INDIAN COMPETITION LAW REVIEW
Volume 1, March 2014, pp 82-91

COMPETITION LAW'S PROTECTION TO NET NEUTRALITY

-AKANKSHA MOHAN

ABSTRACT

In the modern age, it is difficult to imagine a life without internet. Almost everything today can be done with help of internet. The existence of the internet today is hugely due to the concept of net neutrality. Net neutrality is extremely important as it provides an equal and fair ground for companies irrespective of its size.

However lately, a small but vocal minority have been raising their voice as the principles of net neutrality in India are being violated. The United States faced a similar dilemma until recently, the Federal Communications Commission published the final rule on its new "Net Neutrality" regulations. Many telecom operators have launches schemes that hinder net-neutrality.

Net neutrality plays a key role in providing fair and competitive market on the internet. Fair and Competitive market protects the smaller firms. They also encourage new entrants to join the market. This also helps the consumer as it provides for a quality check and constant innovation. In order maintain a fair competition in the market, The Competition Act, 2002 is operational in India.

This paper analyses the importance of net neutrality, the schemes that are said to be against net neutrality and whether these schemes are anti-competitive and prohibited under The Competition Act, 2002.

The importance of internet cannot be undermined. The internet is the window to the world. In today's times, the internet is important for the facilitation of various factors of a person's life. Almost everything today can be done with help of internet. One can pay bills, buy grocery, manage bank accounts, transfer money, research, go to college online, attend conferences, connect with family and friends, network with likeminded people, watch entertainment programs, conduct meetings and even find a marriage partner online. It also acted like *messiah* to many entrepreneurs. The inspirational stories of Google, facebook, flipkart and many other sites are widely known.

Working of Internet

The Internet is a global, interconnected and decentralized autonomous computer network. We can access the internet via connections provided by Internet access providers. These access providers transmit the information that we send over the Internet in so called data ―packets. The way in which data is sent and received on the Internet can be compared to sending the pages of a book by post in lots of different envelopes. The post office can send the pages by different routes and, when they are received, the envelopes can be removed and the pages put back together in the right order. When we connect to the Internet, each one of us becomes an endpoint in this global network, with the freedom to connect to any other endpoint, whether this is another person's computer ("peer- to-peer"), a website, an email system, a video stream or whatever. The success of the Internet is based on two simple but crucial components of its architecture: Every connected device can connect to every other connected device and ll services use the ―Internet Protocol, which is sufficiently flexible and simple to carry all types of content (video, e-mail, messaging etc). [169]

Net Neutrality and its Importance

Net Neutrality is most commonly defined as the principle that Internet users can connect to any other point in the network. Users can create, access and use any content, service and application they choose, without discrimination, restriction or limitation imposed by those who run the infrastructure.[170]

This simply means that all sites on the internet will be offered to at the same cost and at the same speed by the internet providers. However in the absence of net neutrality, if your internet provider has a tie-up with X website, that website will load faster than a competition website. This might eventually reach to certain sites to abusing their dominant position.

Let us consider an analogy. Supposing you are in market that consist of several shops. Two shops are comparatively much bigger in size than others and hold a dominant position. In order to further increase the revenue of the two shops with the private agencies to prevent anyone to enter from certain road, thereby reducing other shops connectivity. Due to this any

[169] Soni Mohak et al., A CASE STUDY ON NET NEUTRALITY IJESMR, 75, 75 Oct 2015

[170] *Id*

customer who wants to visit the shop will have to walk an extra kilometer or shell out more money to enter the shop.

A similar situation is likely to occur in the absence of net neutrality principles.

To further comprehend the position of Net Neutrality and the methods used to cripple it, let us use more realistic example. If a major ISPs (Internet service providers), *Innet* has a deal with a major webmail provider *Pmail*, at a higher speed or free or lower of cost. This is will lead to almost majority of the users using *Pmail.* Additionally, multiple ISPs have similar deal with certain webmail providers, a situation will be created whereby it will be very difficult for small and medium sized email providers to survive. Any webmail providers which is unable to strike such a deal not able to compete even if they provide the same services. This will lead an automatic depletion of competition.

