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Fair Competition
for Greater Good



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Fair Competition
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**Competition Commission of India
New Delhi**

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निर्मला सीतारामन
वित्त एवं कॉर्पोरेट कार्य मंत्री
भारत सरकार



Nirmala Sitharaman
Minister of Finance and Corporate Affairs
Government of India

23rd January 2021

MESSAGE

Happy to note that the Competition Commission of India is bringing out the first volume of 'CCI Journal on Competition Law and Policy'.

Competition law is an important instrument for ensuring fair play in a market-driven economy and for protecting the interests of consumers. It ensures that competition creates an ecosystem of an efficient economy spurring innovation, which ultimately helps in economic development.

As the Commission gears itself for 'Competition 2.0', an era of competition regulation *sans frontiers*, it becomes necessary that the competition law enforcement evolves in such a way that it adopts the latest toolkits for such markets that pose conceptual challenges.

With the publication of this Journal on Competition Law and Policy, I am hopeful that substantial scholarship and ideas will emanate to provide the essential research support. To this end, this platform connecting leading practitioners, academicians, scholars, stakeholders and students to the research area of competition law, economics of competition law and contemporary antitrust issues is a laudable effort. The publication of this journal would go a long way in providing solutions to the challenges posed by fast changing markets.

Would like to take this opportunity to compliment and congratulate the CCI and convey best wishes for its future journey.

[Nirmala Sitharaman]

अनुराग सिंह ठाकुर
ANURAG SINGH THAKUR



वित्त एवं कॉर्पोरेट कार्य राज्य मंत्री
भारत सरकार
MINISTER OF STATE FOR FINANCE
AND CORPORATE AFFAIRS
GOVERNMENT OF INDIA

MESSAGE

It gives me immense pleasure to know that the Competition Commission of India is bringing out the first volume of 'CCI Journal on Competition Law and Policy'.

Competition law is one of the important regulatory pillars governing a market economy. For a law to be effective it is essential that it changes with requirements of the time. The enforcement of the law will have to be in harmony with the evolving business environment and larger economic context. An evidence based enforcement and practice thus requires building of knowledge and creating a research repository to inform the same.

This Journal would serve this purpose by providing a platform to all practitioners and academicians for discussing through well-grounded research contemporary issues and evolving business models and provide pointers for an effective implementation of the law.

I am very hopeful that this Journal in addition to creating a culture of competition in India will act as a bridge between academia and competition law enforcers.

I congratulate the CCI for the inaugural issue of the Journal and wish them success in such endeavours.

(ANURAG SINGH THAKUR)

New Delhi
20.01.2021

Chief Editor's Foreword



The Competition Commission of India (CCI) is a statutory body established under the Competition Act, 2002 with the objective to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interest of consumers and to ensure freedom of trade carried on by other participants in markets, in India. The CCI is also mandated to take suitable measures for promotion of competition advocacy and creating awareness about competition issues. In furtherance of the above, the CCI as a public institution, is encouraging scholarship in the field of competition law and policy so as to develop a better understanding of competition issues relevant in the Indian context, to draw inferences for implementation of competition law and to create a culture of competition in India. In pursuit of the same, the CCI is bringing out a Journal on Competition Law and Policy.

It is a pleasure for me to introduce the inaugural volume of this Journal. This inaugural issue includes five high-quality research papers, two articles, two book reviews on contemporary antitrust issues and also a report on the National Conference on Economics of Competition Law organised by the CCI; from where the idea of starting this Journal was born. I sincerely hope that this first issue creates substantive interest amongst academicians pursuing interdisciplinary research in the area of law, economics and finance. The idea of such a scholarly activity is that given the Indian economic imperatives specific competition issues are identified and addressed through rigorous research and empiricism.

With its broad scope ranging from cartels, vertical restraints, market definition, market power and abuse of dominance, mergers and acquisitions, new age economy, platform markets, intellectual property rights, etc., the Journal intends to provide a platform for deliberation, debate and cross-fertilisation of ideas.

Markets in present day world are going through unprecedented changes and there are challenges for the law. It has to continuously attune itself to the new market realities. We, thus, hope that this Journal will not only contribute to the debate on challenges but will also provide guidance and possible solutions to these pressing issues. We also hope the Journal would serve as a bridge between academia and practitioners.

Using the Journal inauguration as an occasion, I would like to thank all those who created the opportunity for the Journal to be born and who made it happen. The list includes all current Editorial Board members, the CCI team, and many others. My special thanks to the authors for their contribution and to the managing editors for painstakingly getting this first issue together.

Finally, I hope this Journal will grow in academic stature and serve as a unique resource for competition experts in business, law, economics, consulting and academia.



(Ashok Kumar Gupta)
Chairperson, CCI

Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence

Dr. Tilottama Raychaudhuri*

Abstract: An ongoing debate in competition jurisprudence today is with respect to the enforcement of competition law in digital markets. Digital markets are newer markets in context of which traditional tools of competition law have to be understood and applied. Though the challenges of competition enforcement in digital markets are manifold, this paper focusses on the assessment of dominance and abuse in platform markets, particularly in light of the 2019 Supreme Court judgement in the Uber matter. The Supreme Court's opinion that loss-making pricing can be an indicator of dominance is inconsistent with the Competition Commission of India's (CCI) views, which had cautioned against this circular interpretation of dominance and put the issue to rest. The author submits that conflicting interpretations such as these erode the certainty of the law. Competition laws can be flexible but not uncertain or unpredictable. The author identifies areas of concern in digital platforms that are yet unresolved and need to be addressed urgently by guidelines/amendments before the law on this issue becomes incoherent.

Keywords: competition law, digital economy, platform markets, dominance, abuse, predatory pricing

1. Introduction: Digital Economy and Platform Markets

Digital economy is an umbrella term used to describe a host of markets that operate using digital technologies (OECD, 2012). One of the first uses

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of the term ‘digital economy’ was by Don Tapscott in his book titled “The Digital Economy: Promise and Peril in the Age of Networked Intelligence” in 1995, which went on to become the New York Times business bestseller (Tapscott, 1995). In the decades that have passed, digital technologies have transformed the global business landscape. Key features of digital platforms include the provision of a wide range of markets, social networking sites, search engines, and payment systems (Dessemond, 2019). Digital markets differ from traditional/linear business models in various ways. In transaction platforms, firms are able to use price leverage on both sides of the market that they operate on, as compared to players who operate on one-sided markets and are constrained by a unidirectional price structure. In addition to lower costs (both fixed and variable), platforms have the potential of reaching out to a large number of customers in a shorter frame of time (Russo and Stasi, 2016).

Platform markets are also referred to as multi-sided markets. Simply speaking, multi-sided markets are those where firms act as platforms while selling different products/services to customers, and where demand from one group of customers is dependent on demand from the other (Singh and Mukherjee, 2020). In traditional markets, suppliers have to coordinate with buyers, whereas in multi-sided markets coordination is achieved through a platform and by sharing of data (Kaushik, 2019). Such markets thus generate what economists call “reciprocal positive externality between two distinct groups” (Bhattacharjea, 2018).¹ Uber, Amazon, PayPal, eBay, Airbnb are examples of multi-sided markets. However, multi-sided markets are not confined to digital platforms alone. Applying the same rationale, newspapers and credit card markets can be regarded as “offline” multi-sided markets (Wismer and Rasek, 2017).

In India, one of the first cases relating to two-sided markets was the *MCX-NSE case*,² where the CCI in its minority order, elaborated upon the concept of network effects. The CCI observed that network industries are different from traditional markets as they operate on network effects, which mean that the value of a platform increases with increase in the number of users. Further, costs and prices in network platforms may not follow trajectories similar to traditional markets, hence cannot, under all circumstances, be

analysed using traditional economic tools like normal supply-demand curves leading to determination of prices in the market.³ Since multi-sided markets involve distinct consumer groups, market definition becomes more complex in such markets. Often, competition authorities find it challenging to demarcate such markets as most competition laws were drafted keeping in mind the traditional “one-sided” market logic, instead of “two-sided”.

This paper focusses on competition law implications in three crucial aspects of platform markets: market definition, assessment of dominance and predatory pricing. These have emerged as areas of concern in India and worldwide.

2. The Concept of Relevant Market in Competition Law

Relevant market is the filter that demarcates the area of commerce within which a firm’s behaviour is analysed by competition authorities. While regarding relevant market to be an economic concept applied in competition enforcement, it is important to bear in mind that the term has to be interpreted through the lens of the law, for legal certainty.⁴ According to Section 2(r) of the Competition Act, 2002, “*relevant market means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets*”. Defining the relevant product and geographic market is the first step in deciding dominance. Section 19 (6) and Section 19 (7) of the Act lay down the parameters of defining the relevant geographic and product markets, respectively.⁵ Like other competition laws across the world, the Competition Act, 2002, focusses on “substitutability” as a test for defining the relevant market. An important tool for determining substitutability is the “Small but Significant, Non-Transitory Increase in Price” test or the SSNIP test. Simply put, SSNIP evaluates whether, for a small, yet significant price rise (of about 5% to 10%), the consumers of a particular product would shift their choices to another product.⁶ If so, then the two products can be considered to be part of the same market. This test is also known as the “Hypothetical Monopolist” test – one which reveals whether “a relevant market is worth monopolizing” (Raychaudhuri, 2019).

Notwithstanding the tests available, inaccurate demarcation of the relevant market is one of the commonest mistakes that can be made in competition analysis. The conundrum of accurate determination of the relevant market is even more with respect to digital markets. To illustrate, we can take the example of Amazon which has a dual role as a market and an online retailer, where its own products compete with other merchants using the Amazon market place. How would the relevant market(s) be determined in such cases? A further problem with two-sided markets is that there being distinct groups of consumers on either side with interdependent demand, it is more challenging to apply the SSNIP test while considering the profits in one or both sides of the market, and assessing on which side the hypothetical monopolist would raise its price.⁷ The Amazon “hybrid platform” has raised concerns both in Europe and in the US. The European Commission has recently initiated proceedings against Amazon, for alleged violations of Articles 101⁸ and 102⁹ of the Treaty on the Functioning of the European Union (TFEU).¹⁰

3. Dominance and Predatory Pricing: The Concepts

(a) Dominance

The Competition Act, 2002, 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.*”¹¹ Section 4(1) of the Competition Act, 2002, provides that “*No enterprise or group shall abuse its dominant position.*” Section 4 (2) states that “*There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group (a) directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service.*”¹² In cases involving abuse of dominance, the key focus of competition authorities is to ensure that the application of the law does not curb efficiency. Firms may gain market power through efficient production or distribution methods, technological and other innovations and better entrepreneurial efforts. Hence, it is not dominance per se which is frowned upon, but abuse of dominance, through forms of conduct specified in statutes.

The legal requirements for determining dominance may vary from country to country. For instance, some jurisdictions infer *prima facie* dominance through large market shares, whereas some countries do not stipulate market share thresholds.¹³ In India, Section 19(4) of the Competition Act, 2002 lists factors which can be considered by the Commission while determining dominance, including market shares, size and resources of the enterprise, size of competitors, dependence of consumers on the enterprise, etc.¹⁴ Though market shares are an important indicator of dominance, the law in India (both legislation and precedent) does not stipulate any market share threshold. The Commission can take into account all or any of the factors laid down in Section 19 (4) and cases reveal that it is usually a cumulation of factors which are assessed.¹⁵ In Europe, Article 102 of the TFEU lays down the law with regard to abuse of dominant position in the internal market.¹⁶ Dominance was defined by the European Court of Justice in the *United Brands case*¹⁷ as “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers*”.

Enforcement of the law relating to dominance and abuse across jurisdictions is also influenced by larger policy goals. An oft voiced (and debatable) criticism of European law has been with its leaning towards the protection of ‘competitors’ rather than the protection of ‘competition’ in the market, in contrast with the United States law which has focussed more on protecting competition, rather than competitors (Duca, 2020; European Commission, 2005). This was reflected in the controversial Microsoft decision¹⁸ where the Assistant Attorney General for Antitrust of the Department of Justice stated that “*in the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors.*”¹⁹ However, with recent developments in the law in Europe and global consolidation of competition guidelines, this debate has become somewhat redundant.

(b) Predatory Pricing

Simply speaking, predatory pricing means below-cost pricing with the intention of driving competitors out of the market – the rationale being that once competition is eliminated, the predator can monopolise the market and

recoup losses sustained during the period of predation. Cases on predatory pricing can be traced back to the early 1900s when the courts in the US were faced with issues of predatory pricing²⁰ as a violation of the Sherman Act, 1890. However, for many decades, there was no clarity in the US as to what constituted a predatory price (Moisejevas, 2017). Till the 1970s, the success rates for plaintiffs were fairly high as small businesses were sought to be protected against predation by large firms, as theoretically only a firm with sufficient reserves could engage in predation (Leslie, 2013). This attitude underwent a change in the 1970s with the influence of the Chicago School, which was sceptical about predatory pricing being a rational and sustainable business strategy. This was reflected in decisions like *Matsushita v. Zenith*²¹ where the US Supreme Court declared that “*there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful*”.²² The tide turned with the decision in the *Brooke Group case*²³, where the US court laid down the first two-pronged test for predation. Firstly, prices, to be regarded as predatory should be below “an appropriate measure of costs” (cost here is considered to be Average Variable Cost [AVC] as per the Areeda-Turner Test²⁴) and secondly, there should exist a “dangerous probability, of recouping the investment in below-cost prices” (the recoupment test).

