolution to effectively regulate the power-hungry realm of big tech. The competition law framework must undergo integration with other laws such as the Information Technology Act and rules thereunder, the Telecom Regulatory Authority of India Act etc. to fill any gaps. The digital spectrum comprises technological advancements occurring every day, and the Indian competition framework must be dynamic and flexible enough to match the dynamism of a digital spectrum.

The new way to share data in a safe, secure and protected manner is "data trusts".[62] Such data trusts afford a structure for storing data in a safe database system. The use of data by corporate

[58] Lina Khan (n 56).

[59] Aditya Bhattacharjea 'India's Competition Policy: An Assessment' (2003) 38 Econ. & Pol. Weekly 34.

[60] Sarayu Natarajan (n 40).

[61] Priya Dialani 'High Time We Regulate Big Tech Companies to Protect our Privacy' (*Analytics Insight*, 11 November 2020) <https://www.analyticsinsight.net/high-time-we-regulate-big-tech-companies-to-protect-our-privacy/> accessed 25 July 2021.

[62] 'Data Trusts: A new tool for data governance' (*Elementai)* <https://hello.elementai.com/rs/024-OAQ-547/images/Data_Trusts_EN_201914.pdf> accessed 28 July 2021.

entities is managed and supervised by trustees. Such data trusts can prove to be instrumental in capturing any cases of malpractice and misuse of data. In the context of sectors where there is an acute lack of competition and consumers are left without a choice and any alternatives, India must test the viability of such data trusts, at least on a pilot basis. Such a pilot project could help in fostering innovation and ensuring the privacy of the citizens.[63]

Combatting Big Tech Operations in Regulatory Vacuum

Gaps in the Indian competition regulatory framework and consumer inclinations towards the tech space due to the convenience factor have afforded a monopoly-like situation to the big tech. Therefore, an alarming need arises to create a regulatory framework providing consumer safeguards. The regulatory paradigm must holistically cover other aspects of law and follow a multi-disciplinary approach to be successful.

India is currently suffering the brunt of a regulatory vacuum wherein the tech companies continue to violate laws without facing any ramifications for their continued violations. They are acquiring dominance and power in the market by sliding through the regulatory gaps. Considering the existing lacunae and other factors like the current pandemic, there has been a new demand altogether in the tech space due to the wide-scale adoption of technology. In this regard, a holistic competition regulatory framework is an urgent need.

All in all, a fresh approach on the part of CCI to effectively regulate big tech in India calls for better legislative tools and policy measures along with interim remedies to address new forms of abusive conduct and to scrutinise the digital platforms.

"The CCI has only been reactive thus far; prudence and proactiveness are essential toolkits in these times where user harms come in undefined ways." [64]

[63] Sarayu Natarajan (n 40).
[64] Archana Sivasubramanian (n 36).

DATA HARVESTING AND TARGETED ADVERTISEMENTS: A CASE AGAINST ANTI-COMPETITIVE PRACTICE IN THE DIGITAL ECONOMY

MS. ANGELINA JOY

ABSTRACT

*In recent decades we have witnessed a shift from a conventional advertising model to a personalized model based upon heavy data contextualization through user-generated history. Data harvesting has consequently boomed into a billion-dollar industry. With the advent of personalized data, the digital markets have enabled easy facilitation of tailor-made solutions to consumer needs. However, heavy data harvesting and monopolistic access to data intelligence tend to skew the balance of digital markets paving the way to entry barriers and abuse of dominant position giving rise to sinister new centres of unaccountable power. We can't cognize the potential harm to competition posed by information exploitation through data harvesting if we measure competition primarily through price in the digital markets where products and services are given to users at 'zero' price but at the cost of their privacy. Specifically, current competition jurisprudence under appreciates non-price parameters like privacy. These concerns are heightened in the context of online platforms where major platforms have adopted an advertising model infrastructure to generate revenue that indiscriminately infests on user data. This paper maps out facets of the market concentration of digital platforms. Doing so enables us to make sense of platforms' business strategy and illuminates us on the anti-competitive aspects of the digital platforms, and highlights the deficiencies in the present Indian Competition Act, 2002 ["**Act**"]. After establishing a case of privacy as a non-price factor for the competition, the paper closes by giving out potential amendments to the Act.*

Keywords: Data harvesting, personalisation, target advertisements, digital markets, privacy.

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INTRODUCTION

The advent of sophisticated AI (Artificial Intelligence) technologies in the last few decades has enabled the capture, analysis and segregation[1] of raw data into data intelligence. This has changed the status quo of businesses from a conventional advertising model centered around general advertisements to consumers. In the conventional advertising model consumers were targeted with ads irrespective of their preferences. However, today's advertising model has undergone a massive revamp to give tailor-made ads to individual consumers which have been facilitated through a heavy contextualization of data.[2]

With the aid of AI, today's digital commerce is deeply penetrating the minds of the consumers[3] to better understand their consumers vis-a-vis their products to make informed business decisions. We find consumer data to be a pivotal part of today's digital commerce, wherein some companies have founded their entire business model around harvesting consumer data by either selling the harvested data to third parties or by creating personalized ads.[4] Harvesting of personal consumer data has boomed into a billion-dollar industry.[5]

Indiscriminate data harvesting of consumers' data has led to an age of targeted advertisements wherein companies deliver the most relevant ads to the consumers based on the data intelligence gathered from the former's digital footprint. The results of targeted advertisements have been quite impressive with the ability to serve tailored solutions to consumers' individual needs.[6] However, as consumers have become more privacy-conscious, targeted ads have become a double-edged sword wherein on one hand companies like Target operating in the food and general merchandise sector earned millions of dollars in profit turnover after employing algorithms for predicting consumer behaviour. After figuring out individual consumer quirks Target then marketed to people with personalized pitches tailored to appeal

[1] Nate Philip, 'Big Data harvesting case study' (*Quoble*, 2014) <https://www.qubole.com/blog/big-data-advertising-case-study/> accessed 15 June 2021.

[2] Max Freedman, 'How Businesses Are Collecting Data (And What They're Doing with It' (*Business News Daily*, 2020) <https://www.businessnewsdaily.com/10625-businesses-collecting-data.html> accessed 23 June 2021.

[3] Leslie John, Tami Kim and Kate Barasz., 'Ads that don't overstep' (2018) 96 HARV. BUS. REV. <https://hbr.org/2018/01/ads-that-dont-overstep> accessed 15 August 2021.

[4] ibid.

[5] Philip Lew, 'According to IDC Big Data market is projected to be a $50 billion industry by 2019' (*Xbosoft* 2018) <https://xbosoft.com/blog/big-data-50-billion-dollar-industry/> accessed 18 June 2021); Research and Markets, 'The Global Big Data Analytics Market, 2027: A $105+ Billion Opportunity Assessment' (*PR Newswire*, 2020) <https://www.prnewswire.com/news-releases/the-global-big-data-analytics-market-2027-a-105-billion-opportunity-assessment-301014418.html> accessed 18 June 2021.

[6] Avi Goldfarb, 'What is Different About Online Advertising?' (2014) 44 REV. IND. ORGAN. 115.

to consumers' unique buying preferences.[7] On the other hand, market trends and studies have shown consumer backlash over this type of big brother "surveillance".[8] For example, highly specific personalization in the notorious case wherein Target used a promotion model of sending coupons for maternity-related products to expecting mothers that its AI inferred to be pregnant.[9] Interestingly, when the *New York Times* reported this fiasco, Target had a major setback from consumer backlash.[10] A similar fiasco happened with Urban Outfitters' highly specific personalization, wherein the firm personalized their home page with gender-based personalization.[11] In the recent decade, with market regulators becoming more aware of the extent and pervasiveness of the targeted ads, they have taken proactive measures to balance the skewed nature of digital commerce. Recently, a new Antitrust suit was taken up by the European Commission and the UK's Competition and Markets Authority against Facebook's classified ad services.[12] In this investigation, the EU and UK are investigating if Facebook repurposes the harvested data to gain an illegal advantage over its own services following scepticism over Facebook's abuse of dominant position in the digital advertising markets through its data harvesting.[13]

This paper analyses the nature of targeted advertisements becoming anti-competitive through the current WhatsApp's privacy policy change in the Indian regime. Further, this paper argues

[7] Charles Duhigg, *The Powe of Habit: Why do we do what we do in life and business* (Random House Trade Paperbacks 2014).

