

“Application of Competition Law in the E-commerce Market”

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How to deal with the Antitrust issues growing in the E-commerce Sector?

In this paper, we will be doing an in-depth analysis of the various cases regarding e-commerce platforms dealt by the Competition commission and how have they dealt with issues such as relevant market, abuse of dominance etc. We will look at the progression of how the stance of the Commission has changed over the years and what are the factors they have still not considered while dealing with such platforms. Lastly, we will be comparing it with various foreign jurisprudences and how they have approached this issue.

Introduction	An Overview of the Entire Paper
Relevant Market	CCI s analysis and Indian Jurisprudence on the same
Vertical and Horizontal Agreements	CCI s analysis and critique
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E-commerce can be defined as an activity of buying or selling of products or provision of online services over the Internet. The E-commerce market in India is growing at a rapid rate. The revenue increased from 39 billion dollars in 2017 to 120 billion dollars in 2020 approximately. The growing annual rate of 51% is by far the highest in the world.¹ This growth to the e-commerce market has been a result of the discounts offered by the e-commerce platforms, faster deliveries including one-day delivery and cash on delivery options. The growing market has led to creation of many E-commerce platforms coming onto the Indian Market. The use of such platforms has become part of our daily life. An example of this can be seen in the food sector where about 70% restaurants have created an online presence between 2016 and 2018. Many restaurants have become heavily dependent of the e-commerce market for their profit or in a few cases, even for surviving in the market. This growing revenue stream in recent times has led to certain situations where issues of antitrust and dominance have arisen with regards to the various E-commerce platforms operating in the country. The growing dependence on such E-commerce platforms have led to creation of many companies which are dominant in the market and abusing this dominance. It is important to understand the factors that the Competition Commission needs to keep in mind when trying to determine such abuse in the E-commerce market. Through an analysis of case law, we have seen how important it is defining the relevant market in the correctly in order to

¹ 'E-Commerce In India: Industry Overview, Market Size & Growth| IBEF' (Ibef.org, 2020) <<https://www.ibef.org/industry/ecommerce.aspx>> accessed 18 May 2020.

conclude whether a company is liable for a violation under the Competition Act. Factors such as network effects, platform markets etc., need to be considered while determining relevant market.² It is essential that such factors are considered while determining the relevant market as definition of relevant market is the guiding factor in all competition law cases in holding any company liable for infringement of the act. The Competition Commission of India recently conducted a market study on E-commerce wherein it was determined that the scope of e-commerce will include:

Goods/Products - Mobile, Electronic/electrical appliances, Lifestyle, Grocery Services - Hotels, Food³

The E-commerce platform is unique compared to the other marketplaces. The E-commerce platform provides an avenue wherein other sellers can connect with other buyers. A parallel of E-commerce platforms such as Flipkart and Amazon can be drawn with a shopping mall, i.e. a place where buyers and sellers come in contact with one another. This kind of a definition has led to many issues while dealing with Competition issues under Section 3 of the Competition Act, 2002. Section 3 deals with issues of horizontal and vertical agreements which are having anti-competitive effects on the market. For an enterprise to be held liable under this section, it should be a part of the vertical chain in the market. In many cases, E-commerce platforms have been described as a meeting place between buyers and sellers and are not part of the vertical chain and hence do not come within the purview of Section 3 of the Competition Act, 2002. However, recently there has been development in jurisprudence where the E-commerce platforms have been considered a part of the vertical chain and has been brought under the purview of Section 3. Secondly, while dealing with Section 4 of the Competition Act, it is well established by the Competition Commission of India that market share is not enough to establish dominance and it is important to look at plus factors. Section 19 (4) of the act mentions certain pre-requisites to look at while determining whether an enterprise enjoys a dominant position in the market or not. While determining such dominance for e-commerce markets, it is important to look at factors such as Big Data and network effects in order to conclude any kind of dominance by the player in the marketplace when dealing with the e-commerce market. It is important that these factors are taken into consideration by the Competition Commission when dealing with cases of antitrust involving e-commerce enterprises.