In Europe, the first landmark case on predatory pricing was *AKZO v. Commission*,²⁵ where the Commission did not strictly follow the Areeda Turner test. In *AKZO*, the Commission held that a price would be considered predatory when (a) it is below AVC price, or (b) price is above AVC but there is an intention to eliminate rivals (predatory intent).²⁶ This could be proved through documentary as well as circumstantial evidence. Recoupment of losses is not an essential criterion in Europe. This was reiterated in the *Wanadoo case*, where the Court held that “demonstrating that it is possible to recoup losses is not a necessary precondition for a finding of predatory pricing”.²⁷

In India, Section 4 of the Competition Act, 2002 defines predatory price as “*a price, which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors*”. Cost concepts are further elaborated in the Determination of Cost of Production Regulations, 2009 adopted by the CCI.²⁸ According to the Regulations, cost will generally be taken to mean “AVC as a proxy

for marginal cost". However, the Commission may, "depending on the nature of the industry, market and technology used, consider any other relevant cost concept such as avoidable cost, long run average incremental cost, market value".²⁹ Thus, in India AVC is used as the accepted measure of cost, barring exceptional cases. Though the Indian law does not use the term recoupment and the CCI is technically not required to prove the same, cases decided by the CCI have considered the concept. The CCI has identified three conditions for predation. Firstly, that the prices of the goods or services are below the cost of production; secondly, this low price is charged with the "object of driving out competitors from the market"; and thirdly, there is significant planning to "recover the losses if any after the market rises again and the competitors have already been forced out".³⁰

4. Conundrum of Assessing Dominance and Abuse in Platform Markets: The Cab Aggregator Disputes

On 3rd September 2019, the Supreme Court of India reopened investigation into the Uber matter by dismissing an appeal filed by Uber against the order of the erstwhile Competition Appellate Tribunal (COMPAT).³¹ Before discussing the order of the Apex Court and its ramifications on competition law, it is important to traverse the length of the disputes, at least briefly. From 2015, the Commission has been faced with a number of allegations about Ola and Uber whose businesses are based on the aggregator model. This model is a classic example of a two-sided platform which benefits two or more parties. The companies do not own any vehicles but use the Internet and a smartphone-based application to connect drivers with customers seeking taxi rides. Out of the fare paid by the passenger, Ola and Uber retain a percentage and the rest is paid to the driver, who earns more money with the number of trips completed. Cases filed against these companies included allegations of abuse of dominance by means of predatory pricing and other anti-competitive behaviour.

The CCI's orders in the Ola and Uber cases reflect the challenges faced in regulating platform markets. The CCI rejected the claims in almost all the cases, primarily on the ground that Ola and Uber did not enjoy dominance in the market. The decisions of the Commission evoked much debate. Since, there are numerous disputes with similar allegations, for the sake of brevity the author will focus on the key points of the CCI's decision in Case

No. 25, 26, 27 & 28 of 2017 [*Meru v. Ola/Uber - Hyderabad, Mumbai, Kolkata and Chennai cases*] where the CCI clubbed together a number of complaints against Ola and Uber while dismissing them on 6th June 2018.³² The author will then move on to analyse the order given by the COMPAT in an appeal filed by Meru against Uber on a similar matter [*Meru v. Uber - Delhi case*].³³ Finally, the author will discuss the judgement of the Apex Court on the Uber dispute and its ramifications on the law relating to dominance and abuse in platform markets.

4.1 Meru v. Ola/Uber - Hyderabad, Mumbai, Kolkata and Chennai Cases

Key Issues and Findings

➤ The Determination of the Relevant Market

The Commission's determination of the relevant market in these cases was similar to those made in earlier cases, on the same subject.³⁴ The Commission defined the relevant product market as the market for 'Radio Taxi services'³⁵ by considering factors such as "convenience of time saving, point-to-point pick and drop, pre-booking facility, ease of availability even at obscure places, round the clock availability, predictability in terms of expected waiting/ journey time, etc." The Commission stated that for a category of commuters, radio taxis were not substitutable with other modes of road transport like auto-rickshaws, sub-urban railway and metro and private transport.³⁶ With regard to the geographic market, the Commission noted that radio taxi services were a highly localised service as a commuter would generally rely on local transport within the city, instead of going beyond it. Thus, the geographical markets were Hyderabad, Mumbai, Kolkata and Chennai, respectively.³⁷

➤ The Issue of Dominance

There were three important issues raised with respect to dominance. It was alleged that the companies were dominant individually by virtue of possessing high market shares. Secondly, they could be regarded as collectively dominant and thirdly, they could be regarded as dominant as a group owing to the existence of common investors.

With respect to the first issue, the Commission noted that the market share calculation relied upon was based on the market research conducted by a private research company, Tech Sci. Without going into the authenticity of the market research report, the Commission relied on its earlier orders and opined that *“high market shares by themselves may not be indicative of dominance. Though market share is theoretically an important indicator for lack of competitive constraints, it is not a conclusive indicator of dominance. Further, there cannot be any objective criteria for determining market share thresholds and a standard time-period as an indicia of dominance to apply in all cases, especially when under the scheme of the Act, no numerical threshold for presumption of dominance has been prescribed.”*³⁸ Thus, the CCI rejected allegations of dominance in the market by Ola and Uber on the basis of market shares.

With regard to collective dominance, the Commission reiterated its earlier stance³⁹ and stated that the provisions of Section 4 of the Act clearly provide for dominant position by only one enterprise or one group. *“The usage of words ‘operate independently’ appearing in the aforesaid definition clearly shows that the concept of ‘dominance’ is meant to be ascribed to only one entity. Further, the underlined words in the above explanation indicates that the whole essence of Section 4 of the Act lies in proscribing unilateral conduct exercised by a single entity or group, independent of its competitors or consumers. In the presence of more than one dominant entity, none of those entities would be able to act independent of one another.”*⁴⁰

With regard to the third issue, it was alleged that Ola and Uber were dominant as a group owing to the shareholding by common investors like “SoftBank, Tiger Global Management LLC, Sequoia Capital and Didi Chuxing”.⁴¹ Shareholding by common investors could indicate deeper pockets. The CCI considered whether the existence of common investors in Ola and Uber could erode competition between the two firms. According to the CCI, the two main concerns arising out of common ownership would be, firstly, increase in price and decrease in quality (which being unprofitable for the companies, could be beneficial for the investors) and secondly, “coordinated effects” where there could be incentives given to collude and earn collusive profits.⁴² The CCI observed that common ownership may lead to *“softening of competition”*. However, in absence of clear evidence in this regard, an adverse finding could not be made on *“conjectures and apprehensions”*.⁴³

On the basis of the above observations, the CCI opined that the dominance of Ola and Uber could not be established. In the absence of dominance, the question of abuse would not arise. Hence, the CCI held that there was no *prima facie* case to order an investigation into the matter. It is also interesting to note that while dismissing the case, the CCI did not go into an elaborate discussion on platform markets and the role of network effects, as it had already done so in earlier cases.⁴⁴

➤ Predatory Pricing in Platform Markets

Though predatory pricing was not discussed in this case, it is important to know the CCI's observation with respect to predatory pricing in an earlier case on a related matter which was discussed in the instant case. *Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*⁴⁵ [*Meru v. Ola - Bengaluru*] was a dispute relating to abuse of dominance by Ola in the Bengaluru market. While assessing dominance, the CCI elaborately discussed the dynamics of platform markets. The CCI stated that "*the strength of network effects thus becomes a key factor in the determination of dominance in such market*".⁴⁶ However, the CCI clarified that both Ola and Uber were competing vigorously in the market and it could not be said that Ola having the largest network could deter the entry of Uber. Thus, the network effects, in this case, were not strong enough to act as a barrier to entry.⁴⁷

With regard to predatory pricing, an interesting argument was brought before the CCI, relying upon the *MCX-NSE* case⁴⁸, that such pricing could be an indicator of dominance. The CCI opined that conduct of an enterprise "*can only be used as a complement rather than a substitute for comprehensive analysis of market conditions*".⁴⁹ Even non-dominant firms and new entrants could engage in practices like below-cost pricing and loyalty discounts to get a foothold over the market. If this interpretation of dominance was accepted then even a new entrant who shifted consumer base in its favour could be held dominant. To prevent such errors, the factors listed in the Act should be followed for the assessment of dominance.⁵⁰ At the same time, the Commission expressed its reservations on the low prices charged by Ola observing that such prices may not necessarily be from cost efficiency, but could also be from private equity funding. However, there was no clear evidence which demonstrated that access to such funding was not equitable.⁵¹

4.2 Meru V. Uber [Delhi case]: The COMPAT and Supreme Court Orders

In 2016, Meru filed an appeal against the order of the Commission in Case No. 96 of 2015 in a similar matter, wherein allegations of dominance and predatory pricing against Uber were dismissed by the Commission on the ground of lack of evidence demonstrating Uber's dominance in the radio taxi service market in Delhi.⁵² The COMPAT was of the view that the order of the CCI was erroneous, on several grounds. Firstly, the COMPAT found fault with the determination of the relevant geographic market by the CCI.⁵³ The CCI had determined the geographic market as Delhi, as opposed to Delhi-NCR. The COMPAT did not regard this as logical, as it was fairly easy for customers to move "*from one point in NCR to another point calling taxis on telephone/internet platforms.*"⁵⁴ Thus, demarcation of Delhi as a separate geographic market seemed *prima facie* unjustified.

Secondly, the CCI had considered conflicting research reports on market shares in an earlier radio taxi case and concluded that there was no clear proof of dominance in the instant case. However, according to the COMPAT, the very existence of conflicting research reports about the market should have indicated that the matter needs to be investigated.⁵⁵ Further, the COMPAT clarified that market shares in statistical terms are not the only criterion for assessing dominance which indicates a "position of strength". Dominance, especially in non-traditional markets, cannot be judged by market shares alone. It "*should be seen in the context of overall picture as it exists in the radio taxi service market in terms of status of funding, global developments, statements made by leaders in the business, the fact that aggregator based radio taxi service is essentially a function of network expansion and there was adequate indication from the respondent that network expansion was one of the primary purpose of its business operation.*"⁵⁶ The CCI in its own jurisprudence had gone beyond the market share criterion for assessing dominance. Thus, dismissal on the ground of market shares did not appear to be coherent law. Accordingly, the COMPAT ordered that the matter be referred to the Director General of the CCI for investigation.⁵⁷

Uber filed an appeal before the Supreme Court.⁵⁸ The Supreme Court while upholding the order of the COMPAT, relied on data produced in the complaints and stated that "*it can be seen that Uber was losing Rs. 204 per trip*

in respect of the every trip made by the cars of the fleet owners, which does not make any economic sense other than pointing to Uber's intent to eliminate competition in the market."⁵⁹ The brevity of this order is remarkable as, according to the Supreme Court, *prima facie* loss making pricing could affect competitors and the relevant market in the appellant's favour thereby indicating dominance under Section 4 of the Competition Act, 2002. Hence, this situation would warrant a detailed investigation of the market in question.

5. Comments and Analysis

The Supreme Court order is reminiscent of the order passed by the CCI in the *MCX-NSE*⁶⁰ case, one of the first cases on platform markets. In the MCX case, an argument had been made that exclusionary conduct in the form of predatory pricing itself demonstrates the economic strength of an enterprise. The CCI's order noted that the zero transaction fee charged by NSE while incurring huge losses indicated that NSE was in a dominant position.⁶¹ However, this interpretation of dominance had been explicitly rejected by the CCI in the *Meru v. Ola Bengaluru* case, for the inconsistencies in competition jurisprudence that it would create.

With the judgement of the Supreme Court, the law seems to have come full circle. Once again, the two ingredients of Section 4 – dominance and abuse – appear to have been merged as the latter can now be regarded as indicative of the former. Instead of assessing whether the enterprise enjoys dominance in accordance with the factors listed in Section 19(4) and then moving on to determining whether the alleged conduct amounts to abuse, the Supreme Court has adopted a circular approach by considering the conduct of the enterprise as an indicator of dominance. The author submits that this approach is problematic. Conduct of the enterprise cannot be used in isolation, or as a substitute for comprehensive analysis of market conditions, to indicate dominance. Assessment of market power requires holistic analysis of all relevant factors.

The reasoning of the Supreme Court that loss making pricing can affect the relevant market in the appellant's favour thereby indicating dominance, goes against established propositions of law. As pointed out in the *Meru v. Ola Bengaluru* case,⁶² if the interpretation of dominance is based on "the ability to affect consumers/competitors/relevant market" it has to be borne in mind that in most markets there will be enterprises which have varying

degrees of market power by virtue of which they can affect consumers, competitors or the relevant market in their favour. Interpreting dominance in this manner could mean that a new entrant who has a new idea, product or technology that challenges the status quo in a market and shifts consumer base in its favour, maybe erroneously regarded as dominant.⁶³ This is of particular concern in markets characterised by network effects, where there may be aggressive competition in the early stages of the network creation, till the market settles in favour of an enterprise. While it is true that strong network effects can result in “tipping” or transformation of a market with several providers into a highly concentrated market, it is also true that market leadership is precarious and transient in the initial stages of evolution of such markets, and such market leadership is not the same as dominance. It is to prevent such anomalies in assessing dominance that the Act lays down a holistic framework and lists various factors including the relative strength of competitors, entry barriers and countervailing power for determining dominance. The judgement of the Supreme Court is therefore inconsistent with Section 19(4) of the Act which outlines the factors to be considered in the assessment of dominance.

This interpretation of dominance by the Supreme Court also results in lowering the threshold of intervention by competition authorities. The author submits that this is potentially dangerous as it could create a situation of over-intervention where competition law moves towards controlling dominance, rather than abuse. Though in the instant case, the Supreme Court has only ordered an investigation, it has ordered so on the ground that loss making pricing can indicate dominance. It would be difficult to circumvent this interpretation of dominance in future cases until the law on this point is modified.