[8] David Evans, 'The Online Advertising Industry: Economics, Evolution, and Privacy' (2009) 23 J. ECON. PERSPECT. 37; Avi Goldfarb & Catherine E. Tucker, 'Privacy Regulation and Online Advertising' (2011) 57 MANAGE SCI. 57; Yan Lau, 'Report on a Brief Primer on the Economics of Targeted January 2020' (Bureau of Economics Federal Trade Commission 2020) <https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf> accessed 23 June 2021.

[9] Duhigg (n 7).

[10] Kashmir Hill, 'How Target Figured Out a Teen Girl Was Pregnant Before Her Father Did' (*Forbes*, 2012) <https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/?sh=6f01e8906668> accessed 10 June 2021; Charles Duhigg, 'How companies learn your secrets' (*New York Times*, 2012) <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html> accessed 20 June 2021.

[11] Natasha Singer, 'E-Tailer Customization: Convenient or Creepy?' (*New York Times*, 2012) <https://www.nytimes.com/2012/06/24/technology/e-tailer-customization-whats-convenient-and-whats-just-plain-creepy.html> accessed 20 June 2021; Eric Savitz, Making Sense of Online Personalization and Privacy' (*Forbes*, 2012) <https://www.forbes.com/sites/ciocentral/2012/10/22/making-sense-of-online-personalization-and-privacy/?sh=25f3218e313c> accessed 20 June 2021.

[12] Siladitya Ray, 'EU And U.K. Regulators Open Antitrust Probe Into Facebook's Handling Of Advertising Data' (*Forbes*, 2021) <https://www.forbes.com/sites/siladityaray/2021/06/04/eu-and-uk-regulators-open-antitrust-probe-into-facebooks-handling-of-advertising-data/?sh=709d3c1a540a> accessed 28 June 2021; Aoife White**,** **'**EU, UK open first antitrust probe into Facebook in Europe' (*Forbes*, 2021) <https://www.aljazeera.com/economy/2021/6/4/eu-uk-open-first-antitrust-probe-into-facebook-in-europe> accessed 28 June 2021.

[13] ibid.

why privacy should be made a quality parameter for competition. Finally, the author suggests some amendments in the current Indian Competition Act to accommodate the digital sphere under its ambit.

WHEN DO TARGETED ADVERTISEMENTS BECOME ANTI-COMPETITIVE?

Highly personalized ads apparently do not appear to be anti-competitive. However, a nuanced study on the effects of the targeted ads and the way it is sourced through an indiscriminate collection of consumer data highlights how and when targeted ads can become anti-competitive in the digital sphere. In this section, the author throws some light on "how" and "when" targeted ads become anti-competitive in the present market setting in the realm of the digital sphere.

The author has identified two broad settings where the case of personalized ads and data harvesting can become anti-competitive. The first case relates to price discrimination in un-competitive settings. In this model, the targeted ads lead to targeted pricing and a single company with market power including barriers to entry, segregates the market into different divisions and charges consumers present in each division separately.[14] This case presents an anti-competitive scenario where prices offered to the consumers who receive targeted ads are different from those who didn't receive those ads. Examples of price differential models include providing coupons and discounts specifically to targeted audiences while keeping inflated prices to the non-targeted consumers.[15]

The second case relates to market segmentation in a competitive setting. In this model, a target advertising firm finds it more beneficial to target a specific market of products thereby giving rise to mini-monopolists[16] and resulting in a price competition decline. Taking Target's case, Target through the deployment of algorithms had started to maintain a baby shower registry

[14] Benjamin Reed Shiller, 'First Degree Price Discrimination Using Big Data' (2014) Brandeis University, Department of Economics and International Business School Working Paper 58, 2014, 1-3 <https://www8.gsb.columbia.edu/faculty-research/sites/faculty-research/files/finance/Industrial/Ben%20Shiller%20--%20Nov%202014_0.pdf> accessed 16 August 2021; Hal Varian, 'Price Discrimination and Social Welfare', (1985) 75 AM. ECON. REV. 870.

[15] Yan Lau (n 8) 7.

[16] Santanu Roy, 'Strategic Segmentation of a Market' (2000) 18 INT. J. IND. ORGAN. 1279.; Ganesh Iyer, David Soberman and J. Miguel Villas-Boas, 'The Targeting of Advertising' (2005) 24 MARK. SCI. 461.; Andrea Galeotti and Jose Luis Moraga-Gonzalez, 'Segmentation, Advertising and Prices' (2008) 26 INT. J. IND. ORGAN 1106; Nada Ben Elhadj-Ben Brahim, Rim Lahmandi-Ayed and Didier Laussel, 'Is Targeted Advertising Always Beneficial?' (2011) 29 INT. J. IND. ORGAN. 678.

which helped them identify pregnant women which helped the company to decide when to send them coupons for prenatal vitamins or cradles etc.[17]

Market Concentration of Digital Platforms

It has now widely been accepted that digital intelligence[18] through data aggregation and harvesting, has become an enabling asset for controlling the digital economy and thereby strengthens one's position.[19] This digital intelligence is used to channel economic activities by controlling distribution channels in the digital market. For example, Facebook and Google reorganize data using sophisticated AI tools to mobilize logistics and structures thereby redefining the conventional markets in the realm of digital markets.[20] During this transition of our understanding of conventional markets, one finds digital intelligence paving the path for digital platforms to become more data-prosperous. To optimize profits in an advertising model the platforms need a thorough understanding of their consumer base for effective redressal of consumer needs which is smoothly facilitated by the generation of data intelligence.

Rise of Monopolies

The agility in capturing data intelligence is critical in the digital markets owing to its 'time sensitiveness[21], which tends to bestow a competitive advantage.[22] However, on the other hand, over time digital intelligence becomes harder to emulate, leading to prospective entry barriers for new players to the market.[23] Consequently, an established platform's monopolistic access to the data would lead to a detrimental impact on the industry's overall competitiveness.

Google forms a classic example of this as in 1996 when it had revolutionized the search engine market by introducing a search engine algorithm.[24] The search engines since then have dynamically evolved. The contemporary search engines are operated on machine learning

[17] Duhigg (n 7) 82.

[18] Sunil Mithas and Warren McFarlan, 'What Is Digital Intelligence?' (2017) 19 IT PRO. 3.

[19] United Nations Conference on Trade and Development, 'The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development' (3-5 April 2019) U.N. Doc. TD/B/EDE/3/2.

[20] Cecilia Alemany and Anita Gurumurthy, 'Governance of data and artificial intelligence' (Global Civil Society 2019) <https://www.2030spotlight.org/sites/default/files/spot2019/Spotlight_Innenteil_2019_web_gesamt.pdf#page=86> accessed 18 August 2021.

[21] Anusuya Kirubakaran and M. Aramudhan, 'Time Sensitive Business Intelligence - Big Data Processing Methodology for Frequently Changing Business Dimensions' (2016) 7 INDIAN J. SCI TECHNOL. 1.

[22] ibid [2].

[23] Kira Radinsky, 'Data Monopolists Like Google are Threatening the Economy' (*Harvard Business Review* 2015) <https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy?registration=success/> accessed 27 June 2021.

[24] ibid.

algorithms that combine thousands of factors including age, sexual orientation, political leanings among other parameters. One of the prominent factors is the historical search query logs and their complementary search result clicks.[25] Therefore, a lack of matching data intelligence of an incumbent player on a user's search history weighed in to create an entry barrier to new entrants in the search market. Such market distortion was experienced even by platforms with superior algorithms who found it difficult to enter the market and compete with the established Google. For example, when Microsoft entered the search engine market to compete with Google, it allied with Yahoo search[26], thereby accessing the years of digital intelligence of user search behaviour. However, Google still outperforms Bing.

Digital barriers to entry

Another setback of data intelligence is providing inequitable leverage to established players to enter into new markets. This leads to market concentration and digital markets being confined to a few players. For example, Google started as a search engine and later expanded into a leading ad company, video distributor and email service provider among other things. Google's methodology for entering into new markets is hardly a secret. Google's approach has been founded on a data-driven approach.[27] The aggressive data processing gives Google a competitive edge by identifying the weaknesses and inefficiencies in the current market and consequently, exploiting the gaps through its expansion.[28]

Presently, digital intelligence is generated through social interactions of people over various digital platforms leading to aggregation of data from networked data environments. This has led to a radical shift from the conventional way of how commerce functioned thus necessitating a new governance model to check on 'corporate prying' over individual lives. The ways through which digital intelligence is generated, i.e., from networked data environments and social interactions of people to produce profit turnovers marks a radical shift of the edifice of society and economy necessitating a new governance model. Thus, the owner of a dominant

[25] Eugene Agichtein, Eric Brill and Susan Dumais, 'Improving Web Search Ranking by Incorporating User Behavior Information' (2018) 52 ACM SIGIR FORUM 19.