² Ritam Arora, 'E-Commerce, (Big) Data And Competition Law- Need For New Framework For The Application Of Competition Law To Online Platforms' (Economics.hse.ru, 2018) <<https://economics.hse.ru/data/2018/05/27/1149475986/Ritam%20Arora.pdf>> accessed 18 May 2020.

³ 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 18 May 2020.

Relevant Market

Relevant market is an essential aspect in order to determine the market power of any player for competition law matters. While determining the relevant market, one needs to look at two aspects of the same, i.e. ‘relevant geographic market’ and ‘relevant product market’. Section 2(s) of the competition act, 2002 elaborates on the ‘relevant geographic market’ which includes the area where the players are involved in the supply of products or services in which the conditions of competition are ‘distinctly homogeneous’ in nature in comparison with the neighboring areas.⁴ Section 2(t) on the other hand elaborates on the ‘relevant product market’ which comprises of all those products or services which are regarded as “interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use.”⁵ The determination of relevant market is a case to case basis analysis that needs to be undertaken by the CCI. Section 19(7) of the competition act, 2002 lays down certain factors such as physical characteristics, end use, price, and consumer preferences in order to determine the relevant product market.⁶ These considerations are not exhaustive in nature but act as pre-requisites that the CCI must go through while determining the relevant market.

The case of *Ashish Ahuja v. Snapdeal and other*⁷ was one of the first cases regarding E-commerce platform that was dealt by the Competition Commission of Indian. The Commission while determining the relevant market for USBs held that the online and offline markets for USBs are substitutable in nature. According to the commission offline and online markets were said to be just two different distribution channels of the same relevant market. It was by the commission that “If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa.”⁸ However, this stance taken by the commission with regards to the defining the relevant market changed in the case of *All India Online Vendors Association v Flipkart Inc.*⁹ The commission elaborated upon how Flipkart acts as a platform which acts as a building bridge between buyers and third-party sellers. The judgment also explained how an e-commerce platform like Flipkart provides certain different features from an offline market which helps in saving costs for sellers such as setting up of a store, maintenance etc. Therefore, the Commission defined the relevant market as the ‘online platform market.’

The commission in both the above judgments failed to recognize the two-sided nature of the market wherein it is important to take into consideration both the seller’s and consumer’s perspective whilst defining the relevant market. However, in the case of *RKG Hospitalities*

⁴ The Competition Act, 2002, Section 2(s)

⁵ The Competition Act, 2002, Section 2(t)

⁶ The Competition Act, 2002, Section 19(7)

⁷ *Ashish Ahuja v. Snapdeal and others*, Case No. 17 of 2014

⁸ Ibid.

⁹ *All India Online Vendors Association v Flipkart Inc*, Case No. 20 of 2018

*Pvt. Ltd. v. Oravel Stays Pvt. Ltd.*¹⁰, the two-sided nature of the OYO platform which “connects budget hotels with the potential consumers” was considered while determining the relevant market. It was stated by the commission that “since the present case pertains to a grievance raised by a partner hotel, the relevant product market determination needs to take into account all alternatives available with such budget hotels and the competitive constraints faced by the focal product i.e. the service provided by OYO in the present case.” The commission while determining the relevant market also looked at the business model on which OYO operated on i.e. the franchise model. Therefore, the relevant market in this case was defined as ‘Market for franchising services for budget hotels.’¹¹ We can see how while defining the market the commission took the business model into consideration while looking at it from the sellers perspective and how the platform is providing budget while looking at it from the consumer’s perspective. A similar approach for defining the relevant market was also taken in the case of *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others.*¹² The commission elaborated on defining the relevant market in cases when dealing with dynamic markets such as e-commerce platforms and how it needs to be different than traditional ones. It was stated by the commission how “delineation of relevant market is based on market realities as they exist at the time of assessment. In rapidly changing markets in particular, market assessment cannot have a static approach.”¹³ The commission went on to elaborate on how the pace of evolution in digital markets is much faster and therefore the assessment needs to be as current and relevant as possible. It is essential that while dealing with any regarding antitrust law, that the relevant market is defined correctly in order to come to the right conclusion. The dynamic nature of the e-commerce platform makes it essential that while dealing cases of e-commerce platform, one needs to keep in mind all these factors while defining the relevant market and make sure that the all such factors are taken into consideration so that the relevant market is defined in the correct manner.