This line of reasoning may be assessed in light of some of the latest developments on digital markets. A report prepared by the Federal Ministry for Economic Affairs and Energy, Germany, in 2018, states that the present rules on abuse of dominance are insufficient for digital markets. It suggests lowering of the thresholds of market power for intervention in case of platform markets. That is, instead of always defining market before assessing dominance, the courts in certain cases can infer dominance if unilateral conduct results in an exclusionary effect and is not effectively curbed by the laws. However, the report cautions that such intervention

may be warranted only if there is a substantial probability of tipping, or if there is non-coordinated parallel behaviour in a tight oligopoly leading to foreclosure, or if there is any abuse of “conglomerate market power” which may significantly endanger competition even below the market dominance threshold, or in cases of intermediation power and information asymmetries (Schweitzer et al., 2019).

Another report prepared by the Stigler Center (2019) suggests that it becomes more important for antitrust lawyers to develop tools to explain to law courts behavioural biases in the creation of market power. Market power will depend upon what is regarded by consumers as substitutes, and whether there is “competition on the platform between complements, or competition between platforms, or competition between a platform and potential or nascent competitors regarding possible future markets”. Regarding predatory pricing, the report says that digital markets often operate on zero marginal costs which make it difficult for the test of prices below AVC or incremental cost, to work in such markets. The law so far has been interpreted to protect competitors who are equally efficient, which puts firms who have not reached that level of efficiency at a disadvantage.

The Inception Impact Assessment of the New Competition Tool, 2020 by the European Commission speaks of the difficulty in cases where platforms acquire market dominance through “strong network effects, zero pricing and data dependency, as well as market dynamics favouring sudden and radical decreases in competition (‘tipping’) and ‘winner-takes-most’ scenarios”. It states that the present laws cannot effectively tackle certain situations such as “monopolisation strategies by non-dominant companies with market power” (European Commission, 2020). Upon a review of the existing jurisprudence on digital markets, it is clear that the road ahead for India is muddy. Assessment of competition law violations in digital markets requires the development of additional tools/guidelines.

6. Conclusion and Suggestions: Developing a Framework for Regulating Competition in Digital Markets

In the last few years, a number of reports have been published by antitrust authorities and independent experts all over the world, providing an interesting mix of suggestions on how digital markets can be better

regulated by competition authorities. Some of the suggestions have been discussed above. In India, the CCI conducted a detailed *Market Study on E-Commerce* which is the first report of its kind that provides an insight into the dynamics of digital markets (CCI, 2020). In addition, the Consumer Protection (E-Commerce) Rules, 2020 were notified in July 2020 by the Indian Government. These Rules are applicable to electronic retailers registered in India or abroad but offering goods and services to consumers in India. However, Section 3 (b) of the Rules clarifies that the definition of e-commerce is restrictive as *“e-commerce entity means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity”*.⁶⁴

None of the existing Indian laws/regulations holistically address competition issues in digital markets. In view of the rapid growth of digital markets, there is an urgent need for framing of guidelines with respect to the same. Though it would not be possible for the author to give detailed suggestions in this paper, a review of reports/guidelines of other jurisdictions, some of which have been discussed here, could be the starting point of the exercise.

Suggestions

While giving suggestions it becomes important to revisit the objectives of the law. One of the main quandaries in competition law is with respect to balancing false positives with false negatives. The Chicago School, in the 1970s, felt that avoiding false positives (good conduct judged to be bad) is more beneficial to society than avoiding false negatives (anti-competitive conduct judged to be good). This was based on the reasoning that false positives are more difficult to correct whereas false negatives can be corrected by market forces. However, this logic may not be tenable in today's market conditions. Under-enforcement of the law is likely to be costlier now, as the market power of large, technology-based digital platforms is more durable. In digital markets, false negatives are more likely to occur than earlier, due to the evolution of newer forms of anti-competitive conduct. Similarly, false positives may be less common than earlier due to more advanced econometric tools for assessing anti-competitive behaviour and market power. Thus, there is need for the law to

recalibrate the balance between the two. This could be done by developing economic tools required for understanding and assessing the dynamics of such newer markets, and also by amendment to the law (Stigler Center, 2019, p.73-74).

I. Developing Additional Tools for Competition Assessment

At the outset, it may be important to develop new tools/mechanisms for competition assessment in digital markets. A caveat here is that the suggestions given by the author are by no means exhaustive. Digital markets are constantly evolving and require analysis on a case to case basis. However, some general mechanisms could be developed for better understanding and assessment of such markets. These include:

- Development of tools for the definition of markets where a large part of the sales takes place through barter transactions, and to assess the quality-adjusted price paid for a good or service in a barter transaction with a zero, or near zero monetary price (Stigler Center, 2019, p.75). In digital markets payments through barter are common. For instance, customers share their personal information and preferences. The platforms then indulge in targeted advertising and sales on the basis of the information received. Thus, if digital markets are making profits, it can be inferred that information has a market price and is more valuable than the cost of the services. There is economics literature which has modelled this issue and is able to define a data mark-up.⁶⁵
- Mechanisms to evaluate potential competition from new firms and future innovators and entrants. In digital markets, due to high concentration levels, network effects and control over data, it becomes difficult to dislodge a firm once it becomes dominant. Hence, attention needs to be given to entry conditions and the likelihood of innovation. The Stigler Center suggests the development of tools to assess how market conditions may affect the likelihood of innovation (Stigler Center, 2019, p.75). The European Commission report states that in order to encourage the entry of firms and help them in attracting consumers, it is important to ensure that multi-homing and switching are possible (Crémer, Montjoye, and Schweitzer, 2019).

- Defining two, interrelated markets, in case of platform markets. Market definition is complex in platforms which are multisided. Since users on different sides of a platform may have divergent interests, defining a single two-sided market in all cases may obscure the analysis (Stigler Center, 2019, p.75).
- Mechanisms to address and evaluate how technology platforms are able to take advantage of consumer biases and affix consumers to their platform by making it difficult for them to switch to alternatives. The European Commission report suggests that even where consumer harm cannot be measured, practices indulged in by firms aimed at reducing competition on the face of it should be prohibited in the absence of evidence of consumer welfare (Crémer, Montjoye, and Schweitze, 2019, p.3). The recent Google decisions in the EU have addressed various strategies adopted by digital platforms to affix consumers to their platforms and these cases provide valuable insight into behavioural economics and the understanding of consumer choices and biases.⁶⁶
- Using market structure based competition tools to rectify problems that cannot be effectively addressed under the existing law. The Inception Impact Assessment of the New Competition Tool, 2020 of Europe proposes that the Commission may intervene in the absence of dominance *“when a structural risk for competition or a structural lack of competition prevents the internal market from functioning properly”* (Crémer, Montjoye, and Schweitze, 2019, p. 2-3). Structural risks for competition denote situations where the features of the market in question (like network effects, absence of multi-homing and lock-ins) and the behaviour of the firms operating in such markets can potentially threaten competition. Such intervention may be horizontal in scope or limited to particular sectors where market definition is difficult within traditional frameworks, like digital markets. Here, even without a finding of dominance, the Commission may impose behavioural and if needed, structural remedies. The Commission may even recommend legislative action/regulation. However, there will be no finding of infringement. Nor will there be any imposition of fines, or damage claims in such cases.

This approach could also be considered in India, at least as an interim arrangement, till there is more clarity on the nuances of market definition and market power in digital markets.

II. Amendment to the Law by Changes to Existing Legal Principles

- The law relating to predatory pricing needs to be broadened in scope. Predatory pricing laws have been shaped in a manner so as to avoid over enforcement. The recoupment test for instance imposes a very high threshold of holding a firm guilty of such behaviour. In case of digital platforms, the “below AVC” test is also dated as the marginal cost for goods or services can be close to zero. Hence, the law is required to be modified so as to suitably deal with anti-competitive practices in such markets.
- The requirement of burden of proof on the plaintiff/informant may be relaxed or even shifted to the defendant in sophisticated digital markets where the defendant has greater knowledge and more access to relevant information. The European Commission report recommends erring on the side of disallowing conduct which is likely to be anti-competitive and shifting the burden of proof on the defendant to demonstrate competitiveness in such cases (Crémer, Montjoye, and Schweitze, 2019, p.51).
- The standard of proof also needs to be reviewed. In digital platforms, there may be risk of under enforcement of the law if courts insist on a high degree of probability of harm. The European Commission report states that EU cases have made room for relaxation of the standard of proof (Crémer, Montjoye, and Schweitze, 2019, p.42). European courts have held that there is no need to demonstrate concrete proof of anti-competitive effects. It is sufficient to show that the practice in question “potentially excludes competitors”⁶⁷ or “tends to restrict competition”.⁶⁸ Similarly, circumstantial or indirect evidence should be allowed in cases where the propositions in question are not observable and direct evidence is difficult to present. In the US, the American Express case held that indirect evidence may be proof of market power along with *some evidence of harm to competition*, as opposed to “*proof of actual detrimental effects on competition*”.⁶⁹ A similar approach could be followed in India.

- The concept of “intermediation power” may be recognised, in addition to buyer-seller power. Germany’s Competition Law Reform of 2020 suggests the amendment of Section 18 of the Act⁷⁰ (which defines market dominance) to be supplemented by a new paragraph 3b in the following form: *“When assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets”*. Other reforms suggested in the context of digital markets are (a) lowering the threshold for third-party access to data and (b) prohibiting firms with superior market power (which may not yet be dominant) to obstruct multi-homing so as to prevent “tipping” of the market. Such amendments may also be considered in India.

In conclusion, it may be said that there is an urgent need for reforms with respect to the application of competition law to digital markets in India. There are also several related issues which need to be considered in such markets, like consumer protection, privacy and data protection. In view of the complex nature of such markets, it is desirable that the regulators and policymakers opt for reforms which are flexible enough to address the unique circumstances of each case while keeping a broad yet certain framework within which to use discretion. This could be a middle path between the two extremes of having rigid rules (which are not possible or desirable in evolving markets) and no guidelines at all (which is the present scenario) leading to incoherent jurisprudence. Such reforms could be in the form of developing additional tools/mechanisms for competition assessment and by way of amendments to the law, as outlined above.

Endnotes

- ¹ See also Hagiu (2006).
- ² MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors., Case No. 13 of 2009 (CCI).
- ³ *Ibid.* See Minority Order, available at http://www.cci.gov.in/sites/default/files/MCXDissentOrder240611_0.pdf.
- ⁴ See generally, Robertson (2019).

- ⁵ The Competition Act, 2002, § 19(6) provides that “The Commission shall, while determining the relevant geographic market, have due regard to all or any of the following factors, namely: – (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services.” Section 19 (7) provides that “The Commission shall, while determining the relevant product market, have due regard to all or any of the following factors, namely: – (a) physical characteristics or end-use of goods; (b) price of goods or service (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.”
- ⁶ For a detailed discussion on the SSNIP test and its limitations, see Sharma (2011).
- ⁷ See generally Filistrucchi et al. (2014).
- ⁸ The Treaty on the functioning of the European Union (1958), Title VII, Chapter 1, §1, Article 101 prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” Any agreement or decision prohibited under the said article would be automatically void unless they fall under the exceptions listed in Art. 101(3).
- ⁹ *Infra* Note 16.
- ¹⁰ *Opening of Proceedings against Amazon*, Case AT 40462(2017), European Commission, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40462/40462_6210_9.pdf.
- ¹¹ The Competition Act, 2002, §4- Explanation.
- ¹² The Competition Act, 2002, §4.
- ¹³ See generally Anderson et al. (n.d.).
- ¹⁴ The Competition Act, 2002, § 19(4) provides that “The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely: – (a) market share of the enterprise; (b) size and resources of the enterprise; (c) size and importance of the competitors; (d) economic power of the enterprise including commercial advantages over competitors; (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise; (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (i) countervailing buying power; (j) market structure and size of market; (k) social obligations and social costs; (l) relative advantage, by

way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any other factor which the Commission may consider relevant for the inquiry."

- ¹⁵ See *Dr. L.H. Hiranandani Hospital v. CCI & Ramakant Kini*, Appeal No. 19 of 2014; See also *COMPAT* order Appeal No. 19 of 2014, p.28 "At the outset, it may be clarified that market share of an enterprise is only one of the factors that decides whether an enterprise is dominant, or not, but that factor alone cannot be decisive proof of dominance. Also, the Act has not prescribed any market share threshold for determining dominance of an enterprise in the relevant market." See also *Re M/s ESYS Information Technologies Pvt Ltd v. Intel Corporation (Intel Inc) & Ors.*, Case No. 48 of 2011 (CCI).
- ¹⁶ The Treaty on the functioning of the European Union (1958), Title VII, Chapter 1, §1, Art. 102: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) 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 such contracts."
- ¹⁷ *United Brands Company and United Brands Continental BV v. Commissioner of the European Communities*, Case 27/76 (1978), E.C.R. 1978-00207.
- ¹⁸ *Microsoft Corp. v. Commission of the European Communities*, Case T-201/04 (2007), E.C.R. 2007 II-03601.
- ¹⁹ U.S. Department of Justice, Assistant Attorney General for Antitrust, Thomas O. Barnett, issues statement on European Microsoft Decision (Sep. 17, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm.
- ²⁰ See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Company*, 221 U.S. 105 (1911), which were some of the first cases of predation.
- ²¹ *Matsushita Electric Industrial v. Zenith Radio*, 475 U.S. 574 (1986).
- ²² *Ibid.* P. IV(a).
- ²³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
- ²⁴ See *Areeda and Turner* (1975).