[26] Danny Sullivan, 'The Microsoft-Yahoo Search Deal, In Simple Terms' (*Search Engine Land*, 2009) <https://searchengineland.com/microsoft-yahoo-search-deal-simplified-23299> accessed 27 June 2021.

[27] Jefferson Lynch, 'How Google uses data and machine learning to enter a new market' (*LinkedIn*, 2017) <https://www.linkedin.com/pulse/how-google-uses-data-machine-learning-enter-new-market-lynch> accessed 27 June 2021.

[28] ibid.

data harvesting platform such as social media networks etc. finds itself in a dominant position and with considerable market power.

E-distortions

The author has borrowed the word e-distortion from Ezrachi and Stucke[29]. E-Distortion, mean the creation of distortion in a competitive market when consumers give power to a specific player over others through terms and conditions to provide them with a particular service in the context of digital markets. The Anti-competitiveness of market concentration in digital commerce can be explained through e-distortions.[30] According to Ezrachi and Stucke, primary concerns about e-Distortions include quality degradation, wealth transfer to data-opolies (data-monopolies), costs on third parties and finally negative innovation.[31]

First, quality degradation concerns arise when leading platforms deny interoperability.[32] Consequently, leading to high switching costs for consumers who wish to switch to other platforms. For instance, denial of interoperability over social media platforms and the subsequent need to sign up individually to other social media platforms pose a discouraging factor to the consumers to switch over networks. Further in the context of social media platforms, one must also consider the network effect. When it comes to quality degradation concerns, Ezrachi and Stucke argue that when leading platforms deny interoperability and consequently slap high switching costs on consumers who wish to switch to outside options, it provides a fertile ground for quality degradation.[33] Further, when leading platforms reduce privacy protection to increase data harvesting in a heavily concentrated market, this leads to degradation of privacy. This disincentivizes the smaller platforms to provide relatively high privacy than the big platforms.

One of the key accelerators of market concentration in the digital platform market is lowering the rate of multi-home tendencies as put forward by Evans and Schmalensee.[34] Here, multi-home tendency means the ability of the platform to bring two or more different types of the

[29] Ariel Ezrachi and& Maurice E. Stucke, 'Edistortions: How data-opolies are dissipating the internet's potential' in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

[30] ibid [5].

[31] ibid [5-6].

[32] *See generally* Lina Khan, 'Amazon's antitrust paradox' (2017) 126 YALE L.J. 710.

[33] ibid.

[34] Daniel Evans and Richard Schmalensee, 'Markets with Two-Sided Platforms' (2008) 1 Issues in Competition law and Policy 667; David Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided-Platform Businesses' in Roger Blair and Daniel Sokol (eds), *Oxford Handbook on International Antitrust Economics* (vol. 1, 2015).

platform together to facilitate interactions between them.[35] Evans and Schmalensee identify 'strength of indirect network effects' and 'degree of economies of scale'(refers to cost advantage gained by companies over the increased level of production) as important factors that weigh in to determine the concentration process. In terms of the degree of economies of scale, there appears a significant fixed cost for providing the platforms. In two-sided platforms like social media platforms, there is a fixed cost for providing the platforms however not a fixed rate in providing for advertisements.[36]

Thus, the economies of scale become dependent on the strength of the indirect effect to generate takers for advertisements. A user's opportunity to multi-home (particularly in a social media platform) depends upon various factors including switching costs and the structure and height of platform charges. For example, it is easier for a user to switch from one online retailer to another, say from Amazon to Flipkart, where it does not necessarily matter how many users use. However, when we talk about social media networks, a user takes into account the strong direct network effect, say as in Facebook.

Second, the e-Distortion concern relates to wealth transfers to data-opolies (data-monopolies)[37] Albeit, products and services are deemed to be free of cost, data-opolies can extract ostensible amounts of wealth from consumers through data harvesting without paying the fair market value of the personal data collected etc. For instance, predicting individual consumer quirks by prying on the consumer's lives can give a competitive edge to the firms to influence consumer shopping patterns by delivering the most relevant choices to the consumers. However, indiscriminately harvesting data without setting limits leads to consumer disadvantage especially when those individuals are privacy-conscious. This leads to an unfair bargain over data collection. This problem is aggravated when data-opolies unscrupulously collect data and engage in means such as discriminatory pricing and behavioural discrimination.

Third, e-Distortion concern is costs on third parties.[38] In this type of circumstances, a key platform like social media platform can engage in cheap exclusion. The type of exclusion we refer to in this paper is for example, to the detriment of rival sellers steering away prospective

[35] David S.Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (2012) University of Chicago law School Working Paper 623/2012, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1482&context=law_and_economics> accessed 4 November 2021.

[36] David S. Evans and Richard Schmalensee, 'Markets with Two-Sided Platforms' in Wayne Collins (ed), *Issues in Competition Law and Policy* (vol 1, 2008).

[37] Ezrachi and Stuke (n 29) 6.

[38] ibid.

consumers and advertisers to the key provider's own products. For instance, the 'universal search' by Google excluded competitors in its specialized search.[39] In its universal search, Google provided favourable treatment to its own products to the detriment of its competitors and consumers.[40] Thus, by the cheap exclusion of rival products Google provided suboptimal results thereby eliminating consumer welfare gains. Moreover, Google's conduct excluded competitors without offering any efficiency justification.[41]

Fourth, e-Distortion concerns the rise of negative innovation, wherein data-opolies innovate to the detriment of consumer interests and markets. For instance, more data-centric applications, social media platforms run by popular data-opolies give fewer incentives to the new players in the market to provide for greater privacy protections. This leads to a vicious cycle of limitless data harvesting wherein with each passing day firms come up with new innovative ways to harvest novel data for say heart rate, blood pressure, etc. In the context of user privacy, this leads to a rise in innovative technologies to the detriment of consumers.

Neglecting true consumer behaviour is indeed problematic. Since the onset of the pandemic in India, many people have shifted from conventional markets to e-markets which are generally run through personalized ads. For example, buying a laptop requires one to search the web for the best laptops and then evaluate the options on big retail sites like Amazon or Flipkart. When assessing a market, it is important to take up the market realities including the consumer's knowledge over online personalized ads. Since often lesser technologically acquainted consumers tend to take personalized ads featuring in daily feeds as a substitute for neutral ads. This consequently leads to degradation of consumer welfare in the market setting when consumers, especially lesser technological savvy consumers are targeted with personalized ads. Hence resulting in quality degradation of the options which otherwise they would have been privy to if not for the personalized ads. It hardly comes as a surprise if the present Indian consumers are ill-equipped with sufficient know-how about the neutrality of these ads. Therefore, it would be absurd to assume that the consumers would know whether the personalized ads that they see would be favouring one platform over others. Many online shopping ads including one by Google, does not explicitly portray themselves as a neutral

[39] Evans and Schmalensee (n 34).

[40] ibid.

[41] *See* Eric B. Rasmusen, J. Mark Ramseyer, and John S. Wiley, Jr., Naked Exclusion, (1991) 81 Am. Econ. Rev. 1137.

metasearch engine, unlike other shopping comparison sites.[42] The problem of neutrality is aggravated when metasearch engines and personalized ads are conceived as substitutes by consumers. Such inexplicit favouritism by Google results in neglect of effective alternative products, resulting in harm to consumers, competitors and merchants.[43]

Rise of 'Sinister New Centers of Unaccountable Power'

While dealing with different types of forms and sources of power and platform abuses, academicians like Lina Khan have classified the forms and abuse of power into three categories, namely, gatekeeping power, leveraging, and information exploitation.[44] However, this paper is only concerned with information exploitation concerning social media networks. The source of information exploitation by social networking platforms comes from various methods of data collection in multiple markets.[45] These platforms collect enormous information including the time a user spends online on a particular page, the likes one easily gives to a specific type of content etc., thereby giving rise to information exploitation power and privacy threats.[46]

Information exploitation leads to the business model problem[47]. By 'business model problem' the author refers to the tendencies of dominant firms to enter into distinct lines of business.[48] This places the dominant firms which can leverage information for its benefit in direct competition with the firms using their platforms.[49] This leads to competition concerns in e-markets through data control. From the view of privacy, it is of utmost concern that our digital footprints reveal a lot more about a user. Since our social media language can easily reveal our personality, further private traits and attributes are predictable from digital records of human behaviour.[50] The problem is aggravated due to sophisticated AI inferences of a particular data like the data on an individual's lifestyle revealing current health issues or the potential risks.