Anti-competitive Agreements

Section 3 of the competition act, 2002 covers the ambit of all agreements which might prove to be anticompetitive in nature. All agreements¹⁴ that are covered under the definition of Section 2(b) of the act will come under the scrutiny of section 3. Section 3(1) of the competition act, 2002 states that any agreement having an appreciable adverse effect on competition (AAEC) within India shall be held to be void.¹⁵ There are various types of agreements covered under the ambit of Section 3 such as Horizontal agreements and Vertical agreements. Horizontal Agreements can be defined as arrangements between enterprises which are at the same stage of production. Section 3(3) of the competition act states any

¹⁰*RKG Hospitalities Pvt. Ltd. v. Oravel Stays Pvt. Ltd.*, Case No. 03 of 2019

¹¹ Ibid.

¹²*Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others.*, Case No. 14 of 2019

¹³ Ibid.

¹⁴ The Competition Act, 2002, Section 2(b)

¹⁵ The Competition Act, 2002, Section 3(1)

arrangement between two parties involved in identical or similar trade, production of services would be presumed to be anticompetitive in nature unless proved otherwise.¹⁶ This is the per se rule that is applied where any horizontal arrangement that falls within the ambit of Section 3(3) would be presumed as an anticompetitive agreement.¹⁷ The other type of agreements are vertical agreements which can be defined as arrangements between two or more enterprises which are operating at different levels of production, e.g. suppliers and dealers. Section 3(4) of the competition act states that can prove to have an AAEC shall held to be in contravention of Section 3(1) of the competition act.¹⁸ The difference while dealing with vertical arrangements from horizontal arrangements is how the rule of reason is applied rather than the per se rule wherein an AAEC needs to be proved rather than a presumption of the same.¹⁹ Hence when the commission deals with a case when Section 3(3) has been alleged, there is a prima facie view that there is an AAEC and contravention of Section 3 whereas when Section 3(4) is alleged then the duty to prove said AAEC due to the vertical agreement is on the party that alleged such contravention.²⁰ Section 19 (3) of the Competition, 2002 lays down certain criteria to be looked at while determining whether an agreement is has an AAEC or not.²¹ These factors include creation of entry barriers, foreclosure of market etc. However, this is not an exhaustive list while examining agreements under Section 3(3) and Section 3(4).

In the case of *All India Online Vendors Association v Flipkart Inc*²², a contention was raised by Flipkart upon how platform acts as a mechanism to connect the buyers to third-party sellers. An analogy can be drawn with a shopping mall wherein it is a platform where buyers and sellers interact with one another and how they do not perform any service which would add value to the product. Therefore, it was held by the commission that since the e-commerce sites act only as a platform and do not perform any material function which would result in them falling under the vertical supply chain, Flipkart does not come within the ambit of Section 3(4) of the Competition Act, 2002. However, in the case of *Jasper Infotech Private Limited v. KAFF Appliances (India) Pvt. Ltd*²³, this stance changed. It was alleged by of the informant that Snapdeal was taking in part in vertical arrangements which were proving to be anticompetitive in nature.

The Commission while addressing the question whether an online platform can be part of the vertical supply chain held that the unique nature of online platforms and the value added

¹⁶ The Competition Act, 2002, Section 3(3)

¹⁷ 'REVISITING PER SE VS. RULE OF REASON IN LIGHT OF THE INTEL CONDITIONAL REBATE CASE' (Cis-india.org, 2020) <<https://cis-india.org/internet-governance/files/revisiting-per-se-vs-rule-of-reason-in-light-of-intel.pdf>> accessed 18 May 2020.

¹⁸ The Competition Act, 2002, Section 3(4)

¹⁹ 'REVISITING PER SE VS. RULE OF REASON IN LIGHT OF THE INTEL CONDITIONAL REBATE CASE' (Cis-india.org, 2020) <<https://cis-india.org/internet-governance/files/revisiting-per-se-vs-rule-of-reason-in-light-of-intel.pdf>> accessed 18 May 2020.