The consumer will be finally affected as a fair and competitive market ensures options which pilots improvement and constant control though the same will be very difficult without net neutrality. However, if principles against of net neutrality are barred, a deal between Innet and Pmail will be also be barred.

Last year, President Barack Obama came out and spoke in favor of net neutrality. He stated that there should be no blocking, no throttling, increased transparency and no paid prioritization. He also stated, “We cannot allow Internet service providers (ISPs) to restrict the best access or to pick winners and losers in the online marketplace for services and ideas.”[171] In April, 2015, the Federal Communications Commission published "Net Neutrality" regulations, thereby protecting net neutrality in the United States of America.

The following expert from a newspaper article explains the importance of net neutrality brilliantly:

“*Violating the core principle governing the Internet will be a disastrous way of delivering justice. For, the licence to violate net neutrality will mean telcos could now be in a position to ensure some sites are served faster than others. It could also mean it becomes costlier to*

[171] Dominic Rushe Obama calls on FCC to make 'strongest possible rules' to protect net neutrality The Guardian, http://www.theguardian.com/technology/2014/nov/10/obama-strongest-rules-protect-net-neutrality last updated on 10 November 2014

use certain applications. Most importantly, it could endanger the very feature of the Internet that has over the years made it possible for countless start-ups, right from the Googles to the Flipkarts, to dream and act big. It's well acknowledged that the Internet has disrupted the world of business like no other technology has in recent decades. It has helped start-ups with hardly any capital and clout to still make a mark. So by rejecting net neutrality, which will enable telcos to play the gatekeeper to a valuable resource, we will be shutting the door on the entrepreneurial aspirations of millions. That's because the only way for them to compete with the big moneyed Internet players would be to match their spends to make the Internet work for them. The absence of net neutrality will definitely benefit the telcos while at the same time harming the market by unleashing monopolistic tendencies. Telcos don't want to be dumb pipes that agnostically transfer data. The cost of their ambition will be the loss of the Internet's openness"[172]

Projects in India with possible hindrance to Net Neutrality

Multiple projects have been brought about in India that are in opposition to the principle of net neutrality. These include the following:

- **Airtel Zero:** Introduced in April, the Airtel Zero plan promises preferential treatment for websites that agree to sign up for the marketing platform by paying a fee.[173] So, in case you have Airtel Zero, certain websites and apps will load faster and maybe even for free.
- **The Reliance-Facebook deal for Internet.org**: Internet.org is a Facebook-led initiative bringing together technology leaders, non-profits and local communities to connect the two thirds of the world that doesn't have Internet access. [174]. This does look like an amazing initiative. Facebook in February announced that it was tying up with Reliance.org to provide free access on 2G and 3G networks in select parts of India. The definition of 'free Internet' was restricted to Facebook, and a list of sites

[172] EDITORIAL "The importance of net neutrality" The Hindu, Updated on 4 April 2015 http://www.thehindu.com/opinion/editorial/the-importance-of-net-neutrality/article7065661.ece

[173] Pankaj Doval 'Airtel Zero, Internet.org against net neutrality' Times of India May 23, 2015

[174] About Internet (19 October 2015) https://internet.org/about

that the company had teamed up with, which included the likes of ClearTrip, Wikipedia, Bing Search, etc.[175]

- **The free WhatsApp packs**: In 2012, Reliance had announced that it would offer free Facebook and WhatsApp to its GSM users for Rs 16 per month, without any extra data costs. The question remains why should users pay extra to keep Facebook or WhatsApp free or rather why should other apps be chargeable for users.
- **Aircel and Wikipedia**: In 2013, Aircel announced that it will offer free access to Wikipedia on mobile phones.
- **Reliance and Twitter pack**: In 2013, Reliance announced that it will offer Twitter access pack, which gave Reliance users unlimited Twitter access for free once they subscribed to the pack.[176]

All the above stated plans give preferential treatment to certain web portals which is violative of the principles of net neutrality. Had net neutrality been violated a couple of years back, it is very likely that Google, Flipkart, Facebook would not exist in their glory today.