[42] Justus Haucap, 'A German approach to antitrust for digital platforms' in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

[43] Evans and Schmalensee (n 34) 679.

[44] Lina M Khan, 'What makes tech platforms so powerful?' in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

[45] ibid.

[46] ibid.

[47] ibid.

[48] ibid.

[49] ibid.

[50] Park G et. al., 'Automatic Personality Assessment Through Social Media Language' (2014) 108 J PERS. SOC. PSYCHOL. 934; Michal Kosinski, David Stillwell and Thore Graepel, 'Private traits and attributes are predictable from digital records of human behavior' (2013) 110 PROC. NATL. ACAD. SCI. 5802.

In a market where data is valued for targeted advertisements, the concentration of unprecedented volumes of data poses a competition risk especially when the data intelligence can infer an individual's preferences, habits, even moods. In furtherance of it, targeting users with personalized messages tailored to their respective psychological profiles remarkably increase clicks and purchases.[51] Targeted advertisements have led to a remarkable rise in the effectiveness of psychological mass persuasion to appeal to the psychological characteristics of the users. For example, in a study conducted to assess consumers' purchase intentions, when the participants were provided with marketing messages tailored to their personality, the research saw a rise in the purchase intentions of the participants.[52]

Recent advancements have shown that this psychological persuasion could either be used to influence individuals' behaviour in a healthy way. Conversely, these personalized appeals can leech on the weakness of its subject users and persuade them to take action to their detriment and cause harm to the consumers. Therefore, harvesting user data gives an edge to platforms by providing insights of prospective consumers, leading to an information advantage that the platforms can use to increase their digital monopoly and weed out nascent rivals thereby creating entry barriers.

Information exploitation and data monopolization by few data-opolies provide them with the power to dictate which content a user is exposed to on their platform which consequently plays a catalyst to influence user behaviour. It is pertinent to note that in the digital markets precisely, there has been a rapid rise in the "economy of attention,"[53] wherein a user's attention has become the primary commodity to be traded.[54] Many firms now have started to capitalize on our attention by having understood how scarce our attention is.[55] Again, it warrants a question, in an economy with poverty of attention are digital platforms paying a fair market price for surplus generating stimuli by prying individual's behaviour traits It would be quite absurd to envisage a model, where the internet would be free of advertisements, especially when most of

[51] Sandra Matz et. al., 'Psychological Targeting as an Effective Approach to Digital Mass Persuasion' (2017) 114 PROC. NATL. ACAD. SCI. <https://www.pnas.org/content/114/48/12714> accessed 14 August 2021.

[52] Jacob Hirsh, Sonia K Kang and Galen Bodenhausen, 'Personalized persuasion: Tailoring persuasive appeals to recipients' personality traits' (2012) 23 PSYCHOL. SCI <https://www.researchgate.net/publication/321043573_Psychological_targeting_as_an_effective_approach_to_digital_mass_persuasion> accessed 15 August 2021.

[53] Sandra Matz, Guy Rolnik and Moran Cerf, 'Solutions to the threats of digital monopolies' in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

[54] L Weng et. al., 'Competition among memes in a world with limited attention' (2012) 2 SCI. REP. 335.

[55] 'Paying Attention: The attention economy' (*Berkeley Economic Review*, 2020) <https://econreview.berkeley.edu/paying-attention-the-attention-economy/> accessed 4 November 2021.

the 'zero' cost services (wherein one can avail the services of the platform without incurring any cost) are provided on the advertisement model. However, it takes another absurd turn, if we allow platforms to mushroom data aggregation indefinitely to expand their advertisement business, creating higher leverage power and concentrating digital markets.

In a data-driven market, platforms are thrust upon costs in terms of lesser user privacy. The problem is worsened when consumers don't have the choice to opt out of personalized advertisements when using such platforms.[56] Lack of consumer control is witnessed through unreasonable setting choices in the platforms where the user has no choice but to accept the personalized advertising to use the services like in the case of major social media platforms.[57] Another technique employed by digital platforms in making opt-out tedious for users is by using primary default settings which mandate the users to opt-out to make an effort to alter the default setting. The regulation of one's privacy is worsened through complex engagement settings which discourages the users from effectively changing the privacy layout due to unclarity, poor accessibility and barriers to consumer actions.[58] Therefore, a user's ability to use the platform is contingent upon their permission on receiving targeted advertisements.

In the context of competition in a digital market, it becomes pertinent to discuss the advanced tactics employed in targeted advertisements to manipulate and prey upon the user's weakness. Interestingly, recent researches have demonstrated that exposure to content at a rate of three views per person suffices to generate conscious awareness of a brand in a user.[59] While ten views per person are sufficient to yield unconscious preference for a product.[60] In any competitive market, it becomes undesirable if targeted ads influence the consumers in a way that tends to imbalance consumer preferences by data monopolization. Since it creates an inequitable start for other players including new players and existing insignificant players to catch consumer attention in a scarcity of attention economy. Information leverage in such a context creates entry barriers for the latter's thereby raising competition concerns.

[56] Competition and Markets Authority, 'Online platforms and digital advertising Market study final report' (2020) <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf> accessed 17 August 2021.

[57] ibid [178].

[58] ibid.

[59] Herbert Krugman, 'Why Three Exposures May be Enough' (1972) 12 J. ADVERT. RES. 11.

[60] Martin Eisend and Susanne Schmidt, 'Advertising repetition: A meta-analysis on effective frequency in advertising' (2015) 22 J. ADVERT. 415.

The hegemony of a few platforms augments due to a lack of transparency. At present, the users are kept in dark about the amount of data gathered from them, the way it is analyzed, and put into use as digital intelligence. In a study conducted by Matz et. al.,[61] it came as a surprise when the outcome of research revealed that the psychological targeting in advertisements can be made even without getting hold of an individual's direct access to data. For example, the type of reaction one gives to a Facebook post or the type of post one gives high preference to likes or shares. Simply analyzing the input given by an individual through their clicks and likes can reveal character traits of individuals without the users becoming aware that their information has been exposed.

Despite ethical concerns over transparency in a market setting, firms have legitimate interests in keeping their trade secrets.[62] The advocacy of trade secrets presents a strong case over speculation on exacerbated manipulation and abuse of transparency and gains momentum, especially where traditional IP protections are unavailable.[63] Nevertheless, transparency in its true sense, which is devoid of any ambiguity or dichotomy, becomes important for a user to navigate the complex territory of 'consent' in the digital market. When a user is not properly acquainted with the platform of the consequences of the data being gathered, it presents us with an 'actual consent conundrum'. By 'actual consent conundrum', the author refers to that situation wherein the users freely give their valuable consent over data harvesting to a platform without actually being able to gauge the severity of the consent and the consequent actions it can entail. Thus, it becomes important to draw a fine line over corporate profits and the self-determination of users through privacy.

In a competitive market where consumer attention has become the new commodity priced by platforms, it demands a serious discussion over balancing privacy over trade secrets. 'Actual consent conundrum opens Pandora's box of market distortions and abuse of dominance. Transnational platforms (refers to platforms that connect to the Global markets) utilize the user data without any accountability to the users. In absence of any practical and effective governance framework, the transnational platform has started to create structural inequalities

[61] Sandra Matz et. al., (n 53) 2, 4.

[62] Stuart Meyer and Grace Fernandez, 'A Looming AI War: Transparency v. IP Rights' (*JD Supra*, 2019) <https://www.jdsupra.com/legalnews/a-looming-ai-war-transparency-v-ip-34524/> accessed 27 June 2021.

[63] ibid.

by information exploitation. Third world economies without adequate competition safeguard[64] risk to become an unregulated innovation playground for digital platforms to experiment in.[65]

ABUSE OF DOMINANCE - A CASE STUDY ON WHATSAPP'S NEW PRIVACY POLICY

In this section, WhatsApp's recent privacy policy change has been analysed to understand why deep penetration of an individual's data by a dominant platform poses a threat to competition. On January 4, 2021, WhatsApp announced its revised privacy policy.[66] The policy highlighted certain features as to the prospective changes in how user accounts would be impacted. The initial announcement provided an ultimatum to the users to either accept the privacy policy changes allowing data-sharing between WhatsApp and Facebook or be unable to use WhatsApp post-March 15, 2021.[67] Following a public backlash, WhatsApp came up with a clarification that the data sharing between WhatsApp and Facebook did not incorporate personal communications but only included communication with businesses via WhatsApp.