- ²⁵ AKZO Chemie BV v. Commission of the European Communities, Case C-62/86 (1991), E.C.R.1991 I-03359.
- ²⁶ *Ibid.*
- ²⁷ France Télécom SA v. Commission of the European Communities, Case C-202/07 (2009) 4 C.M.L.R. 25, at 113. Recently, however, the EU is considering the use of recoupment tests when analysing predatory pricing cases. *See* Mehta (2008). He mentions that EU recently has also been considering the use of recoupment tests when analysing predatory pricing cases.
- ²⁸ The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 (No. 6 of 2009).
- ²⁹ *See Ibid.*§3.
- ³⁰ M/s Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd., Case No. 09 of 2013 (CCI) at 23. *See also Supra* Note 3.
- ³¹ Uber India Systems Pvt. Ltd. v. Competition Commission of India & Ors., Civil Appeal No. 641 of 2017 (SC).
- ³² Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd. & Ors., Case No. 25, 26, 27 & 28 of 2017 (CCI).
- ³³ Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. & Ors., Case No. 96 of 2015 (CCI).
- ³⁴ Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015 (CCI); Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. & Ors., Case No. 81 of 2015 (CCI); M/s Mega Cabs Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 82 of 2015 (CCI); Mr. Vilakshan Kumar Yadav & Ors. v. ANI Technologies Pvt. Ltd. & Ors., Case No. 21 of 2016 (CCI), etc.
- ³⁵ Except Kolkata, where the market was for radio taxis and yellow taxis.
- ³⁶ *Supra* Note 33 at 38.
- ³⁷ *Supra* Note 32.
- ³⁸ *Ibid.* at 41.
- ³⁹ Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015 (CCI).
- ⁴⁰ *Supra* Note 34 at 42.
- ⁴¹ Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd. & Ors., Case No. 25, 26, 27 & 28 of 2017 (CCI) at 44.

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⁴² *Ibid.* at 46.

⁴³ *Ibid.* at 53.

⁴⁴ Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015 (CCI).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 90.

⁴⁷ *Ibid.* at 93.

⁴⁸ *Supra* Note 3.

⁴⁹ Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015 (CCI) at 97.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 122.

⁵² Meru Travel Solutions Pvt. Ltd. v. Competition Commission of India & Uber India Systems Pvt. Ltd., Appeal No. 31 of 2016 (COMPAT).

⁵³ *Ibid.* at 11.

⁵⁴ *Ibid.* at 12.

⁵⁵ *Ibid.* at 15.

⁵⁶ *Ibid.* at 16.

⁵⁷ *Ibid.* at 20.

⁵⁸ Uber India Systems Pvt. Ltd. v. Competition Commission of India & Ors., Civil Appeal No. 641 of 2017 (SC).

⁵⁹ *Ibid.* at p. 3.

⁶⁰ *Supra* Note 2.

⁶¹ *Ibid.* at 10.47.

⁶² Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015 (CCI).

⁶³ *Ibid.* at p. 97.

⁶⁴ The Consumer Protection (E-Commerce) Rules, 2020 (India).

⁶⁵ See Bergemann, Bonatti and Smolin (2018).

⁶⁶ See Fletcher (2019). See also Hourihan and Finn (2019).

- ⁶⁷ Post Danmark A/S v. Konkurrencerådet (Post Danmark II) Case C-23/14, EU:C:2015:651, at 66.
- ⁶⁸ Tomra and Others v. Commission Case C-549/10 P, EU:C:2012:221, at 68.
- ⁶⁹ Ohio, et al. v. American Express Company, et al. 138 S. Ct. at 2289.
- ⁷⁰ Act against Restraints of Competition, (Competition Act - GWB), http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf

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Big Data Mergers: Bridging the Gap for an Effective Merger Control Framework

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Abstract: The emergence of multi-sided platforms, connected devices and Internet of Things (IoT) has turned us into a valuable information asset, whereby data about our tastes and preferences as a consumer can be 'commoditised'. Even though 'data' is the key to competition, and thereby ensures competitiveness across markets – as diverse from retail to healthcare, from taxi rides to air travel, thanks to the uberisation of the economy – this valuable reservoir of information is controlled by a handful of Information Technology (IT) firms. Remarkably noteworthy is the fact that a significant proportion of the growth of these IT companies is not organic; instead, most of their valuable innovations have been acquired inorganically through acquisitions! Against this dynamic backdrop, this paper addresses the following research questions. First, what are the potential suitable tests for the notification of a transaction, and what factors must be taken into consideration for the selection of a particular test over others? Second, how can competition authorities innovate as regards the 'theory of harm'? In other words, what should be the design and construct of a theory that can effectively capture the novel concerns in big data mergers? Here, the discussion is not just limited to 'privacy' as a dimension of competition, but also other areas of concern – such as non-horizontal effects in big data mergers. Finally, the paper very briefly discusses key factors to be taken into consideration for designing effective remedies.

Keywords: Big Data Mergers, Privacy, Share of Supply Test, Turnover test, Doctrine of Local Nexus, Theory of Harm, Merger Remedies, Apple/Shazam, Facebook/WhatsApp, Facebook/Instagram

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1. Introduction

The emergence of multi-sided platforms, connected devices and Internet of Things (IoT) has turned us into a valuable information asset, whereby data about our tastes and preferences as a consumer can be 'commoditised'. 'Data' has always been a valuable input in understanding consumer behaviour, and for targeted advertising.¹ It has traditionally offered large retail stores a strong competitive advantage and bargaining power over their upstream suppliers, and consumers downstream. What makes the current debate exceptional is how following technological disruptions such as digitalisation and the rise of the platform economy, the rapid decrease in the cost of storing large volumes of data (particularly on the cloud), and advanced algorithms available online, 'data' today has become 'essential' to offer meaningful competition in even the most traditional brick and mortar markets. Even though 'data' is the key to competition, and thereby ensures competitiveness across markets – as diverse from retail to healthcare, from taxi rides to air travel, thanks to the *uberisation* of the economy – this valuable reservoir of information is controlled by a handful of Information Technology (IT) firms. Remarkably noteworthy is the fact that a significant proportion of the growth of these IT companies is not organic; instead, most of their valuable innovations have been acquired inorganically through acquisitions! Consider for instance the case of Google, organised since 2015 as *Alphabet Inc.* Known for disrupting the digital space by introducing disruptive services such as – the 'cost per click' (CPC) online advertising model, online video sharing platform and now digital health and digital homes – Google has been able to enter these markets by acquiring some 100+ promising start-ups. Google's success in digital advertising is attributed to its targeted CPC model, wherein the advertiser needs to pay only once the user has 'actively' clicked on the advertisement – hence, the name 'CPC'. This has been possible only following Google's acquisition of Double Click.

It took almost a decade and following some notable transactions such as Google/Double Click, Google/Sanofi/Joint Venture, Facebook/Instagram, Microsoft/LinkedIn and many others², that the regulators are getting progressively cognizant of the *gap* in the merger control regulation as it stands today. The emergence of Multi-Sided Platforms (MSPs)³ has effectively put to question whether the current competition policy framework, and merger control in particular, are suitable to address the

nuances of the platform economy. Against this dynamic backdrop, this paper – part of an ongoing comparative and inter-disciplinary research project dealing with Merger Control in the converged telecoms sector⁴– addresses the following research questions. First, what are the potential suitable tests for the notification of a transaction, and what factors must be taken into consideration for the selection of a particular test over others (Section 2)? Second, how can competition authorities innovate as regards the ‘theory of harm’? In other words, what should be the design and construct of a theory that can effectively capture the novel concerns in big data mergers (Section 3)? Here, I limit myself not only to ‘privacy’ as a dimension of competition, I also look at the other areas of concern – such as non-horizontal effects in big data mergers. Section 4 very briefly discusses key factors to be taken into consideration for the design of effective remedies. Section 5 concludes with a framework for further research. These questions are extremely germane to the current debate on big data mergers and *gap* in the merger control framework of the world’s leading competition authorities, including India. In the European Union (EU), for instance, even though the EU managed to evaluate some of these transactions following a referral-up from its Member States (*infra* Section 2), the gap in the EU Merger Control Regulation 134/2004 continues to exist to date. In the Indian context, considering that there exists ‘only’ one competition authority, the Competition Commission of India (CCI), the question merits all the more urgent attention. Notwithstanding the critical mass that these big data mergers offer to the GAFAM in the big data-led economy, scarce ‘academic’ attention has been paid to big data mergers (*infra* Section 2). This is deplorable on account of the fact, that following a merger it is all the more difficult to ‘unscramble the egg’ that is undo a merger. Further, a suitable merger control framework not only needs to explore the tools available in the current merger control toolbox, it also needs to go a step further, and explore new theories of harm and remedies (Sections 2 and 3). It is this *gap* in the current policy framework that this paper seeks to redress.

2. Jurisdiction and Notification Thresholds: Time for Re-think?

Section 5 and Section 6 of the Indian Competition Act, 2002 are the relevant provisions as regards the regulation of combinations. As per the provisions of Section 5 of the Competition Act, 2002, a merger is notifiable when the

relevant threshold – in terms of the value of the assets and the turnover – as prescribed, is met. The value of these assets are determined based on their book value, as indicated in the audited account books for the ‘financial year immediately preceding the financial year in which the date of proposed merger falls’. To calculate this value – both tangibles, as well as intangibles, such as the value of the brands, goodwill and intellectual property rights – are taken into account. To be subject to merger control review – either the value of the assets of **the parties to the acquisition**, shall be more than one thousand crore rupees or the turnover shall be more than three thousand crore rupees (in India) or in the alternate, the value of the assets must exceed five hundred million US dollars or turnover should exceed fifteen hundred million US dollars (in or outside India or in the aggregate). Alternatively, **at the group level**, when the joint value of the assets exceeds four thousand crore rupees or turnover exceeds twelve thousand crore rupees (in India) or the value of the assets exceed two billion US dollars or turnover exceeds six billion US dollars (in or outside India or in the aggregate).

In the big data-led economy, where the firms can ‘monetise’ the markets only after the platforms have tipped to one dominant player, and the customer gets locked⁵ into the platform – means that many of these high value transactions that need to be closely monitored by the CCI, are neither notified nor reviewed by it. The irony of all this is that considering the significance of data and its associated four Vs (value, volume, velocity and veracity), success in Indian markets is key to the success of any platform-based communications app.⁶ The above-referred test fails this litmus test – the current merger control fails, where it probably needs to be most effective in the big data-driven economy. The Facebook/Whatsapp merger is evidently most illustrative of this *gap*.

Shortly after Facebook announced its intentions to acquire WhatsApp for US\$ 19 billion, it was argued that even though the tests under Section 5 of the Competition Act, 2002 were not met, the country’s fair trade regulator ‘could [and should]’ nonetheless scrutinise the deal as the proposed transaction had ‘*substantial local nexus*’ considering that WhatsApp had over 36 million active users, compared to its nearest competitors Line and Hike that had at the time a user base of 16 and 15 million users, respectively (Bose, 2014). The argument raised by Bose (2014) as regards ‘sufficient local

nexus', it may be useful to add, is in alignment with the well-established 'effects-based approach' in international law. As per the approach, if a merger has a substantial connection with the jurisdiction, then the concerned competition authority can review it as per the doctrine of 'local nexus' (Schöning and Ritz, 2018). There also exists a very relevant merger decision of the European Commission that was substantially upheld by the General Court (formerly the Court of First Instance). Gencor, a South African group and Lonrho, a British company were two international conglomerates that were amongst other fields, active in mining and minerals. The proposed concentration was a full-function joint venture that led to the two companies acquiring joint control of the undertaking 'Implats'.⁷ As the European Commission's (EC) assessment indicated that the merger would lead to a duopoly – jointly dominated by the merged entity and 'Amplats' – the EC decided to prohibit the said merger.⁸ The parties appealed the decision before the General Court (formerly the Court of First Instance). The key procedural contention of the parties was that considering that the merging parties were located outside the Union (at the time, the European Community), the European Commission had erroneously exercised its jurisdiction to prohibit the merger. Rejecting the parties' arguments, the Court as regards the issue of jurisdiction stated as follows:

Article 1 [of the 1989 EU Merger Control Regulation] does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory.⁹

As regards the compatibility of the contested prohibition decision with the principles of public international law, the Court added:

Application of the [EU Merger] Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an *immediate and substantial effect* in the Community.¹⁰

In that regard, the concentration would, according to the contested decision, have led to the *creation of a dominant duopoly* on the part of Amplats and Implats/LPD in the platinum and rhodium markets, as a result of which *effective competition would have been significantly impeded in the common market* within the meaning of Article 2(3) of the Regulation.¹¹

The CCI in the Facebook/WhatsApp merger, however, exercised restraint as the thresholds prescribed in Section 5 of the Competition Act, 2002 were not met, and the Commission is yet to break the ice in terms of reviewing a big data merger (Khan and Chand, 2018). The CCI's restrained approach can be explained on the ground that the current thresholds restrict the CCI's ability to review these high tech and high value mergers. In other words, the *current gap* in the Indian merger control as regards the notification of mergers limits the ability of the CCI to review these high value transactions.

From the perspective of big data mergers, evidence indicates that irrespective of whether it is a horizontal, vertical or even conglomerate merger (which otherwise are considered to be benign, and in fact efficiency-enhancing) merit equal scrutiny. This is on account of the fact that in the platform economy, non-horizontal mergers offer the merged entity an opportunity to envelope and enter into the neighbouring markets and leverage its position of dominance from one market to another.¹² This phenomenon is usually not seen in the brick and mortar world (consider the great cross-Atlantic divide in the GE/Honeywell merger for instance). In the digital space, this, however, is a frequently occurring phenomenon, and therefore, for the purposes of this paper, it is argued that big data mergers – irrespective of whether they are horizontal or non-horizontal – merit equal scrutiny. Case analysis of the Google/Double Click, Google/ITA, Microsoft/LinkedIn and Microsoft/Real Player acquisitions, discussed in Sections 3 and 4 *infra*, unambiguously elucidate this assertion.