²⁰ *Mohit Manglani v. Flipkart India Private Limited and others*, Case No. 80 of 2014

²¹ Competition Act, 2002, Section 19(3)

²² *All India Online Vendors Association v Flipkart Inc*, Case No. 20 of 2018

²³ *Jasper Infotech Private Limited v. KAFF Appliances (India) Pvt. Ltd.*, Case No. 61 of 2014

services provided by them to their users made it a part of the vertical chain. The Commission observed that these online platforms are providing various value-added services such as “logistics, warehousing, marketing and sales including provision of assistance to consumers in sorting and buying products, return/replacement services, tracking services for orders placed etc.”²⁴ The Commission elaborated upon how these unique features provided by these platforms help businesses meet their needs and also help with reduction of administrative costs. Another feature of such online platforms highlighted by the commission is how these platforms connect many users in a market. It was stated by the commission that Online platforms “actively collect information on suppliers’ products and consumers’ preferences and use matching algorithms to match these in an efficient way in order to reduce search costs.”²⁵ Keeping the above stated factors in mind, the Commission drew a distinction of an online platform like Snapdeal from a normal market place, wherein the due to the features that an online platform can provide their users, they had to be considered a part of the vertical supply chain under Section 3(4) of the Competition Act, 2002.

In the case of *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*²⁶, the informant alleged that MMT and OYO were in contravention of Section 3(4) of the Competition Act, 2002. It was observed by the commission that a random search for hotels in different that OYO’s competitors like Fab Hotel and Treebo (Established in the case of *RKG Hospitalities Pvt. Ltd. v. Oravel Stays Pvt. Ltd*²⁷) were not present on the platform, which was not the case earlier. It was stated by the Commission that “OYO which is a budget hotel chain is in a vertical relationship with MMT, which is essentially a distribution platform for hotels.”²⁸ It was also observed that both these parties have significant market power in their respective markets and a commercial agreement between the two enterprises could have adverse effects in the competition of the market and needs to be further investigated. Therefore, it was held by the commission that there is a prima facie view that the two parties are in contravention of Section 3(4) of the Competition Act, 2002 and further investigation into the matter was ordered by the Commission. Finally, the case of *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Others*²⁹ is the most recent case that dealt with the issue of Section 3(4) in the E-commerce Sector. It was alleged by the informants that both Flipkart and Amazon had entered into vertical agreements with their preferred sellers that had led to foreclosure of market for the other sellers which was said to be a violation under Section 3(4) of the Competition Act, 2002. The Commission looked at various factors while considering the allegation such as deep discounts offered the two companies, exclusive tie ups that company has while considering violation under Section

²⁴Ibid.

²⁵Ibid.

²⁶*Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*, Case No. 14 of 2019

²⁷*RKG Hospitalities Pvt. Ltd. v. Oravel Stays Pvt. Ltd.*, Case No. 03 of 2019

²⁸*Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*, Case No. 14 of 2019

²⁹*Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Others*, Case No. 40 of 2019

3(4). It was stated by the Commission that “*the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms,*”³⁰ along with the fact that the preferred sellers have a certain nexus with the two e-commerce entities via a ‘*direct or indirect ownership or some understanding*’, is having an appreciable effect on competition and needs to be investigated further.

Abuse of Dominance

Section 4 of the Competition Act, 2002 states that no enterprise can abuse its dominance in the market directly or indirectly.³¹ An enterprise is stated to be dominant in the market can be defined as “*a position of strength, enjoyed by an enterprise in the relevant market in India which enables it to operate independently of competitive forces in relevant market.*”³² Further, abuse of dominance can be defined as “*practices which are being undertaken by a dominant firm in order to maintain or increase its position in the market.*”³³ Section 19 (4) of the Competition Act, 2002 lays down certain factors such as market share, size of the enterprise etc., which the Commission needs to look at the while determining whether a commission is in a dominant position or not.³⁴ While dealing anticompetitive cases involving e commerce companies, who are operating in a dynamic market with various companies having various new types of business models, it is important to look at some other factors while determining dominance of E-commerce market and abuse of such dominance.