For example, when you communicate to a business, it would be visible to WhatsApp and it can gather that information to use it for its own marketing purposes including the incorporation of such information for advertising on Facebook.[68] As mentioned earlier, even if content messages (direct data) still remain encrypted, sharing metadata with Facebook provides leverage to Facebook to boost its business strategy in targeted advertising. Recently, EU, UK competition

[64] Padmashree Gehl Sampath, 'Regulating the Digital Economy: Dilemmas, Trade Offs and Potential Options' (2019) SOUTH CENTRE Research Paper, Paper No. 93/2019, 11-13 <https://www.southcentre.int/wp-content/uploads/2019/03/RP93_Regulating-the-Digital-Economy-Dilemmas-Trade-Offs-and-Potential-Options_EN-1.pdf> accessed 16 August 2021.

[65] Alemany and Gurumurthy (n 20) 87.

[66] Tech Desk, 'WhatsApp privacy policy update delayed: Everything that has happened' *Indian Express* (2021) <https://indianexpress.com/article/technology/social/whatsapp-privacy-policy-update-delayed-your-a ccount-wont-be-deleted-7148553/> accessed 23 June 2021, *see* Pallavi Bedi and Shweta Reddy, 'PDP Bill is coming: WhatsApp privacy policy analysis' (*The Centre for Internet Society*, 2021) <https://cis-india.org/internet-governance/blog/pdp-bill-is-coming-whatsapp-privacy-policy-analysis> accessed 23 June 2021.

[67] Rohit Kulkarni, 'WhatsApp Will Stop Users From Reading, Sending Messages After May 15, If They Don't Do This' (*Trak*, 2021) <https://trak.in/tags/business/2021/02/22/whatsapp-will-stop-users-from-reading-sending-messages-after-may-15-if-they-dont-do-this/> accessed 24 June 2021); Ketan Pratap, 'WhatsApp privacy policy May 15 deadline is now sheer blackmailing for users' *India Today* (2021) <https://www.indiatoday.in/technology/talking-points/story/whatsapp-privacy-policy-may-15-deadline-is-now-sheer-blackmailing-for-users-1801710-2021-05-12> accessed 24 June 2021.

[68] WhatsApp Help Centre, 'Answering your questions about WhatsApp's Privacy Policy' (*FAQ WhatsApp*) <https://faq.whatsapp.com/general/security-and-privacy/answering-your-questions-about-whatsapps-privacy-policy/?lang=en> accessed 23 June 2021).

watchdogs have launched antitrust suits against Facebook over allegations of Facebook's unfair use of consumer data to compete with advertisers.[69]

After WhatsApp's policy change, the Competition Commission of India ["**CCI**"] took a *suo motu* cognizance of the matter against WhatsApp and its parent company Facebook.[70] The CCI concluded that WhatsApp violated the provisions of section 4 of the Act and held it liable for abusing its dominance.[71] The CCI directed a detailed investigation to ascertain the full extent, scope and impact of data sharing through its new privacy policy.[72] In this section, the author analyses why deep penetration of an individual's data by a dominant platform poses a threat to competition. However, to establish abuse of dominance by WhatsApp, three steps must be followed. First, determination of the relevant market; second, determination of dominant position; and third, determination of abuse of power.

A. Relevant market

The CCI, in its 2016 order, described the relevant market for WhatsApp as "the market for instant messaging services using consumer communication apps through smartphones."[73] In its update of the definition, the CCI, in its 2020 order, noted that the relevant product market for WhatsApp was the "market for Over-The-Top (OTT) messaging apps through smartphones."[74] Concerning this case study, the relevant geographic market is India.

It is interesting to note that in the very same order CCI distinguished between relevant markets held by WhatsApp and Facebook. For WhatsApp, the CCI described it as an OTT application, whereas Facebook was described as a social networking application. However, despite the different technical characteristics and applications of WhatsApp and Facebook, the CCI recognized that owing to Facebook's ownership of WhatsApp, there exists an intrinsic link between the two in the digital marketplace.[75]

Dominant Position

[69] Foo Yun Chee and Kate Holton, 'Facebook's Marketplace in EU and UK antitrust crosshairs' (*Reuters*, 2021) <https://www.reuters.com/technology/eu-antitrust-regulators-investige-facebooks-marketplace-2021-06-04/> accessed 4 November 2021.

[70] Competition Commission of India, *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Case No.1/2021, [5].

[71] ibid [34]; Section 4, The Competition Act, 2002 (Act 12 of 2013).

[72] ibid [34].

[73] Competition Commission of India, *Vinod Kumar Gupta v WhatsApp*, Case No.99/2016, [11].

[74] Competition Commission of India, *Harshita Chawla v WhatsApp*, Case No.15/2020, [70].

[75] ibid [80].

In the Indian jurisdiction, the dominant position of WhatsApp can be identified through analyzing the metrics provided in section 19(4) of the Act. However, for the purpose of this paper vis-a-vis economic factors, we analyze section 19(4) (a), (b), (c) and (d), i.e., market share of the enterprise, size and resource of the enterprise, size and importance of the competitors and economic power of the enterprise. Before starting the analysis, it is noteworthy that the Competition Law Review Committee ["**CLRC**"] report observed that the criteria laid down in section 19(4) is inclusive enough. Further, section 19(4)(b), which states about the "size and resources of the enterprise", is flexible enough to include data ownership as a factor for the determination of dominance.[76]

The first step to determine the dominant position is to identify whether WhatsApp has advantages in user base, usage and reach. In the Indian jurisdiction, it comes as hardly any surprise that WhatsApp exerts an extensive advantage over its competitors like Snapchat[77] etc., in terms of the user base. In quantitative terms, WhatsApp boasts an enormous user base of around 530 million users in India.[78] The second most used messaging application amongst Indians was Facebook Messenger.[79] Interestingly, since Facebook is the parent company of WhatsApp, it can't be held that either of the two limits each other's competition in the instant messaging service industry.[80]

The second step in determining the dominant position is to identify any entry barriers for the competitors. When it comes to social networking sites, entry barriers to the marketplace become tricky since the success in such platforms is obtained primarily through first, network effect.[81] The network effect is defined as "any situation in which the value of a product, service, or platform depends on the number of buyers, sellers, or users who leverage it".

Second, the high-switching cost, in terms of operating social media platforms, is defined as "various economic and psychological costs incurred when a customer changes service

[76] Competition Law Review Committee (CLRC), 'Report of the Competition Law Review Committee' (Ministry of Corporate Affairs 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 17 August 2021.

[77] Harshita Chawla (n 74) [81], [84].

[78] 'Govt Announces New Social Media Rules to Curb Its Misuse' *The Hindu* (2021) <https://www.thehindu.com/news/national/govt-announces-new-social-media-rules/article33931290.ece> accessed 23 June 2021.

[79] Harshita Chawla (n 74) [20].

[80] ibid [84].

[81] Tim Stobierski, 'What are Network Effects?' (*Harvard Business School Online*, 2020) <https://online.hbs.edu/blog/post/what-are-network-effects> accessed 4 November 2021.

suppliers."[82] Unlike online retail stores, it becomes difficult for users to multi-home since the viability of social networking sites depends upon the number of relative social connections present in a particular platform. Thus, we see the utility of social networking sites increasing in proportion to the number of users. In an advertising model like Facebook's, the number of users generates profitability of the platform through an increase in advertisements.[83] Since the "willingness to pay, for a buyer, increases as the number of buyers or sellers for the business grow".[84] Further, the non-interoperability between social media platforms leads to high switching costs to users in terms of creating a new account on another social media and sharing of information.[85] The absence of clear incentives for users to switch to other competing platforms aggravates the existing Facebook's monopoly over social media platforms.

The third step concerns data availability and its consequent information exploitation. As aforementioned, the success of an advertising model heavily depends upon the data harvesting and consequent aggregation of data intelligence. Now, according to WhatsApp's new privacy policy, the platform would be able to amass information from the business accounts on WhatsApp and pass it over to Facebook. This would create an influx of data for easy customization of advertisements by the parent company Facebook. In this context, one must note that "access to data can represent a form of competitive advantage."[86]

Abuse of Dominant Position

The abuse of dominant position by Facebook and WhatsApp needs to be looked into through the scheme of section 4(2)[87] of the Act. The scheme of section 4(2) envisages an abuse of dominant position if a firm directly or indirectly imposes an unfair or discriminatory condition in purchase or sale of goods or price in purchase or sale of goods or services etc. In the 2021 privacy policy[88], there is no opt-out clause, therefore, a user cannot compromise his privacy.