Considering the very special nature of the platform economies – network effects, economies of scale and learning effects, discussed *infra* – mergers that adversely impact the process of competition, may have an enduring impact that can neither be remedied by the self-correcting nature of the markets nor through ex-post competition law enforcement. To march towards an effective merger control framework, therefore, the first right step is to ensure that these high value transactions, that currently go un-notified, be made reviewable before the relevant competition authority. In case the review fails to clearly outline the impact of the merger, the competition authority may then decide for either a stricter or more lenient merger enforcement. Such an approach is also vital considering that

following *digitalisation* and the *uberisation* of the economy, an increasing number of otherwise highly valuable mergers in India fail to meet the turnover based requirements of the Competition Act, 2002.

In the European Union, the European Commission until recently confronted a similar challenge. The European Union Merger Regulation (EUMR) 139/2004 recommends a turnover-based test for the review of mergers. This has led to a call for the reform of the EU Merger Control. In 2015, the German *Monopolkommission*, an independent body that advises the German government and public authorities on competition and regulatory issues, undertook a detailed study on competition law enforcement in the digital markets. As regards merger control in the digital markets, the *Monopolkommission* recommended key changes to the notification regime (Monopolkommission, 2015). Following these recommendations, first Germany and subsequently Austria amended their rules for the notification of mergers.¹³ According to the new test, introduced by the 9th Amendment of the Act against Restraints of Competition (ARC), in case the value of the transaction exceeds 400 Million Euros (€), the *Bundeskartellamt* (BKA), the German Federal Cartel Office, may review the proposed transaction.¹⁴ Shortly thereafter, Austria too amended its Cartel and Competition laws to introduce a similar notification threshold. In Austria, the threshold is set at €300 million (Reinart, 2017), unlike the German competition law wherein the threshold for notification is €400 million.

Before going into the merits of the amended tests introduced by the German and the Austrian authorities, it may be useful to add that it is not for the first time that a competition authority has taken into account the 'value of the transaction' as the relevant criteria for notification. In the US, following the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, merging parties are since 1976, required to notify the Federal Trade Commission (FTC) and the Department of Justice (DoJ) in case, amongst others, the value of the deal exceeds an annually adjusted threshold.¹⁵

In addition to the 'value of the transaction' test, there exists another very interesting 'share of supply' test. In the UK, for example, the 2002 Enterprises Act, in addition to the 'turnover-based test' recommends the 'share of supply' test. According to the latter, in case the merging parties fail

to meet the 'annual turnover-based threshold' (currently at £70 million), the Competition and Markets Authority (CMA, formally the OFT, the Office of Fair Trading) may nonetheless review the proposed transaction in case the merging parties capture over 25 per cent of the relevant market.¹⁶ Utilising the provisions of this 'share of supply' test, the then OFT (now the CMA) reviewed two notable big data mergers. In Facebook/Instagram, even though both Facebook and Instagram at the time of the merger, were freely downloadable apps in the UK, and thus, did not generate any substantial revenues, the OFT (now the CMA) could nonetheless review the merger as Facebook's market share at the time of the proposed transaction was well-above the 25 per cent threshold, and the acquisition of Instagram was expected to further strengthen this position of Facebook in the relevant geographic market of the UK for virtual social networking services.

In the European Union, recurring calls for a reform of the EU Merger Control notwithstanding, the EC is yet to introduce any changes to the current turnover-based test – that in its current form is substantially similar to the provisions of the Indian Competition Act, 2002. The question that remains unanswered is then how did the EC manage to review many of these transactions – most notably, the 2018 unconditionally cleared Apple/Shazam merger or the 2016 Facebook/WhatsApp merger?

Both Facebook/WhatsApp and Apple/Shazam had failed to meet the turnover based thresholds of Articles 1(2) and 1(3) of the 2004 EUMR.¹⁷ In the EU, if a transaction is capable of being reviewed by three or more Member States, then the notifying parties, may by 'means of a reasoned submission' within the meaning of Article 4(5) of the Merger Regulation request the European Commission to review the merger.¹⁸ In case the Member States express no disagreement with this referral, the proposed concentration can be considered to have a 'Union dimension' and be reviewed by the Commission. In Facebook/WhatsApp, thanks to this provision, the Commission could review the proposed transaction.

In the year 2018, Apple proposed to acquire Shazam for about US\$ 400 million (about €363 million). Considering Shazam's limited worldwide turnover, even though the EU Merger Control thresholds were not met, the transaction was, however, following the 2017 amendments to the German and Austrian laws, caught by the 'value of the transaction' test. Herein, also lies a subtlety. Considering the €400 million threshold in the German ARC,

the transaction was *not* notifiable to the German competition authority BKA. As the Austrian threshold was lower and set at €300 million, the proposed transaction was notified to the Bundeswettbewerbsbehörde (BWB), the Austrian Federal Competition Authority. Pursuant to the provisions of Article 22(1) of the EUMR, the Austrian BWB in turn ‘referred up’ the Apple/Shazam merger to the European Commission. As the national competition authorities (NCAs) of the other Member States joined the Austrian FCA in this referral request, the Commission acquired jurisdiction to examine the proposed concentration.¹⁹

The Facebook/WhatsApp and Apple/Shazam transactions decorously illustrate the nuances of how the EU merger control operates procedurally. This flexibility to ‘refer up’ and ‘refer back’ is very peculiar to EU competition law, and is unavailable across other jurisdictions. Benefitting from this co-operation between the European Commission and the NCAs, the Commission has, for the time being, declined to amend the current threshold tests or introduce any significant reforms to the EU Merger Control. In the aggregate, considering the flexibilities available, such as ‘references’ from the NCAs to the Commission, and *vice versa*, the European Commission enjoys the flexibility to ‘wait and watch’, and if required, based on the experiences, implement changes to the EUMR framework.

In the Indian context, however, this flexibility is absent, and with the CCI as the country’s only competition authority, that ensures that ‘the “*Common Man*” or the “*Aam Aadmi*” has access to the broadest range of goods and services at the most competitive prices’, it is crucial, that as a first step, it *gets* to review these mergers. The question of ensuring this jurisdiction implies first, a selection of the most appropriate test for the notification of the transaction; and second, the selection of a suitable threshold that shall prompt the requirement for notification. In other words, should the test be the ‘share of supply’ or the ‘value of the transaction’ test? Second, if, for instance, the test eventually incorporated is the ‘share of supply’ test, then what should be the threshold – 25 per cent as in the case of the UK Enterprises Act, 2002 or some other, whether a higher or a lower, threshold?

If, in the alternative, the new additional test adopted is the ‘value of the transaction’ test, then what should be a suitable value – an annually adjusted value as in case of the US HSR Act or €400 million as in case of

Germany or €300 million as is the case in Austria, or some other lower or higher threshold?

These are questions of vital significance considering that there exist substantial demographic and purchasing power parity (PPP) differences between India, and other jurisdictions, where these proposed tests are currently in force. Consider, for instance, if the CCI were to adopt the 'share of supply' test. The UK with a homogenous population and the same national language used across the country can effectively implement the share of supply test with a 25 per cent threshold. In case of India, however, with a national population of 1.3 billion and 23 official languages, the CCI in case of a telecoms/media merger, for instance, will certainly come across distinct sub-markets.²⁰ For an effective and meaningful reform of the current test for the determination of jurisdiction, and the notification thresholds, the subtleties of the country need to be taken into consideration. These are some procedural aspects that impact the choice of the relevant test. In addition, there is an additional policy consideration that must be taken into account. The ICT and the pharmaceuticals sectors are the two key innovation-driven industries that are vital to promoting both competition and innovation. Considering the peculiarities of these two sectors - in case of the ICT sector, this being profitability flowing, only after the network effects tip the market towards a given platform or a product, and in the pharmaceuticals meaning that small firms may get acquired early on (typically during phase III of the trials) when they enjoy little or no turnover - choice of an appropriate test for notification is of vital significance. The value of the transaction, usually determined by the parties based on the expected future cash flows, therefore, is a first good indicator of how these transactions are expected to impact the profitability of the acquiring firms.

3. Theories of Harm: The Road (Less Travelled) to Innovation

Notification is only the tip of the iceberg. This current 'gap' in merger control is evident not *only* in determining the jurisdiction and the choice of a suitable filing threshold; it is also evident in the challenges associated with the correct identification of the resulting harm. The traditional theories of harm - such as unilateral effects, foreclosure effects, etc.,²¹ - that well capture the potential harm in ICT mergers, are ineffective in addressing the real concerns in big data mergers. To appreciate the reason

for the failure of the current theories of harm one must be cognizant of the peculiarities of the digital economy. Considering that the additional cost of producing an additional digital copy, such as that of an e-book or software is negligible, Lemley (2015) uses the expression 'zero-price economy' and 'zero marginal cost society' to describe this digital economy. In the zero-price economy, evaluating harm based on the classic principles of neo-classical economics may lead to erroneous results.²² This may be attributed to the fact that the services offered often have zero price in terms of monetary value, even though it may have other significant costs incurred by the consumer, such as the valuable information shared by him/her as regards his/her tastes and preferences. In other words, even though the consumer pays no monetary consideration for the services offered by these digital platforms, and therefore, the price may not be the relevant parameter of competing in these markets. Consider this with the very simple example of communication apps. To call one's friends and family using a fixed line, or mobile phone has monetary costs, which based on the distance, whether local or international, may be substantial. But with the available digital communication apps, today it costs virtually next to nothing to call someone, irrespective of whether they are near or afar. Notwithstanding such a high utility for the consumer, why do these Apps increasingly prefer to offer their services devoid of any monetary costs? Even more intriguing is why these promising startups (such as WhatsApp) get acquired by the established GAFAM for such insane sums? The European Commission (EC) assessed these concerns in Facebook's US\$ 19 billion acquisition of WhatsApp, as the merger offered Facebook access to WhatsApp's valuable user data. As part of the various theories of harm, the EC also assessed the possibility of whether Facebook could combine the two data sets – that is the user data from its social networking site, Facebook, and the data from WhatsApp.²³ Facebook suggested that considering its diverse technical architecture, which was tied to its users' Facebook id, and WhatsApp, which was tied to its users' mobile phone number, it was 'technically impossible' to integrate the two services, and therefore, the parties were not in a position to integrate the two user groups into 'one common network'.²⁴ Adding that if any post-merger data-related concerns were to arise, the relevant provisions of the 2016 EU General Data Protection Regulation (GDPR) could address those concerns, the EC unconditionally cleared the merger.

Post-merger investigations by the EC, however, indicated that the foregoing information provided by Facebook was incorrect, considering that even at the time of the review, Facebook was technically very close to finding a common basis (in technical terms 'Phone ID matching solutions') to integrate the users' Facebook and WhatsApp accounts.²⁵ Following these findings, Facebook was fined €55 million for providing misleading information to the EC.²⁶

The competition authorities discomfort with Facebook's acquisition of WhatsApp and Instagram do not stop here. Following a year-long probe, the US FTC has gone even a step further than the European Commission, and for the first time is planning to unscramble a digital egg – in other words, file an antitrust lawsuit calling for the divestiture of WhatsApp and Instagram from the digital giant.²⁷

In the Google/Double Click, the merger offered Google the possibility to combine the 'deep information' gathered through Double Click that, in turn, could be combined with the 'broad and general information' about the consumer's web surfing habits.²⁸ When the merger was first proposed in 2007, some of the Commissioners, such as the then Commissioner Harbour at the US Federal Trade Commission (FTC) anticipated the possibility that Google may potentially 'commercially use' this 'deep information', and therefore, in a dissenting opinion argued that the merger be conditionally cleared.²⁹ However, as the other Commissioners saw no harm to competition, Google/Double Click received the US FTC's unconditional clearance.³⁰ On the other side of the Atlantic, the EC too unconditionally cleared the merger, as it observed that any data and privacy-related issues were to be taken care of by the then Data Protection Directive (since replaced by the more stringent and mandatory 2016 EU GDPR).³¹

In another study, I identify that the distinct industry-specific challenges posed by the Information Communications Technology (ICT) markets, and the telecommunications sector – can be, with suitable adaptations, effectively met by the flexibilities offered by the current EU merger control framework.³² However, considering the peculiarities of the platform economy – such as the 'economics of zero', network effects, economies of scale and scope and platform envelopment³³ – the current merger control framework certainly merits a critical re-think. Availability of *valuable*

news and knowledge, and other services to the consumers for ‘free’ for the *invaluable information* that the consumers offer about themselves in return merits contemplation (Furman, 2019). In order to effectively capture these big data mergers, ‘privacy’ and ‘data’ should be more central to antitrust analysis (Swire, 2007). Swire (2007) argues that privacy be considered a dimension of competition. In the more recent Microsoft/LinkedIn merger, the European Commission was of the opinion that the merger could lead to the reduction of consumer welfare in the market for Professional Services Networks (PSNs). Competing providers of PSN, such as Xing, that offered enhanced privacy options were expected to be marginalised following post-merger foreclosure strategies by the merged entity.³⁴ The remedies, as the following section discusses, addressed these foreclosure concerns.