One such factor that needs to be considered by the commission is network effects. Network effects occur “when a consumer’s benefit from a product or service increases with an increase in the number of other users.”³⁵ The effect can be indirect in nature also an example being in a two sided market where users derive a positive effect from the increase of users on the other side i.e. buyers and sellers will always get attracted to an online retail platform that has a large number of users on the both sides. In the case of *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*³⁶, the commission talked about how companies are offering deep discounts in order to establish network effects. Thus, the effect of Network Effects in an E-commerce market can result in the enterprise becoming dominant in nature. In the case of *Fast Track Call Cab Pvt. Ltd. V ANI Technologies Pvt. Ltd.*, the Commission held that the network effects do play a role in two sided markets to determine the ‘competition dynamics and relative position of strength’ of the market players but the network effects need to create entry barriers in order to constitute as a factor for abuse

³⁰*Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Others*, Case No. 40 of 2019

³¹ The Competition Act, 2002, Section 4

³² ‘What Is Abuse Of Dominant Position Under Competition Act?’ (Vakilno1.com, 2017) <<https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html>> accessed 18 May 2020.

³³ Ibid.

³⁴ Competition Act, 2002, Section 19(4)

³⁵ Avirup Bose and Smriti Parsheera, ‘Network Effects in India’S Online Businesses: A Competition Law Analysis’ (Cresse.info, 2016) <http://www.cresse.info/uploadfiles/2017_pa14_pa2.pdf>. accessed 18 May 2020.

³⁶ *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*, Case No. 14 of 2019

of dominance which was not the case with Uber.³⁷ In the case of *All India Online Vendors Association v Flipkart Inc*³⁸, the Commission while determining the relevant market stated that how it would be beneficial for a seller to list his product on a platform which has a high number of buyers using the platform, i.e. a platform having Network effects. A contention regarding an advantage of the incumbent players due to network effects which may lead to entry barriers in the market. However, it was pointed out by Flipkart that many other entities had entered the market in recent times which would suggest that the network effect did not create a barrier to entry. It is when these Network effects create entry barriers into the market, in that case the enterprise will be held dominant in nature.

Another factor considered by the Commission while analyzing dominance is the concept of Big Data. Data is most essential commodity in the world today. E-commerce platforms operating on a large scale have abundance of data which they collect from their consumers through various mechanisms. When such data can be used by the platforms to create entry barriers in the market, this creates a dominant enterprise in the relevant market. Big data refers to the large data being collected by such platforms which will help them devise market tipping mechanisms and result in them abusing their position in the market.³⁹ In the case of *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*⁴⁰, it was stated by the commission how 'big data analytics' have helped online travel platforms devise a customized service helping them stand out in the hospitality industry in India. In the case of *Matrimony.Com Limited v. Google LLC & Others*⁴¹, the Commission dealt with the concept of Big Data extensively. The Commission elaborated on the increasing value of data in the world and a parallel was drawn to the value of oil possessed in the previous century. The Commission stated that how "new business models based on collection and processing of Big Data is currently shaping the world"⁴² and how using Big Data, Google is being able to attract advertisers. It was held that this usage of data gave Google an undue advantage in the market and created entry barriers for other players.

In the case of *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Others*⁴³, considered factors of 'network effects' and 'Data' while analyzing the allegations made by the informant under Section 4 of the Competition Act, 2002. It was alleged by the informants that exclusive tie ups can create network effects which leads to elimination of competition. The commission observed that network effects are a source of market power wherein "large number of users make an ecommerce platform more valuable, which further attracts more

³⁷ *Fast Track Call Cab Private Limited v. ANI Technologies Pvt. Ltd.*, Case Nos. 6 & 74 of 2015

³⁸ *All India Online Vendors Association v Flipkart Inc*, Case No. 20 of 2018

³⁹ Ritam Arora, 'E-Commerce, (Big) Data and Competition Lawneed For New Framework for The Application of Competition Law to Online Platforms' (Economics.hse.ru) <<https://economics.hse.ru/data/2018/05/27/1149475986/Ritam%20Arora.pdf>> accessed 10 November 2019.

⁴⁰ *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. And Others*, Case No. 14 of 2019

⁴¹ *Matrimony.Com Limited v. Google LLC & Others*, Case Nos. 07 and 30 of 2012

⁴² Ibid.