[82] Akihiro Nakamura, 'Estimating Switching Costs of Changing Social Networking Sites', 19th Biennial Conference of the International Telecommunications Society (ITS): "Moving Forward with Future Technologies: Opening a Platform for All", Bangkok, Thailand, (18 -21 November 2012).

[83] Fiona M. Scott Morton and David C. Dinielli, 'Roadmap for an Antitrust Case Against Facebook' (*Omidyar* 2020) <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf> accessed 10 June 2021.

[84] Stobierski (n 85).

[85] Bill Goodwin, Sebastian Klovig Skelton and Duncan Campbell, 'How Facebook's 'Switcheroo' Plan Concealed Scheme to Kill Popular Apps' (*Computer Weekly*, 2019) <https://www.computerweekly.com/feature/How-Facebooks-Switcheroo-plan-concealed-scheme-to-kill-popular-apps> accessed 15 June 2021.

[86] CLRC (n 76) [2.15].

[87] Section 4(2), The Competition Act 2002 (Act 12 of 2013).

[88] 'WhatsApp Privacy Policy 2021' (*WhatsApp*, 2021) <https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en> accessed 4 November 2021.

In such a case, there is an ambiguity in reasonable alternatives that WhatsApp provides amidst looming scepticism of the disablement of services. The 2021 policy imposes an unfair price on the consumers by taking away their privacy for the use of the former's services. Thus, the 2021 privacy policy fails on the 'user choice' test to determine the imposition of the unfair terms or conditions on the user under the aegis of section 4(2)(i)(a) of the Act.[89]

Second, contrary to the popular belief, during the Privacy Policy change of 2016[90], the CCI held that the 2016 privacy policy change didn't fall under the abuse of dominance because the data sharing was facilitated to Facebook for legitimate purposes like improvising user and product experiences.[91] However, in recent years, the digital markets and advertising model has gone a major overhaul to get a grip of the non-transparent nature of data usage by the digital platforms and their aggressive targeted advertisement strategy. Albeit digital platforms often put extensive data gathering in certain well-known euphemisms like improving user experience etc. Therefore, it becomes imperative to draw a line regarding what is, and what is not, permissible in the flourishing digital markets to avoid rampant abuse of dominant position.

PRIVACY AS A QUALITY PARAMETER AFFECTING COMPETITION

Following the anti-competitiveness of targeted ads in certain settings, the author in this section makes a case of including privacy as a non-price factor affecting competition. In this section, the author tries to evaluate recent jurisprudential change in the attitude of market regulators across various jurisdictions in holding firms accountable for a breach of privacy violation through unconventional quality parameter analysis.

A. International trend in factoring non-price considerations as a parameter

In recent decades with increasing knowledge of the importance of data for commercial purposes, privacy has created a buzz during mergers or acquisitions of data-rich industries.[92] The developments in data harvesting and changes in privacy policies of WhatsApp, raises novel regulatory issues in competition law, including privacy concerns and the extent in the domain of digital markets and targeted advertisements. In the western countries, there is an emerging

[89] Section 4(2)(i)(a), The Competition Act, 2002 (Act 12 of 2003).

[90] 'WhatsApp Privacy Policy 2016' (*WhatsApp*, 2016) <https://www.whatsapp.com/legal/privacy-policy/revisions/20160825> accessed 4 November 2021.

[91] Vinod Kumar (n 73) [15].

[92] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (2018) University of Oslo Faculty of Law Research Paper 26/2018, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232701> accessed 16 August 2021.

trend adopted by the European Commission ["**EC**"] and the US Federal Trade Commission ["**FTC**"] in weighing privacy as a non-price competition parameter. In various decisions including Facebook/WhatsApp merger decision,[93] Microsoft/LinkedIn,[94] Google/DoubleClick merger,[95] these regulators considered privacy as a significant quality parameter. Nevertheless, inducting privacy as a quality parameter comes with its set of chaos, particularly, in deciding the attributes of privacy that should come under the purview of competition. Amidst the uncertainties over privacy, the author explores ways in which privacy fits into competition analysis as a non-price parameter vis-a-vis data harvesting by social media platforms.

At its crux, competition policy is concerned with balancing the market power that may detriment consumer welfare. In a highly effective competitive market, such a market benefits the consumer welfare through the diversity of choices, quality and lower prices.[96] In contrast, a market becomes anti-competitive when a transaction or conduct results in the accumulation of market power. Consequently, making that firm dictate prices, output, choice or quality of goods and services and adversely influencing other parameters of competition in its favour.[97] Logically speaking, it can be inferred that when few data-opolies single-handedly hold information on our data. It easily facilitates information exploitation by them through their business models like the advertising model.

Despite the inference, many academicians find taking privacy as a parameter quite tricky due to its multidimensional nature since the multidimensional concept holds many attributes.[98] This makes it difficult to figure out the specific attributes of privacy that are important for consumers in competition law analysis.[99] Since there is no consensus on what attributes of privacy are relevant for competition. Despite all of this, the author asserts that non-price considerations

[93] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision 139/2004/EC [2004] OJ L24/1, para 87.

[94] European Commission, 'Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions' (2016) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284> accessed 18 August 2021.

[95] Federal Trade Commission 'Statement Concerning Google/DoubleClick' (2017) <https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf> accessed 17 August 2021; *Google/DoubleClick* (Case. COMP/M.4731) Commission decision C (2008) 927 [2008] OJ C184/10.

[96] C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] OJ C151/4 para 22.

[97] 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004) para 8 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN> accessed 17 August 2021.

[98] OECD, 'The Role and Measurement of Quality in Competition Analysis' (OECD, Policy Roundtables, 2013) <https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf> accessed 18 August 2021; Esayas (n 92) 6.

[99] Ariel Ezrachi and Maurice Stucke, 'The Curious Case of Competition and Quality' (2015) 3 J. ANTITRUST ENFORC. 1.

like privacy must feature in key areas of competition including abuse of dominant position in light of anti-competitive practice in digital markets. It needs to be mentioned that '[t]raditional competition analysis fails to capture the interests of all the relevant parties,' particularly 'consumers whose privacy is at stake.[100]

Conventionally in the competition analysis price had been the primary competition parameter. Thus, the ubiquitous nature of 'zero' price services offered in the realm of social media platforms in exchange for personal data demands a policy change. However, a heavy reliance on price starts to break down when such products and services are offered freely like on Facebook. Therefore, privacy and personal data must be considered as the chief parameter in such situations to judge whether such social media platforms are paying a fair price for the data collected from the users. Moreover, it must be noted that when a service is given at zero fees, quality becomes an essential and significant competition parameter.[101] In the realm of social media platforms where personal data has become the chief input for providing services and goods, privacy considerations could serve as a promising constraint to curb abuse of dominant position by such platforms.[102]

For determining data privacy as a quality parameter, it is important to get normative guidance on data privacy. EU's data privacy has robust guidelines on the different dimensions of privacy[103], highlighting the attributes of privacy as a quality parameter.[104] In light of principles and rights embodied in the GDPR, data privacy as a quality parameter can incorporate the following aspects like the modalities of the information provided to the third parties[105], limited access to the sensitive data of the consumers, induction of opt-in regime, the time frame of storing personal data to name a few. It is imperative to note here that the list is not exhaustive in itself but is mentioned here to provide a foundation for discussion on privacy as a quality parameter. Thus, investigating different attributes of privacy on the aforementioned lines can bring a consensus on the relevant attributes of privacy for competition analysis.

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[100] Federal Trade Commission, 'Dissenting Statement of Commissioner Pamela Jones Harbour' (2017) <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf> accessed 17 August 2021.

[101] *Microsoft/Yahoo! Search Business* (Case. COMP/M.5727) Commission Decision C (2010) 1077 [2010] [101].

[102] Facebook/WhatsApp (n 93) [174].

[103] *See generally* 'Guidelines 4/2019 on Article 25 Data Protection by Design and by Default' (European Data Protection Board, 2019) <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf> accessed 18 August 2021.

[104] Esayas (n 92) 10.

[105] General Data Protection Regulation 2016, Art. 5(1(a)) and Art. 12-14.