Many critics believe that even if these might give short term benefits to certain segments of the society, disturbing the equality that internet provide can be disastrous in nature. If it is allowed violate net neutrality numerous Internet service providers will be in a position to ensure certain sites are served faster or cheaper than other sites.

This will endanger the very feature of the Internet that has over the years made it possible for countless start-ups to become multi-billion dollar companies. The internet has been facilitator in helping many innovative aspiration start-ups to became multi-billion dollar industries. Many major internet based companies began the functioning in a small room with basic computer software and almost insignificant capital and contacts. Flipkart, Google, and facebook are examples of such companies. The absence of net neutrality will lead to the market being abused by companies in a dominant position and prevent a fair and healthy competition.

[175]Shruti Dhapola Not just Airtel Zero: Facebook to WhatsApp, everyone has violated Net Neutrality in India, The Indian Express (Last updated on 18 April 2015) http://indianexpress.com/article/technology/social/net-neutrality-debate-its-not-just-limited-to-airtel-zero/#sthash.96zJvdG4.dpuf

[176] *id*

Post Prime Minister Narendar Modi and Mark Zuckerberg's meeting, many believed that Digital India is against the principles of net neutrality as it is in collaboration with Internet.org. However, no such collaboration has been officially notified by any of the parties. In fact, Facebook has refuted associations of internet.org with Digital India. Digital India though no where concerns with net neutrality but till *prima facie* is not against net neutrality. However, there is still lack of clarity regarding the same.

Laws protecting healthy competition such abuse of dominant position

Competition law in India is primarily protected by The Competition Act, 2002.

The Act is believed to have multiple aims. These aims include ensuring an effective competitive process, promoting consumer welfare and ensuring a level playing field for small and mid-sized enterprises, and promoting fairness and equality.

The object of Competition Act can be best summarized as:

"*An act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India…*[177]"

The Competition Act, 2002 mainly prohibits any activity that is anti-competitive. Any activity that is "appreciable adverse effect on competition within India"[178] is considered to be anti competitive.

At the core, the Competition Acts protects activities classified under three heads. These are Anti-competitive arrangements, Abuse of dominant position; and Mergers and acquisitions that have an appreciable adverse effect on competition in India.

Are Agreements against net neutrality anti-competitive in nature?

[177] Preamble, The Competition, 2002

[178] Section 3 of The Competition, 2002

The Act prohibits any conduct which amounts to the abuse of a dominant position which may have, as its object or effect, an appreciable adverse effect on competition in any market in India.

The Act defines "dominant position" as a "position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to:

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour." [179]

Exactly what will constitute as a conduct amounting to an "abuse" of dominant position has not been defined. However, the Act does prescribe certain forms of conduct as being likely to fall within this general prohibition.

These are:

(i) engaging in predatory pricing or any other form of predatory behavior;
(ii) limiting production, markets or technical development to the prejudice of consumers;
(iii) indulging in practices resulting in denial of market access;
(iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; and/or
(v) leveraging the dominant position in another market to enter into, or protect the relevant market[180]

In *Automobiles Dealers Association* v. *Global Automobiles Limited & Anr.*[181], the Competition Commission of India held that it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3) of the Act

In another landmark case[182], the Director General observed that the certain practices clearly limits the market or the supply of products and thus the conduct of All India Organization of

[179] The Competition Act, 2002

[180] *id*

[181] CCI Case No 33 of 2011

[182] [2013] CCI 15

Chemists and Druggists and its affiliates were to be presumed in contravention of the Act as the prices of drugs are directly or indirectly getting fixed and are not getting determined by the inter play of market forces.

Internet business, unlike other business ventures can be accessed from anywhere in the world. Hence, if certain sites are given preference over other sites, the other sites have a lot at stake.

In light of the above two cases stated, a single plan currently might not be highly anti-competitive in nature, however, in totality they can called anti-competitive. A simple examination of the plans together that are violative is of net neutrality, it is clear that it amounts to abuse of dominant position.

Since these plans in entirety and not individually are anti-competitive, they become collectively dominant.