⁴³ *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Others*, Case No. 40 of 2019

*users, platforms benefit from a 'positive feedback loop', which gives rise to market power.'*⁴⁴ It was held that these leads to creation of entry barriers in the market. It was also stated by the Commission that both Amazon and Flipkart have large amount of data due to their market power which helps them 'target advertisers' by using such data and "*also marginalize other competitors which are unable to capture the market due to lack of access to data.*"⁴⁵ The Competition Law Review Committee has stated that Section 19(4)(b) which talks about 'size and resources of the enterprise' is broad enough to include factors such as 'control over data' and 'network effects' to prove dominance under the Competition act, 2002.⁴⁶

Foreign Jurisprudence

Similar issues have also been faced by competition commissions of various jurisdictions across the world including in the European Union and the United States. Amazon, the biggest E-commerce platform in the world has been subject to various allegations of anti-competitive behavior in recent years and various commissions across the world have been investigating the behavior of the company. In September 2018, the European Commission ("EC") sent out formal requests for information to investigate allegations of anticompetitive conduct that might be undertaken by Amazon.⁴⁷ Complaints against Amazon have been received in various jurisdictions across Europe where in June 2018, the German Federal Cartel Office stated to receive numerous complaints regarding the conduct of Amazon.⁴⁸ The company is playing a dual role in the market wherein it acts as a market platform for others and also is an online retailer. Most allegations against Amazon have been against the manner in which Amazon collects and analyzes the retailer's data to recognize the products that are selling well in the market and use the data that it collects to compete against them.

The European Commission has stated that Amazon's conduct raises several concerns and these suspicions could amount to violations under Article 101 and Article 102 Treaty on the Functioning of the European Union. Article 101 covers the ambit of anticompetitive agreements which could lead to sharing of sensitive information. Article 102 on the other hand prohibits abuse of dominance. The European Commission looked at many aspects while dealing with the potential harm that is being caused by Amazon in the market. They considered aspects such as exchange of information, abuse of dominance through predatory pricing, the exploitative use of data, favoring of downstream and leveraging while conducting the investigation against Amazon.⁴⁹ It has been alleged that has been involving itself in predatory pricing and using third-party data for same. It was alleged that "*the data used by*

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Trisha Jalan, 'What The Competition Law Review Committee Said On Algorithms, Control Over Data, And If Data Can Be 'Price' (MediaNama, 2019) <<https://www.medianama.com/2019/10/223-competition-law-review-committee-report/>> accessed 10 November 2019.

⁴⁷ 'Press Corner' (European Commission - European Commission, 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 18 May 2020.

⁴⁸ Nicholas Hirst, MLEX, 27 June 2018, *Amazon's 'hybrid function' catches eye of German antitrust enforcers*

⁴⁹ Lina M. Khan, *Amazon's Antitrust Paradox*, The Yale Law Journal 2017.

*Amazon excludes any risks regarding the launch of a new product and makes it easier to adjust the scope of production to the actual demand. This is not about predatory pricing but more about its ability to benefit from economies of scale and scope because of unfairly obtained information advantage.*⁵⁰ Secondly, they were accused of exclusionary and exploitative use of data. A similar finding was observed in the case of Facebook,⁵¹ but the use of data by Amazon was considered to be more harmful to competition. Amazon uses the data directly against the sellers who used the online retail platform and can be harmful to those users directly as Amazon will use the data to make its own version of the products in demand for a cheaper price on Amazon under ‘Amazon basics’.⁵² Thirdly, Amazon was said to be active both on the upstream intermediation market for merchant platforms and on the downstream online retail market and could use dominance in one to dominate in the other. A similar situation arose in the Google Search Shopping case, wherein the European Commission observed that “*Google abused its dominance in the upstream market by favoring its downstream comparison-shopping service on general search results as compared to competing services.*”⁵³

The European Commission due to these complaints opened a formal investigation against Amazon “*whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.*”⁵⁴ The dual role of Amazon market place was highlighted and the agreements between Amazon and Market place sellers was under contention being alleged of violation under Article 101 of Treaty on the Functioning of the European Union. The inquiry is also looking into potential abuses of a dominant position by Amazon under Article 102 of the Treaty on the Functioning of the European Union. If Amazon is found to impose or conduct certain anti-competitive business practices that adversely affect user or competitors of Amazon, the Commission can found such behavior could be a breach of Article 102 under Treaty on the Functioning of the European Union. The Department of Justice(‘DoJ’) on the other hand announced on 24th July 2019 that it is going to be initiating a similar investigation to the one being conducted by the European Commission wherein they will be investigating into leading online platforms and examine “*whether they are unfairly restricting competition.*” . The DoJ said it was sparked by