Network effects can be direct (as in case of telephone networks) or indirect (as was the case in the classic Microsoft Windows abuse of dominance case). Indirect network effects, have been over time identified to lead to another very unique phenomenon in platform markets, referred to as ‘market envelopment’.³⁵ First defined in the context of Microsoft Media Player’s ‘envelopment’ of the then dominant music player, ‘Real’ (Eisenmann et al., 2010; Parker et al., 2016); this theory has recently gained significant traction in the debate on the reform of competition policy.³⁶ Market Envelopment means that it is extremely profitable for firms to leverage their dominance from one market to another neighbouring market, and thereby develop an ‘ecosystem’ of services, such that the consumer never leaves the platform.³⁷ Considering these distinctive features of the platform economy, non-horizontal mergers, that have generally been considered benign and actually efficiency-enhancing, can in effect substantially harm the process of competition and innovation.³⁸ To effectively counter these effects, authorities need to develop newer and more novel theories of harm that take into account the distinct nature of the digital economy (Crémer et al., 2019). A key contribution of such a reform policy will be the possibility to capture and assess non-horizontal mergers. Considering the complexity and exceptionally long time taken in case of follow on abuse of dominance cases (Budzinski and Stöhr, 2018), merger control may be a more useful instrument to ensure competitive digital markets. Moreover, once the platforms have tipped to dominance, and the competitors have been eliminated, there is limited, if any, possibility to resuscitate contestability in the tipped markets. Considering this complex dynamics

of the digital economy, the Furman Report (2019, p.54) called for the setting-up of a Digital Markets Unit (DMU), that amongst others could identify, and focus on companies with a 'strategic market status', that is identify and regulate companies that enjoy a position of significant market power 'over a gateway or bottleneck', and thus, 'control others' market access. In addition to regulated monitoring of these firms, the Report also called for an obligatory reporting by these firms.

4. Re-thinking Remedies

This section offers a brief overview of an effective remedial design for digital mergers. In other words, considering the very special nature of the platform economies, such as network effects, QWERTY-nomics and customer lock-in, the discussion evaluates what can be a good remedial design - that preserves merger-specific efficiencies, while successfully circumventing any potential anti-competitive effects of the proposed transaction?

QWERTY-nomics refers to the set of factors - such as learning effects, economies of scale and customer lock-in - that establish a given product or platform as the dominant standard. QWERTY-nomics comes from the QWERTY keyboards that we see on our laptops and computers (previously typewriters). The key alternative keyboard is the DSK (the Dvorak Simplified Keyboard), more familiar to the Apple Mac users (Arthur, 1983). Even though the DVORAK keyboard in many a contests proved to be more efficient and superior to the QWERTY keyboards, however, once a certain critical number of users tipped towards the latter, QWERTY keyboards emerged as the *de-facto* standard.³⁹ Switching to other standards would require learning and adapting to the new device, and hence, following these learning effects, one observes that customers get locked-in to these devices. This industry-specific feature, therefore, is the first important consideration to keep in mind for an effective design of remedies.

Second, it is generally agreed that non-structural remedies are highly effective in the ICT sector in general and the platform economy in particular.⁴⁰ Non-structural remedies, here mean the remedies that effect the behaviour of an enterprise, as distinguished from the structural remedies, that alter the structure of an enterprise. Delineation of remedies as structural and non-structural is more appropriate instead of the alternate classification as structural and behavioural.⁴¹ It has been observed that

non-structural remedies – such as non-discriminatory access, licensing and firewall remedies are also the more frequently employed remedies in ICT and telecommunications mergers.⁴² Parties' access commitments to the US Department of Justice (DoJ) in the Google/ITA are insightful in this regard. In 2010, Google proposed to acquire ITA, the world's leading provider of airfare pricing and shopping system (P&S system).⁴³ To address the DoJ's 'vertical' competition concerns, the parties offered a set of non-structural commitments, that included – licensing of QPX and InstaSearch, two key software solutions – to potential licensees on 'fair, reasonable and non-discriminatory' (FRANDly) terms.⁴⁴

Another very interesting decision as regards the design of remedies is the European Commission's conditional clearance of Microsoft's acquisition of LinkedIn. Even though the Commission's analysis is very insightful as regards the impact of the big data on markets as dispersed from search to professional networking (Hatton et al., 2018), the remedies addressed the European Commission's conglomerate concerns (and not any big data-related concerns).⁴⁵ More particularly, the merger was expected to lead to foreclosure of competing PSNs, as Microsoft's existing monopoly in the productivity software offered it the possibility to integrate LinkedIn features into Office. To address these concerns, the parties offered 'Integration Commitments', according to which other PSNs could access, without any discriminatory terms and conditions, Office's Add-in Programme and the associated Application Programming Interface (API).⁴⁶ This decision not only highlights how conglomerate mergers, usually considered to be benign, may in the digital world lead to anti-competitive concerns. The design of remedies, in addition, signals the value of access remedies, in ensuring that, whereas on the one hand, the merged entity continues to enjoy the economies of scale and scope, the key to success in platform economies, then on the other, new entrants, with access to the key resources and facilities, that constitute significant barriers to market entry, can effectively enter the relevant markets and compete on the merits.

It may be useful to add here that the foregoing merger decisions offer a useful benchmark for design of remedies in big data mergers. To date, however, no competition authority, to the best of the knowledge of the author, required remedies on account of big data-related concerns in merger control.

5. Summary

For the design of an effective merger control framework, it is absolutely essential that the competition authority at least gets to review big data mergers in order to understand their true impact on competition and innovation in the relevant market.

This paper makes the following evidence-based recommendations to improve the current merger control framework in India. The first recommendation is to amend the current tests for the determination of jurisdiction, and the notification thresholds. Moreover, considering the demographic peculiarities of the Indian markets, any amendment to these tests, must in addition, also present the flexibility to duly account for the distinct sub-markets (or the regional markets) with all their linguistic and cultural diversity across the country (Section 2 *supra*). This is particularly germane while assessing mergers in the converged telecoms sector.⁴⁷

It is true that both type I (false positive) and type II (false negatives) have significant externalities on the process of competition and innovation in an economy. With the significant Chicago school influence, the general tendency has been to err towards type II (false negatives) rather than type I (false positives) (Devlin and Jacobs, 2010). The approach is principally grounded in the belief that the effect of a 'pro-competitive behaviour', if erroneously prohibited, will be irreversible, whereas the effect of an anti-competitive conduct, if allowed, will be transient on account of the 'self-correcting nature' of the markets.⁴⁸ As the experience of hindsight reveals, this may not necessarily be true in the digital world. The UK CMA's unconditional clearance of the *Facebook/Instagram* merger, in retrospect identified as a 'naïve decision' by its Chief Executive Andrea Coscelli, is a case in point (Ibitoye and Ebersole, 2018). This word of caution brings my recommendation to address the second and third *gap* in the current merger control framework. We have come a long way from the Chicago to the post-Chicago world, where in game theoretical models have significantly contributed to our understanding of strategic behaviour in the digital economy.⁴⁹ What can be those potential theories of harm, that can first, take the peculiar strategic behaviour of the firms into account? And second, how can privacy be identified as a dimension of competition? As regards these questions – this paper recommends the need to systematically assess

and address the strategy of ‘platform envelopment’, a commonly identified behaviour in the digital markets. In other words, this paper recommends that non-economic parameters of competition such as privacy be taken into account.

Fourth, as regards the design of remedies, the decisions referred to, particularly the Google/ITA merger, offer a useful first indicator of designing effective remedies for big data mergers.

A notable limitation, and perhaps a recommendation for further research that this paper offers is an empirical assessment of the value of data. This is particularly important, considering that India is the world’s second most populated country, and for any online service provider to succeed on a global level, success in the Indian markets is a *sine qua non*. It is the value of data that fuels the engine of these big data mergers. To understand the subtleties of these mergers, the value of this data needs an economic assessment, a quantification.

Endnotes

- ¹ For an interesting account of how a leading US-retail store data-mined customer information to accurately predict the pregnancy of a teenage girl, see Hill (2012).
- ² On account of the word limit, only key highlights of the European Commission’s decisions in these cases are discussed here. For a detailed case study analysis of these and other big data mergers, see Tyagi (2019a).
- ³ For the sake of simplicity, and considering the word limit, the expression platform economy has been generally and interchangeably used to refer to various kinds of multi-sided platforms. A well-rounded discussion will necessarily call for deliberating on the fine distinctions between different kinds of transaction-based and non-transaction-based platforms. See Filistrucchi et al. (2013).
- ⁴ The expression ‘converged telecoms sector’ refers to the various sectors of the economy that have been disrupted following convergence, digitisation and digitalisation of the economy. With such an encompassing definition, it refers not only to the convergence of fixed/mobile and content, but also to the platform economy. Considering the word limit, in this paper, however, the discussion concentrates only on the platform economy, and the acquisitions by GAFAM (Google, Amazon, Facebook, Apple and Microsoft), currently under the radar of the competition authorities worldwide. For a comparative study and the research insights on the converged telecoms sector see Tyagi (2019a). For inter-disciplinary insights using inputs from competition policy and business strategy, see Tyagi (2019b).
- ⁵ Customer lock-in may happen on account of a number of factors, most notable amongst them being switching costs and learning effects. Switching Costs refers to the costs

incurred in terms of switching from one service provider to another. These may be fixed costs such as the investments made in terms of purchasing new hardware or software or learning effects that is the time required to learn how to use and adapt to a new interface.

⁶ Even for Facebook, India is one of its biggest and most crucial markets. Threatened from the success of TikTok in India, Facebook launched its Tik Tok clone in India. The Indian market, therefore, is not only crucial to the success of the social networking giant; it also is a place to test new products and services. Manish Singh, Facebook tests TikTok-style video format on its main app in India, *Tech Crunch* (14 August 2020)

⁷ Case No IV/M.619 Gencor/Lonrho, paras 4-12.

⁸ *Ibid.*, para 219.

⁹ Case T-102/96 *Gencor Ltd v Commission of the European Communities*, Judgement of the Court of First Instance (Fifth Chamber, extended composition) [1999] ECR II-753, para 79.

¹⁰ *Ibid.*, para 90.

¹¹ *Ibid.*, para 91. Emphasis added.

¹² See Tyagi (2019a), pp. 31 ff.

¹³ For a detailed discussion on jurisdiction and filing thresholds, see Tyagi (2019a), 277-280.

¹⁴ Bundesministerium für Wirtschaft und Energie (2019a), available only in German. For an English summary of the changes, see Freshfields Bruckhaus Deringer (2017).

¹⁵ The value is adjusted annually. The original prescribed value was US\$ 200 million, with the current adjusted threshold for the year 2018-19 being US\$ 337.6 million. See, Federal Trade Commission (2018).

¹⁶ UK Enterprises Act, 2002, Sec. 23.

¹⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/01, Article 1(2) and 1(3).

¹⁸ *Ibid.*

¹⁹ *Apple/Shazam* (Case M.8788) [2018] OJ C417/04, paras 6-9.

²⁰ See, for example, the Competition Commission of India Combination Registration No. C-2012/03/47 (28 May 2012) in Reliance Industries Limited/Independent Media Trust <<https://www.cci.gov.in/sites/default/files/faq/C-2012-03-47.pdf>> accessed 6 December 2019. In the said decision, however, the complexity of sub-markets was not discussed. The discussion was confined to contestability of the markets and the ease of starting new channels. The CCI at para 29 observed, 'It is apparent from the above that new television channels can be started with ease in India with sufficient scope for innovation and competition, both in terms of technology and content.' Further, even though the relevance of targeted national and regional viewership was referred to in

para 28, it was not elaborated, considering the CCI's observations as regards the ease of starting new channels (para 29). It may be interesting to compare this approach of the CCI with the European Commission's distinct approach as regards regional markets with different *lingua franca*. See, for example, the European Commission's decisions in the Dutch Liberty Global/Ziggo and its preliminary observations in the Telia/Bonnier Broadcasting merger, discussed in Tyagi (2019c).

- ²¹ For a discussion on unilateral effects and other non-horizontal theories of harm in the ICT sector, see Tyagi (2019a), 47 seq.
- ²² See Tyagi (2019a), p. 265 seq.
- ²³ Facebook/WhatsApp (Case No COMP/M.7217) [2014] OJ/C 4174, paras 180-190.
- ²⁴ *Ibid.*, paras 116-142.
- ²⁵ Commission Decision of 17.05.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply of an undertaking of incorrect or misleading information (Case No. 8228 - Facebook/WhatsApp), paras 61 seq.
- ²⁶ *Ibid.*, paras 107-108.
- ²⁷ See Kendall, McKinnon and Tracy (2020) and Tracy (2020). It should come as no surprise that by the time this paper gets published, the digital eggs may be on their way to get unscrambled!
- ²⁸ Preliminary Opinion of the European Data Protection Supervisor, 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (March 2014), 29-30 <https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf> accessed 6 December 2019.
- ²⁹ Dissenting Statement of Commissioner Pamela Jones Harbour, Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007) <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf> accessed 6 December 2019.
- ³⁰ Press Release, Federal Trade Commission, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), <<https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation>> accessed 6 December 2019.
- ³¹ *Google/DoubleClick* (Case COMP/M.4731) [2008] OJ C184/10.
- ³² Tyagi (2020). For a discussion on market envelopment, and non-horizontal harm in particular, see Tyagi (2019a), 37-38.
- ³³ *Ibid.* For a detailed and systematic discussion on these factors, see Tyagi (2019a), 31 seq. See also the references therein.
- ³⁴ Microsoft/LinkedIn (Case M.8124) [2016] OJ/C 388/04, paras 339-352.
- ³⁵ See Tyagi (2019a), 37 seq.

- ³⁶ Bundesministerium für Wirtschaft und Energie (2019b), 17 seq. Kindly note that the report is available only in German.
- ³⁷ *Ibid.*
- ³⁸ *Ibid.*
- ³⁹ Here the discussion is limited to de-facto standard setting, and the emerging QWERTY-nomics. Standard Setting may also be de jure, as, for example, standards being set by the Standard Setting Organisations (SSOs). An interesting interplay of standard setting and merger control can, for instance, be seen in the Google/Motorola merger. For a comparative discussion of the unconditional clearance decisions of the US and EU competition authorities (that took account of Google's commitment to the SSOs to offer FRANDly access to Motorola's patents) on the one hand and the conditional clearance decision of the then Chinese Ministry of Commerce that following Google's clear commitments to offer FRANDly access to Motorola's patents, offered conditional clearance, see Tyagi (2019a), 88 seq.
- ⁴⁰ See Tyagi (2019a), 143 seq.
- ⁴¹ On a property rights-based reason, and the effectiveness of such a classification, see Tyagi (2019a), 161 seq.
- ⁴² *Ibid.*
- ⁴³ United States v. Google Inc., Case No. 1:11-cv-00688, 2011 WL 1338047, Complaint 3 (D.D.C. Apr. 8, 2011), < <https://www.justice.gov/atr/case-document/file/497686/download>> accessed 5 December 2019.
- ⁴⁴ *Ibid.*
- ⁴⁵ Microsoft/LinkedIn (Case M.8124) [2016] OJ/C 388/04. For a detailed case study based analysis of the decision, see Tyagi (2019a), 290 seq.
- ⁴⁶ *Ibid.*
- ⁴⁷ See Tyagi (2019c).
- ⁴⁸ Devlin and Jacobs (2010). See also the references therein.
- ⁴⁹ See Tyagi (2019a).