A case against Antitrust harms

Targeted advertising that leads to 'a less privacy-protective structure' inevitably decreases consumer welfare since those consumers with particularly high privacy preferences invariably 'pay more for a good if greater privacy intrusions are contrary to their preferences'.[106] This leads to two observations, first enterprises at present are not paying a fair share of the market price for indiscriminate mining of data, especially personal sensitive data. Consumers who might not have any problem with sharing their personal data might in some instances be wary to share their sensitive data. Here, we see a lack of division in personal and personal sensitive data. Secondly, there has been a significant rise in negative innovation pertaining to data collection with lesser privacy checks on digital platforms. This negative innovation has resulted in consumer harm, especially to privacy-conscious consumers. Since an increase in negative innovation vis-a-vis data harvesting by leading digital platforms gives fewer incentives to other like platforms to maintain user privacy. Here, we specifically refer to high switching costs, time and manual costs to sign up for different platforms and a decrease in network connectivity. If those platforms providing relatively higher privacy are less popular, for example switching from WhatsApp to say signal or telegram.

In the testimony before the FTC, Peter Swire in the Google/DoubleClick merger case argued that like other harms to consumer preferences, harms to consumers' privacy preferences must be a part of the conventional antitrust analysis.[107] If a platform using its dominant position, starts to require more personal data from the users then such a situation can be seen as an increase in the price for using the product or services.[108] For example, an increase in data collection by WhatsApp can drive away current and prospective consumers from the platform to other minor platforms thereby reducing the quality of services for consumers with high-privacy preferences. A decrease in the quality of product/service is an established category of antitrust harm. If privacy harms constitute a decrease in the quality of product/services, then privacy should inevitably be counted in the antitrust analysis.[109] Interestingly, privacy remains a relevant factor where it has a high likelihood to affect competition parameters. For example,

[106] Peter Swire, 'Behavioral Advertising: Tracking, Targeting, and Technology' 5 (Testimony to the Federal Trade Commission Behavioral Advertising Town Hall on Google/DoubleClick, Federal Trade Commission 2007) <https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/testimony_peterswire_/Testimony_peterswire_en.pdf> accessed 18 August 2021.

[107] ibid [5].

[108] Eleonora Ocello, Cristina Sjödin and Subočs, 'What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU Merger Case' (2015) 1 Competition Merger Brief 6.

[109] ibid.

in the famous Facebook/WhatsApp merger, the EC investigated how a decline in privacy could catalyze targeted advertising in WhatsApp, thereby augmenting Facebook's position in the online advertising market.[110]

Consumer-choice Approach

There emerges such a circumstance wherein an increase in data harvesting to propagate targeted advertisements may not always lead to consumer harm especially in cases where consumers prefer personalized experiences. Therefore, it becomes important for us to effectively encapsulate harm by discussing the consumer choice approach.

Choice-based approach factors in non-price parameters thereby elevating non-price parameters like privacy in competition analysis. This approach stems from the fact that price is not the sole factor for the determination of the user's choice.[111] In a choice-based approach, non-price parameters are not converted into price terms.[112] The conduct is assessed in terms of antitrust violation if it hampers the choices available to a consumer in a free market to their detriment given that if the restraints were absent the market would otherwise have provided.[113] Therefore, this approach poses a question of whether a particular business practice resulted in some unreasonable and significant limitation on consumer choice, unmediated by a marketplace test.[114] Variety, as an ultimate goal of competition policy, is often associated with the Ordoliberal school of thought, which recognizes the positive role of the State actors in the protection of the economic freedom of market players and the subsequent competitive order.[115] Thus, protecting consumer choice assumes the existence of an ample number of producers in the market.[116] Pragmatically speaking, it would necessitate the competition policy to concentrate on protecting 'rivalry' and 'market structure' as its principal goals. In the context of the advertising model, 'variety as an ultimate goal of competition policy' would translate to

[110] Facebook/WhatsApp (n 93) [174].

[111] Esayas (n 92) 24.

[112] Niel Averitt and Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 ANTITRUST L. J. 175, 186.

[113] ibid [182] and [184].

[114] Averitt and Lande (n 112) 177.

[115] Mathias Siems and Gerhard Schnyder, 'Ordoliberal lessons for economic stability: different kinds of regulation, not more regulation' (2014) 27 GOVERNANCE 379.

[116] Peter Behrens, 'The 'Consumer Choice' Paradigm in German Ordoliberalism and its Impact Upon EU Competition Law' (2014) Europa-Kolleg Hamburg Discussion Paper 1/14, 23 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568304> accessed 16 August 2021.

curtail information exploitation through data harvesting to stop entry barriers and abuse of dominant position.

Foreclosure effect- access to the market made impossible or difficult

The EC, to demonstrate concrete harms on consumer welfare and efficiency, had laid down multiple economic tools. One such economic tool envisaged by the EU Commission is the 'As Efficient Competitor' (AEC) test.[117] The AEC test investigates whether the alleged conduct of the firm leads to foreclosure of its competitors which are as efficient as dominant undertaking. Interestingly, in the Indian competition law jurisprudence, the dominant undertaking is not designated under mere price parameters. The dominance of the undertaking is to be determined by factors such as the ability of the firm to operate independently of competitive forces or to affect its competitors or consumers in its favour etc.[118] Thus, an effect-based approach is feasible vis-a-vis social media platforms in the Indian regime.

When applying effect-based tests over a firm's conduct, many European Courts have emphasized that a decrease in consumer choice is, by their very nature, apt for foreclosing competitors.[119] In terms of targeted advertisements and data harvesting, it becomes easier to understand that the foreclosing model depends upon the ability of one firm to make access to the digital advertising market difficult for other firms.[120] The EU courts contrary to what the effect-based approach and the AEC test appears to require, have reiterated that for none of the aforementioned practices is there a necessity to lay concrete effects by using specific quantitative tools.[121] The AEC test does not mandate to show anticompetitive effects. It is enough to show that access to the markets has been made difficult.[122]

To paraphrase the aforementioned, it is sufficient enough to show that a dominant undertaking is engaging in conduct that can restrict access to the market of competitors. Alternatively, making access to the market for the competitors difficult. Such conduct would be then presumed to produce an anticompetitive effect.[123] To summarize, demonstration of mere

[117] Pinar Akman, 'The Reform of the Application of Article 102 TFEU: Mission Accomplished?' (2017) 81 ANTITRUST L.J. 1.

[118] Section 19, The Competition Act, 2002 (Act 12 of 2003).

[119] *Intel v Commission* (Case No.C-413/14) Commission Decision [2017] ECLI:EU:C:2017:632 para 85.

[120] ibid [77] [78] and [176].

[121] ibid [104].

[122] ibid [146-149].

[123] Paul Nihoul, 'The Ruling of the General Court in Intel: Towards the End of an Effect Based Approach in European Competition Law?' (2014) 5 J. E. C. L. & PRACT. 526.

foreclosure is enough to deem the conduct unlawful. An added benefit of incorporating data privacy into competition analysis through the effect-based theory of harm is that the burden of proof rests upon the defendant. The defendant has to demonstrate the efficiency of benefits that can come from an increase in data harvesting that could outweigh the harms to competition as a defence mechanism.[124]

NEW ANTITRUST LAWS FOR DIGITAL ECONOMY

In this Section, the author observes a few statutory changes in different jurisdictions following the incorporation of privacy in the competition law jurisprudence. Following such changes, the author envisages a few amendments in the current statutory structure of the competition Act to tackle new issues of the digital economy vis-vis targeted advertisements.

A. Global practice compared with international jurisdictions

The recent trends in digital markets show that market power springs from data harvesting and monopolization. Therefore, competition analysis founded purely on arithmetic parameters like prices etc. is inadequate to demonstrate potential harm to competition in digital markets. In jurisdictions like Germany, the competition authorities have reinterpreted the conventional competition policy to accommodate it in the digital platform markets.

The newly incorporated §18 no. 3a of the Act against Restraints of Competition Germany[125] aims to proactively target non-price violations. An assessment of an undertaking's position in a market under §18 no.3a requires to weigh in: direct and indirect network effects, multi-homing and switching costs, economies of scale concerning network effect, access to data, and competitive forces of innovation. It is noteworthy that these factors steer away from the limited understanding of market concentration in the digital age. When these factors are measured through an understanding of the aforementioned harms to consumer choice and other theories adopted by the EC and the FTC, the lines of uncertainties start blurring to determine anti-competitive practices.

B. Amendment for tackling new issues of the digital economy and target advertising

[124] ibid [527].

[125] Section 18 no. 3a, Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition Germany) 2002.