⁵⁰ Thomas Höppner and others, 'The EU'S Competition Investigation Into Amazon Marketplace - Kluwer Competition Law Blog' (Kluwer Competition Law Blog, 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/11/30/the-eus-competition-investigation-into-amazon-marketplace/?doing_wp_cron=1589621733.5750489234924316406250> accessed 18 May 2020.

⁵¹ 'Bundeskartellamt - Homepage - Preliminary Assessment In Facebook Proceeding: Facebook's Collection And Use Of Data From Third-Party Sources Is Abusive' (Bundeskartellamt.de, 2017) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.h.tml> accessed 18 May 2020.

⁵² Jennifer Rankin, The Guardian, 23 June 2015, *Third-party sellers and Amazon – a double-edged sword in e-commerce.*

⁵³ Thomas Höppner and others, 'The EU'S Competition Investigation Into Amazon Marketplace - Kluwer Competition Law Blog' (Kluwer Competition Law Blog, 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/11/30/the-eus-competition-investigation-into-amazon-marketplace/?doing_wp_cron=1589621733.5750489234924316406250> accessed 18 May 2020.

⁵⁴ 'Press Corner' (European Commission - European Commission, 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 18 May 2020.

“widespread concerns” about “search, social media, and some retail services online.”⁵⁵ The DoJ has sweeping powers where it has the authority to investigate firms which could be in violation of competition laws. If found guilty, the DoJ has the power to levy fines and break up companies too if proven to be extremely dominant in the market and guilty of abusing that dominance. We can see how even foreign jurisdictions have realized that the increasing market power and importance of such online market platforms cannot and should not be ignored by Competition law regulators around the world. Both the European Commission and DoJ investigations into the market power of the online market platforms show that regulators are now struggling with how to keep a check on the activities of such platforms and ensure that the interests of both buyers and sellers is maintained which is not going to be easy.

Conclusion

In present times, the dependency of the modern consumer on such E-commerce platforms is massive, and it is important that competition is maintained between parties and no one entity can dominate proceedings as this could very well prove to be against the interests of the consumers at large who are very dependent on such platforms. We can see through the case laws stated above in this paper, how the Competition Commission of India has evolved in their analysis in cases involving E-commerce platforms wherein they have considered factors such as network effects and data as a part of their analysis. However, we can clearly see that in a comparison between analysis conducted by foreign regulators and Competition Commission of India, the foreign regulators have a much more rigorous process of analyzation. While analyzing, a depth investigation into the two-sided market model, usage of data and exclusive agreements is being undertaken by the DoJ and the European Commission. The Commission in India has considered these factors, but failed to draw up a link between data and how it used to abuse their hold over that data or highlight the importance of data in the functioning of all such e-commerce platforms. It is important for the Commission to start considering these factors in light of the present times. I would like to end this paper highlighting the Facebook-Jio acquisition that has been brought before the Competition Commission of India for approval. It is vital that the commission takes an in depth view considers how it could be against the interest of consumers and other competitors due to the massive data owned by these two entities which could be used to abuse the E-commerce market in the near future.⁵⁶

⁵⁵ 'EU Commission Scrutinizes On-Line Platforms With Competition Investigation Into Amazon | Lexology' (Lexology.com, 2018) <<https://www.lexology.com/library/detail.aspx?g=869b7acc-3121-442f-9147-061d02e6db4d>> accessed 18 May 2020.

⁵⁶ Surabhi Agarwal, Devina Sengupta and Anandita Mankotia, 'Facebook-Reliance Jio Deal To Go To CCI, Trai May Also Step In' (*The Economic Times*, 2020) <<https://economictimes.indiatimes.com/tech/internet/deal-to-go-to-cci-trai-may-also-step-in/articleshow/75306062.cms>> accessed 18 May 2020.