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Antitrust Investigation against E-Commerce Platforms in Goods Category in India: A Review from Timeliness Perspective

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Abstract: With the entry of e-commerce, the traditional way in which business was conducted in a marketplace has changed considerably. Although, e-commerce offers a multitude of pro-competitive benefits, yet it is vulnerable to anti-competitive practices owing primarily to its characteristic features such as strong network effects, high innovation rates, fast-changing technologies, etc. In this paper, we review antitrust cases against e-commerce platforms in goods category, in light of the fast-moving nature of online businesses and the importance of timeliness in completion of investigation. We have adopted a doctrinal research methodology in this paper. Based on the findings, we suggest that as per the dynamic situation of markets, it is imperative that a time-bound investigation may be completed so that the true picture comes out. We recommend a holistic investigation by the Director General in such cases and the use of negotiated remedies in the form of settlements and commitments.

Keywords: E-commerce, platform business, fast-moving, online marketplace platform

1. Introduction

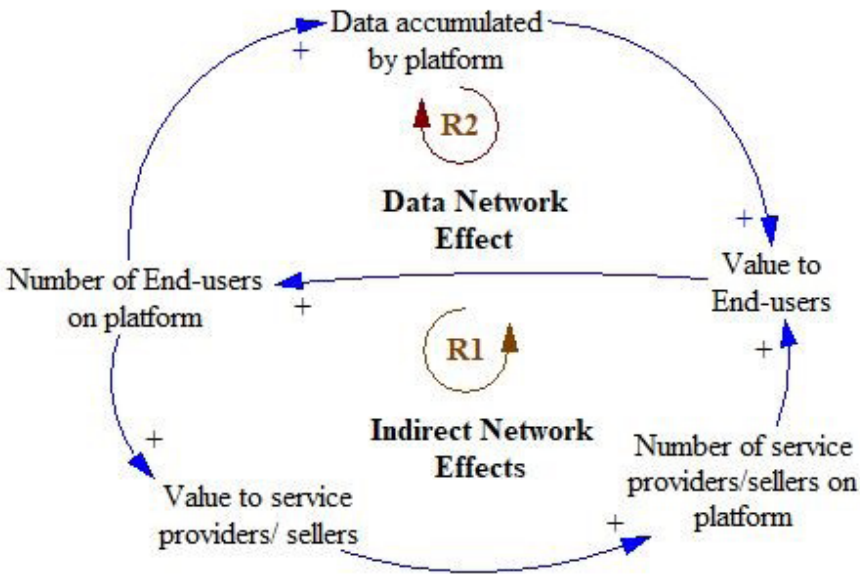
We live in an era in which almost all aspects of our lives have been permeated by digital technology. The technology companies are revered for their disruptive innovations and efficiencies they create. However,

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technology-driven businesses are vulnerable to acquisition and abuse of market power (Parsheera, Shah, and Bose, 2017, p. 3). Digital markets, which are characterised by strong economies of scale and scope, network effects, and multi-sided markets, provide unique opportunities as well as pose challenges for antitrust enforcement (CLRC, 2019, p. 149). With regard to challenges, the fast-moving nature of online business and the relevance of timely investigation in antitrust cases against them have been subject matters of discussion amongst various competition law scholars. The time elapsed *between a full-fledged investigation and the determination of violation* is a matter of concern in antitrust cases against online businesses (Parsheera, Shah, and Bose, 2017, p. 6). The ultimate findings of a case may become ineffectual or irrelevant due to the *mismatch between "law time"*, i.e. the time that authorities take in deciding a case and *"new-economy real time"* (Posner, 2000, p. 9). Compared to other sectors, internet businesses have much faster growth and to make a difference, the opportunity lies in the time window before the setting-in of network effects. A time-bound system of investigation needs to be adopted to ensure the relevance of findings, given the changing market dynamics (Parsheera, Shah, and Bose, 2017, p. 18). In the antitrust investigation against the internet giant Google conducted by the European Commission (EC), Joaquin Almunia, the then Competition Commissioner of the EC, notes: *"fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement"* (Almunia, 2012). Margrethe Vestager, Executive Vice-President of the European Commission for a Europe Fit for the Digital Age, highlights the relatively slower pace of the European Union (EU) antitrust rules to catch up with the pace of digital and fast-moving markets and goes on to say that *"fines do not do the trick"* once the market has tipped and network externalities are strong (European Parliament, 2019, p. 28). Although, tipping is common to network industries¹ but the market can tip in favour of the player who does not necessarily have the most innovative product but uses anti-competitive practices to tip market in its favour (Bose and Parsheera, 2016). Fines only serve as a punishment for illegal behaviour in the past but may not restore effective competition (European Parliament, 2019, p. 28) if there are significant delays in the determination of violation.

Figure 1: Feedback Mechanism related to Network Effects² in Platforms



Source: Drawn by Authors.

In recent times, e-commerce, a part of the fast-moving online business ecosystem, is witnessing fast growth in India.³ However, with this growth, the allegations against e-commerce platforms indulging in anti-competitive practices have also grown in number. In view of e-commerce’s growing importance, the Competition Commission of India (CCI) carried out a market study to understand the functioning of e-commerce sector and the possible implications for the competition (CCI, 2020). The Competition Law Review Committee (CLRC), constituted to review and recommend changes to the Competition Act, 2002, also took up the issue of Technology and New Age Markets in its report in which it assessed the Competition Act on whether it is ready to address the issues of growing digital markets (CLRC, 2019). Hence, with this context and taking a cue from the existing literature on the importance of timely investigation, a research study aimed at reviewing and analysing the antitrust cases against e-commerce platforms in India from the perspective of time elapsed in the investigation will be a good academic contribution that will help in evolving a newer approach to competition enforcement in e-commerce space.

1.1. Research Objective and Questions

This research paper aims to review and analyse recent antitrust cases against e-commerce platforms in goods category⁴ in light of the delays in investigation and come up with suggestions to speed up the process. More specifically, this research paper attempts to answer the following two broad questions:

- What are the current trends of antitrust cases pertaining to e-commerce platforms in India, in light of time elapsed in determination of violation? In answering this question, researchers summarise each case, and discuss the timelines with a focus on delays. The delays for the purpose of the study mean overall delays which may be due to delay by the CCI or any other judicial authorities.
- How, in light of recent judicial pronouncements, a holistic investigation by Director General (DG) becomes important in these cases? In answering this question, the researchers discuss various judgements of Courts which provide ground for the DG to investigate a matter referred to it by the CCI in a holistic manner.

1.2. Methodology

A doctrinal research methodology has been adopted by the researchers for answering the above research questions. The data comes from secondary sources such as various judgements of Honourable Supreme Court of India (SC), High Courts (HC), and the Competition Commission of India. In addition to this, various journal papers and articles have also been referred to.

2. A Brief Overview of Competition Law in India and Background to E-Commerce Sector

Before going ahead, it is worthwhile to understand the contextual background. In this section, researchers attempt to provide an overview of competition law framework in India followed by a brief discussion on the concept of e-commerce and underlying possible competition issues.

2.1. Competition Law Framework in India

The competition law landscape in India is governed by *the Competition Act, 2002*, henceforth called as "The Act". This Act is the successor of Monopoly

and Restrictive Trade Practices Act, 1969 (“MRTP Act”) which was the operational law that regulated some competition aspects, prior to the time when the Competition Act got operationalised in 2009. The essence and objective of the Act can be captured in its preamble. To quote:

“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, and for matters connected therewith or incidental thereto” (The Competition Act, 2002, p. 1).

Based on the preamble, it can be inferred that the broad thrust of the Act is on ‘economic development’ of the country. It envisages a Commission with four major aims, namely:

- prevention of practices that adversely affect competition in the market,
- protection of consumer interest,
- promotion and sustenance of competition in the market, and
- ensuring ‘freedom of trade’.

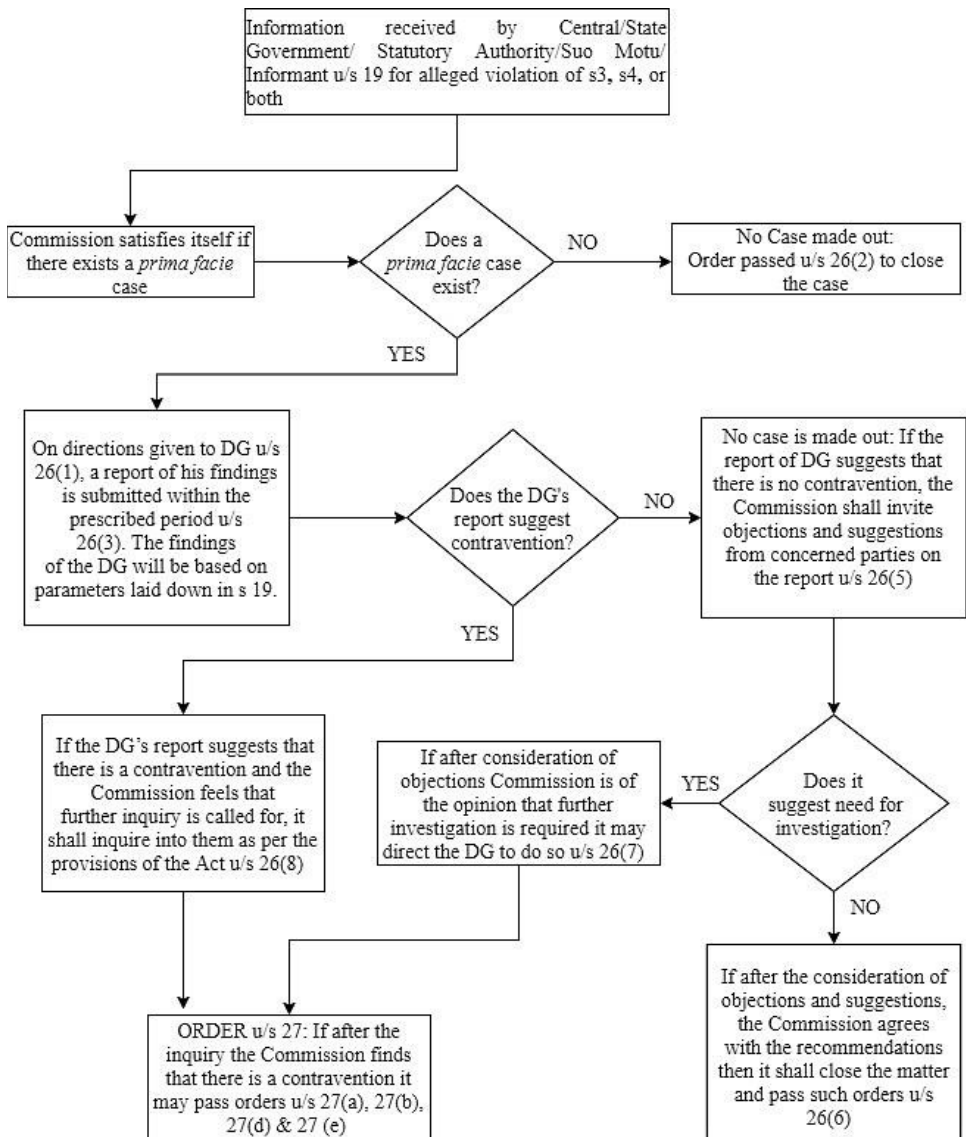
In pursuance of these aims, the Act prohibits the agreements that are anti-competitive in nature under Section 3 of the Act, whereas abuse of dominant position is prohibited under Section 4 of the Act. The Act also regulates Combinations under Section 5 and Section 6.

2.2. E-Commerce Sector in India and underlying Competition Issues

Furthermore, trends of the e-commerce sector in India including some key statistics, features, and underlying competition issues need to be discussed. This section attempts to do the same with a special emphasis upon the CCI’s market study on e-commerce, recently concluded, in its quest for better understanding this sector and prevalent practices.

To explain in brief, e-commerce or electronic commerce is a “*business occurring over networks using non-proprietary protocols established through an*

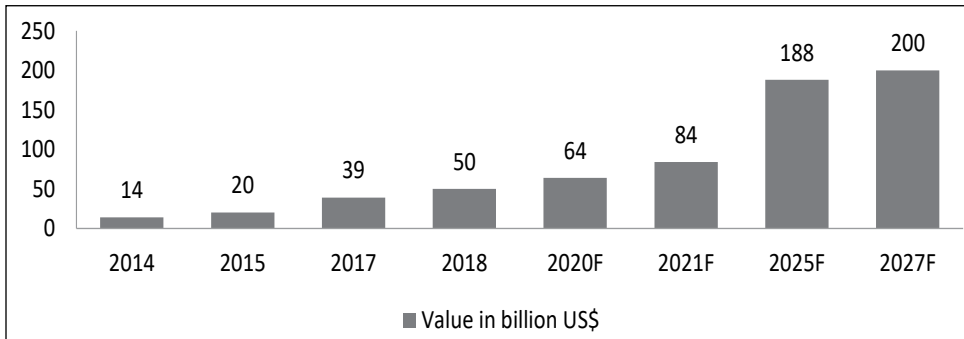
Figure 2: Procedural Flowchart for Section 3 and Section 4 Cases



Source: Adapted by Authors from Prakhar et al. (2015).

open standard setting process” (OECD, 2000, p. 7). Simply put, e-commerce implies sale and purchase of goods and services over an electronic medium such as the internet. In Draft National E-Commerce Policy, released by the Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, Government of India, the term e-commerce has been described as follows: “*e-commerce includes buying, selling, marketing or distribution of (i) goods, including digital products and (ii) services through electronic network. Delivery of goods, including digital products, and services may be online or through traditional mode of physical delivery. Similarly, payments against such goods and services may be made online or through traditional banking channels, i.e. cheques, demand drafts or through cash*” (DPIIT, 2019, p. 9). The major categories in e-commerce are goods, online travel agencies (OTAs), food, tech, etc. The market size of e-commerce in India for the years 2014 to 2018, with a projection till 2027, is provided in below chart (Figure 3).