In the Indian regime, the present Act, as it stands, needs a revamp over its understanding of privacy to expand the ambit of privacy to include it as a non-price parameter of competition particularly to determine abuse of dominant position in the digital platform market landscape.

i. Privacy-specific amendments required in law

While adopting non-price parameters like privacy, the current Act must draw specific amendments keeping in mind consumer choice approach and foreclosure effect in determining abuse of dominance in social media platforms. *First*, with recent trends of providing products and services for free by the social media platforms, it becomes important that the Competition Regulators take in privacy as a principal factor to determine competition parameters. Particularly to judge if the impugned digital platforms are paying a fair price for the data collected by the users.

Second, in absence of a data protection statute in the Indian jurisdiction, to study privacy with normative guidance, the Regulators must note certain parameters. These could include the type of data collected in terms of sensitivity and volume, the purpose of such data collection, the duration for which it is stored, and the number of parties with which it is shared. Further, the users must be made aware of the information gathered from them and if they deny an increase in the data extraction, would the services provided to them be disabled or suffer from degradation in quality. Another parameter could be whether the platform has privacy features or extracts data by default.

Third, in the Indian competition jurisprudence, there is a need to accommodate consumer welfare vis-a-vis privacy preference and investigate whether platforms engage in such behaviour which coerces users with high privacy preferences to pay more for goods and services. *Fourth*, a choice-based approach to investigate if the conduct of digital platforms has resulted in a reduction in choice to the detriment of consumers should also be a relevant factor to weigh in consumer harm. *Fifth*, the Act must adopt foreclosure effect analysis, wherein the regulators examine if the market access has been made impossible or difficult by the particular conduct of the digital platform.

The Act must actively intervene with the current status quo of data harvesting and the competition regulators could require platforms to give users a reasonable option to choose not to share their personal data albeit allowing access to platform services and products. In this scenario, users would be receiving contextual advertising which would be non-personalized

and based upon the content of the web page.[126] For example, an ad for fitness equipment, while browsing through a health blogpost. Contextual advertisement could be done through contextual targeting i.e., based upon the context and the segmenting ads on different metrics including keywords or website topic etc.[127] Although, some platforms like Facebook, have shown scepticism on this model often claiming that contextual advertising would require data about the content a user is browsing.[128] However, one must understand that contextual advertising is not based on the collection of personal data like age, gender but is based upon the content a user is viewing.[129] The contextual advertising model could reduce the data collection and decrease market concentration in e-commerce.

Treading on the realities of the current advertising business model, the author believes that replacing personalized advertisement with general advertisement as adopted in conventional mass media wouldn't be practical. Nor would it be desirable since it tends to annoy users because of its heavy irrelevance. However, contextual advertising draws a fine line between relevant advertising and privacy provided we keep additional safeguard clauses.

ii. The overlap conundrum - CCI and Data Protection Authority

Taking privacy as a non-price parameter, there is an intersection of the CCI and the prospective Data protection authority. This may lead to regulation on similar aspects of data harvesting of corporate behaviour.[130] When different sectors overlap, there is an interface conundrum. For instance, in *CCI v. Bharati Airtel*[131], Reliance Jio filed an application against Bharti Airtel, Idea Cellular Limited, Vodafone India Limited etc for the alleged cartelization under Section 3 and subsequent abuse of dominant position under Section 4. Reliance Jio also went forward with an application to Telecom Regulatory Authority of India ["**TRAI**"] to look into the conducts of cellular Operators Association of India and Idea Cellular Limited, Vodafone India etc. Herein, the SC while observing that CCI is a sector agnostic regulator while TRAI is a sector-

[126] Ted Vrountas, 'Contextual Advertising 101: How it Works, Benefits & Why It's Necessary for Relevant Ads' (*Instapage*, 2020) <https://instapage.com/blog/contextual-advertising> accessed 27 June 2021.

[127] ibid.

[128] Competition and Markets Authority, 'Online platforms and digital advertising market study' (2020) <https://assets.publishing.service.gov.uk/media/5fe36a658fa8f56af0ac66f2/Appendix_X_-_assessment_of_pro-competition_interventions_to_enable_consumer_choice_over_personalised_advertising_1.7.20.pdf> accessed 17 August 2021.

[129] ibid [X11-12].

[130] Competition Commission of India, 'Interface between Competition Commission of India and Sectoral Regulators' (2010) <https://www.cci.gov.in/sites/default/files/speeches/interface.pdf?download=1> accessed 17 August 2021.

[131] *Competition Commission of India v Bharti Airtel*, AIR 2019 SC 113.

specific regulator held that TRAI had priority to look into the jurisdictional issue first. While TRAI looks for any segments of anti-competitive practice the power of CCI though not completely washed away is pushed away for a while.

While the role of sector-specific regulators and competition watchdogs can be complimentary, at times, it leads to a rise in tension. For example, sector-specific regulators identify a problem ex-ante and pursuantly build an administrative structure to address the issues before the onset of the problem,[132] while the competition policy generally addresses a problem ex-post in a market setting.[133] In times of uncertainty, incoherent legislation can increase the conflicts which would eventually hurt consumers. The author identifies that the damage caused by the jurisdictional conflict between the prospective data protection authority and CCI can lead to taxing maintainability issues in the Courts and other concerns in a data-driven economy.

The tension between sector regulators and CCI is aggravated due to the legislative inconsistencies in the provisions in dictating a precise procedure to be followed in case of such regulatory overlap. The crux of this interface is embodied in sections 18[134], 21[135], 60[136] and 62[137] of the Act. Section 18 mandatorily directs the CCI to eliminate practices that have adverse effects on the competition, promote consumer interests, and ensure freedom of trade for other players in the market. The wordings of section 18 is extraordinarily wide while being oblivious to the sector-specific regulators.[138] This empowers CCI to take action on sector overlapping issues. Further, while section 60 asserts the supremacy of the Act within the arena of competition enforcement, section 62 encourages the Act to work harmoniously with other statutes. Ironically, the statutory paradox begins when we analyze the language of both sections 60 and 62 which are drafted in a mandatory language. While section 60 necessitates the provisions of the Act to have an overriding effect, whereas section 62 requires that the provisions of the Act must align with any other provisions of law for the time being in force. Here both the sections run in opposite tangents while declaring two polar duties, i.e., legislative supremacy of the Act and harmonious adjustment with other sector-specific statutes.

[132] ibid [1].
[133] ibid.
[134] Section 18, The Competition Act 2002 (Act 12 of 2003).
[135] Section 21, The Competition Act 2002 (Act 12 of 2003).
[136] Section 60, The Competition Act 2002 (Act 12 of 2003).
[137] Section 62, The Competition Act 2002 (Act 12 of 2003).
[138] CCI (n 130) 2.

To further alleviate the overlap paradox, section 21 of the Act recommends that in any proceedings for a statutory authority in case of a need the concerned statutory authority may refer to the CCI. Interestingly, upon reference, the opinion of the CCI is only persuasive in nature.[139] This provision thus creates a fertile ground for jurisdictional overlaps between the sectoral regulators like the prospective data protection authority and CCI. However, there is a stark difference in their functioning since the sectoral regulators may not always have a holistic understanding of the economy as a whole and generally apply distinct yardsticks to other regulators.[140] On the other hand, CCI is the champion of the economy and addresses behavioural issues in the market.[141] Thus, the CCI plays a superior role in maintaining the balance in the economy while the prospective data authorities would be limited to ensuring the data protection of the users. Presently, the provisions under the Act are not adequate to solve this overlap conundrum thereby requiring specific amendments to acknowledge data protection authority and its jurisdiction in the digital market. Necessary amendments are required to identify concerning issues,[142] channel concerns to the proper authority,[143] and establish a framework to limit the CCI's work to market regulation.[144]

CONCLUSION

The recent growth of Silicon Valley giants has expanded the role of data in the e-commerce and digital economy. While a data-driven economy paves the way to new opportunities and wealth creation in the digital sphere. It also gives rise to potential concerns of antitrust issues especially market concentration through data monopolization by few data-opolies. Particularly social media platforms that are more or less founded on an advertising model infrastructure. Another concern addressed by the author is the abuse of dominance by social media platforms and a consequent compromise over user privacy through data harvesting. For transforming the opportunities and challenges offered in the digital platform market adequate policy responses and a thorough amendment are needed. The paper analyzed that the CCI can adopt various approaches including the effects-based, consumer-choice, foreclosure etc. to better equip themselves with the digital age anti-competitive practices brought in through data harvesting.

[139] Section 21(1), The Competition Act, 2002 (Act 12 of 2013).
[140] CCI (n 130) 10.
[141] ibid [10].
[142] ibid [4].
[143] ibid.
[144] ibid.

Lastly, the paper attempted to highlight the issues involved in a possible jurisdictional overlap between the two regulators over a similar subject matter.