In following has been stated court in a leading case explaining collective dominance and its position in India,

"*It further observed that Indian law does not recognize collective abuse of dominance as there is no concept of 'collective dominance' which has evolved in jurisdictions such as Europe. The word 'group' referred to in Section 4 of the Act does not refer to group of different and completely independent corporate entities or enterprises. It refers to different enterprises belonging to the same group in terms of control of management or equity……. But the concept of dominance does centre on the fact of considerable market power that can be exercised only by a singly enterprise or a small set of market players……. It is noteworthy that the Competition Act uses the article "an" and not "any" before the word "enterprise" in subsection (2) of Section 4. For a plural interpretation of "an" the combined entity should be an identifiable artificial juridical person such as association of persons (AOP) or body of individuals (BOI) mentioned in subsection (1) of section 2 of the Act. That is why the Act includes the term "group" separately because a "group" of firms with joint management control can have collective decision making and can exercise joint dominance. In this case, the respondents cannot be said to be AOP or BOI. Therefore, they cannot be said to be "an enterprise" for the purpose of Section 4. 19.1""*[183]

[183] Consumer Online Foundation Informant v. Tata Sky Limited Case 2/2009

The above judgment states that the Competition Act does not protect the industry from collective dominance.

The same view has been taken in multiple cases by The Competition Commission. In Royal Energy Ltd v IOCL and others,[184] N. Sanjeev Rao v. Andhra Pradesh Hire Purchase Association,[185] ; Consumer Online Foundation v Tata Sky Ltd & Ors,[186] it has specifically denied the applicability of joint dominance in Indian Competition Law.

With limited individual plans hindering net neutrality, and no single plan poses a great threat to the same these plans cannot be said to be anti-competitive.

However, the Competition (Amendment) Bill, 2012 seeks to change the current situation. Amongst numerous modifications to the Act, the Bill seeks to inserts the phrase 'jointly or singly' to Section 4 of the Act.

After the insertion the bill reads "No enterprise or group jointly or singly shall abuse its dominant position"[187]

The insertion of the word brings the concept of collective dominance on the foreground and gives the court to power to take any case that fall in its purview. Many believe that such amendment will further strength the competition laws.

However, since under the current legal the agreements done by a single enterprise are individually competitive in nature since they do not impact the market significantly, these agreements are valid.

CONCLUSION

Net Neutrality as a principle has been hugely beneficial to the society. It has been able to maintain a playing level field for all companies. It has led to growth of multiple sites and given the consumer a variety of options. It has been a palace of innovation and creativity. Till today, marginal capital and no contacts are required for an internet company to start, function

[184] MRTP Case No. 1/28

[185] CCI Case No. 49/2012

[186] CCI Case No. 2/2009

[187] The Competition (Amendment) Bill, 2012

and even thrive. However, with advent of certain policies taken up by various telecom agencies in interest of cooperate greed will weaken and destroy the level playing field that the net provides.

Competition Commission of India's member M. S. Sahoo addressing a session organized by the Indian Institute of Company Secretaries and Assocham stated the following "We are not concerned about Net Neutrality at this point of time, as the sector regulator is yet to firm up its mind...But we are keeping a watch on it and will act if it is found to be anti-competitive,[188]"

Individually, the effect that these plans initiated by Telecoms have on market is not of that great a significance. However, with the amendment on its ways the Telecom companies might fall under the purview of the act and their plans in totality and the schemes can be labeled as collective dominance.

It is also very possible that change in the interpretation of Section 4 of the Competition Act in the interest of fulfilling the aim of the Act. While till now, the courts have refused to accept the concept of collective dominance is present in Section 4, the amendment has been welcomed.

Also, the plans deterring net neutrality have seen a steady growth. Though the current plans bought up by various Telecom agencies do not individually violate the Competition Act, any extension of any of these plans may pose a serious danger to numerous small scale websites. As stated by the member, that these plans are still in the initial stages and still unfolding.

One of the aims of The Competition Act is to ensure a level playing field for small and mid-sized enterprises and hence, it is the responsibility of the Competition Commission to protect net neutrality and as assured by the member it is keeping a keen watch over them.

****

[188] Indrani Dutta 'CCI not looking at Net Neutrality issue now' The Hindu (last Updated on 20 July 2015) http://www.thehindu.com/business/cci-not-looking-at-net-neutrality-issue-now/article7444280.ece