Figure 3: E-Commerce Market Size in India*

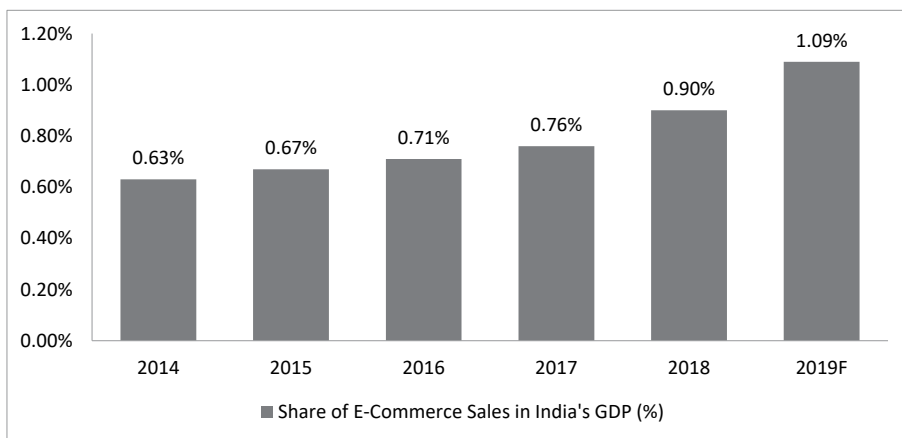


Note: *Estimated values. F after year means forecasted value. This forecast does not estimate the impact of COVID. The current trends emerging after COVID indicate that e-commerce may reach US\$ 200 billion sooner than 2027 (Unicommerce, 2020).

Source: IBEF (2019).

The importance of e-commerce for India’s economy can be understood by its growing share in Gross Domestic Product (GDP). Figure 4 provides share of GDP made up by e-commerce sales for the years 2014-2018, along with a projection for the year 2019.

Figure 4: Share of E-commerce in India's GDP

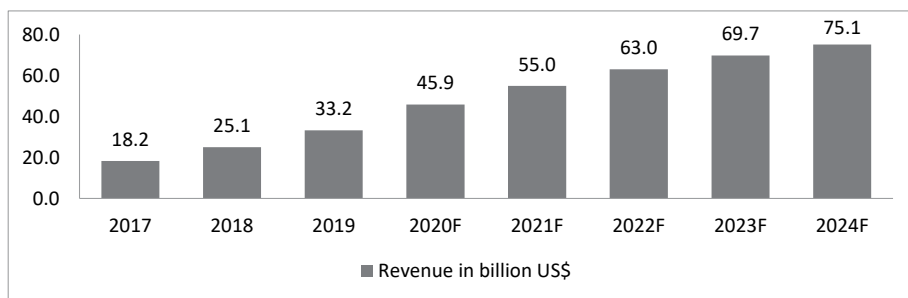


Note: F after year means forecasted value.

Source: SAP; ECommerce Foundation (2019, p. 11).

Figure 5 provides revenue of retail e-commerce market in India for the years 2017 to 2019 with a forecast till 2024. According to this forecast, the revenue of e-commerce can be expected to grow to US\$ 75.1 billion by 2024 with a CAGR of 22.42 per cent.

Figure 5: Retail E-Commerce Revenue Forecast for India



Note: All monetary figures refer to the annual gross revenue and do not factor in shipping costs. Forecast adjusted for expected impact of COVID.

Source: Statista (2020).

The COVID pandemic, which hit us in 2020, has also provided a significant boost to e-commerce in India. The e-commerce saw growth by 17 per cent as compared to pre-lockdown order volume (Unicommerce, 2020). If we

consider the share of online retail in overall retail, it was around 1.5 per cent in 2016, 3 per cent by 2019, and 4.5 per cent after six months in 2020. The journey from 1.5 to 3 per cent took three years, however, it grew to 4.5 per cent in just six months due to the pandemic effect (Redseer, 2020).

2.3. Competition Issues in E-Commerce: A Discussion Based upon CCI's Market Study on E-commerce in India

In this section, the researchers discuss the key findings from the “Market Study on e-commerce in India” conducted by the CCI. However, the discussion is limited to e-commerce in goods category, in line with the theme of the paper.

Starting with preliminaries, the CCI (2020) in its study has found that there is a variation in the relative importance of online channel for distribution of goods as compared to offline channel based on the type of goods. For some goods such as mobile phones, online mode is preferred and for some other goods, offline mode is preferred. According to the study, price competition has increased in this space. The retailers change price very frequently and sometimes even multiple times in a day.

The study highlights the key competition issues pertaining to e-commerce platforms. “*Platform Neutrality*” is first major issue that has been brought out in the study. There are broadly two issues which stem the concerns with regard to platform neutrality. First issue is related to the “*own private label*” products which are nothing but the products manufactured by the third party and sold by the platforms with their brand name. Second issue is related to “*preferred sellers*” who allegedly enjoy preferential treatment from the platform. Simply put, this issue arises when e-commerce platforms serve both as a platform and a competitor on the same platform. In this way, they are in a position to leverage their platform control to the disadvantage of other sellers. Also, the intermediary role of e-commerce platform is such that it allows the platform to gather a large amount of data related to demand, price, etc. With this much data available, platforms can use it to deliver more targeted recommendations for product on the consumers’ side, whereas, on the sellers’ side, it can boost their own label products or preferred sellers. Apart from Platform Neutrality, second major issue suggested by the findings of the study is of “*unfair contract*”

terms". The study finds the absence of standard contract terms available to all sellers. The sellers have alleged that commission rates are changed unilaterally by the platform owner. Under the unfair contract terms, "deep discounting" is also found to be a key issue. The sellers have claimed that they have to sometimes participate in the deep discount sales at rates that are unviable to them; otherwise, their visibility becomes lower on the platform. The third major issue, which the findings of the study suggest, is related to the "Platform Price Parity Clause". Through this clause, the sellers of goods are restricted to sell their goods on other platforms at lower rates. This is imposed through a contract by the platform. The fourth major issue is related to "Exclusive Agreements". As per the study, stakeholders claim that there is a presence of exclusive agreements between some brands and the platform. There are two kinds of such exclusive agreements: under first kind of agreements a certain product offering is launched exclusively on a single online platform and under second kind of agreements a platform lists only one brand in certain product category. This issue is more pronounced in the case of smartphones. Some smartphone brands launch their product only through preferred sellers of the platform concerned, and these preferred sellers most of the time do not have multi-homing⁵ and operate exclusively on the concerned platform. The perception of retailers about preferred sellers is that it is an extended arm of the platform.

3. Analysis of Antitrust Cases against E-Commerce Platforms in Goods Category in Recent Times

In this section, the researchers present a review, along with an analysis, of the competition law cases pertaining to e-commerce platforms in goods category. Although, there are multiple cases but two specific cases, namely *All India Online Vendors Association ("AIOVA") v. Flipkart India Private Limited and another ("Flipkart")* and *Delhi Vyapar Mahasangh v. Flipkart and Amazon* have been analysed in detail due to their relevance in answering the research questions.

3.1. Delineation of Relevant Market: Changing Stance of the CCI

The first and perhaps the most crucial part of any competition law case is the delineation of the relevant market which includes delineating both relevant geographic market and relevant product market. In the cases

pertaining to e-commerce, the CCI's stance on defining relevant market has not been uniform. In *Ashish Ahuja v. Snapdeal and SanDisk*, the CCI asserted that the online and offline markets are merely different channels of distribution of the same product, not different relevant markets. Quoting CCI,

*"...these two markets are different channels of distribution of the same product and are not two different relevant markets."*⁶

However, the CCI changed its stance in *AIOVA v. Flipkart*, where it acknowledged the difference between online markets and offline markets. The reasoning provided for this distinction is, mainly, the convenience which the online markets provides to both buyers and sellers as compared to their offline counterparts. The relevant market in *AIOVA v. Flipkart* is defined by the CCI as *"Services provided by online marketplace platforms for selling goods in India."*⁷ Further, the CCI also made a distinction between *"online marketplace platform"* and *"online retail store"*. While making this distinction, the CCI also acknowledged the presence of network effects in the case of online marketplace platforms which is almost absent in online retail store.

3.2. Case No. 20 of 2018 All India Online Vendors Association Ltd. v. Flipkart India Private Limited and another

All India Online Vendors Association (AIOVA) filed the Information in this case alleging that Flipkart India has contravened the provisions of Section 4 of the Act.

In this case, the CCI ruled that the party in question is not even dominant in the relevant market, let alone abuse of dominant position by it.⁸ The reasons given for this are mainly the presence of multiple players in the market, a close competitor with significant valuation and global presence, new entrants as an indicator of low-entry barriers, etc. However, the CCI acknowledged that network effects may provide a certain advantage to incumbent players as compared to the newer players. A noticeable proceeding in this case was that the CCI held preliminary conferences with the parties, and also invited Amazon, not a party in this case, to understand *nuances of the online retail sector.*⁹

Finally, the CCI closed the case under Section 26(2) of the Act in its order dated 06.11.2018. However, the informant, AIOVA, challenged this order

in Appellate in *Competition Appeal (AT) No. 16 of 2019*, which subsequently overturned the judgement of the CCI and directed the CCI to direct the DG to carry out an investigation into the matter. This order has been discussed in detail in Section 3.5.

3.3. Case No. 40 of 2019 *Delhi Vyapar Mahasangh v. Flipkart and Amazon: First Investigation Ordered by the CCI*

Delhi Vyapar Mahasangh filed the Information in this case on 25.10.2019 against Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities for an alleged contravention of Section 3 and Section 4 of the Act.

Broadly, the allegation was against the vertical arrangements between Flipkart/Amazon with their 'preferred sellers' on the platform. More specifically, four practices of the marketplaces were alleged to be in contravention to Section 3(1) of the Act. These were exclusive launch of mobile phones, preferred sellers on the marketplaces, deep discounting, and preferential listing/promotion of private labels.¹⁰

The CCI, in this case, *prima facie* observed that there is a possibility of an exclusive arrangement between e-commerce platforms and manufacturers of smartphones which can lead to an appreciable adverse effect on competition. Quoting CCI,

*"...Thus, exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition."*¹¹

In this case, the CCI passed an order dated 13.01.2020 under Section 26(1) directing the DG to investigate for the alleged contravention of Section 3(1) read with Section 3(4). However, with regard to Section 4, the CCI stated that the Act does not allow for the inquiry into the cases of collective/joint dominance.

However, Amazon challenged the order of the CCI in *Delhi Vyapar Mahasangh v. Flipkart and Amazon* in Honourable High Court of Karnataka in a Writ Petition (WP) 3363/2020. HC has stayed the 26(1) order passed by the CCI dated 13.01.2020. This order is discussed in detail in the following sub-Section 3.4

3.4. WP 3363/2020 *Amazon v. Competition Commission of India*

The Petitioner, Amazon, challenged the order dated 13.01.2020 passed by the CCI in Case No. 40/2019 directing the DG to undertake an investigation under Section 26(1) of the Act in Honourable High Court of Karnataka. Justice P.S. Dinesh Kumar in his Daily Order dated 14.02.2020 in WP 3363/2020 has ordered that the CCI Order shall remain stayed and the Respondents shall file their statement of objections in 8 weeks.¹²

The basis of the stay order was the CCI's inference in the impugned order that there 'appears' to exist an agreement between smartphone manufactures and e-commerce platform, without there being any material on record. The Judge took notice but did not comment on the *Star India Pvt. Ltd. v. CCI* judgement of the Bombay High Court which said that an agreement between parties must be recorded as an inference with material on record rather than as something that appears to be the case.

The Judge also took note of the following background facts in the judgement.

- The CCI, in 2018, in the complaint filed by All India Online Vendors Association against Flipkart and another entity, absolved the Amazon and Flipkart of violation of Section 4 of the Act. In the mentioned case, the CCI invited Amazon, which was not a party in this case, but was called upon to understand nuances of the sector. However, the CCI did not call upon Amazon to put-forth its case in *Delhi Vyapar Mahasangh v. Flipkart and Amazon* despite the fact that the information filed in the case contained a reference to the CCI's order in AIOVA v. Flipkart.
- Confederation of All India Traders (CAIT) filed a WP each in the Delhi High Court and the Jodhpur High Court. In the former, namely *W.P. (C.) No. 9932/2018* against Directorate of Enforcement (DOE), Flipkart and another entity, the Court's disposal was based on the accepted submission that these entities were located in Bengaluru so the concerned authorities may have examined this issue and any inquiry if warranted would have to be carried out by these authorities.
- *W.P. (C) No. 7907/2018* filed by Telecom Regulatory Authority of India (TRAI) before the Delhi High Court against DOE, Amazon and

Flipkart was disposed of by recording the counter affidavit filed by the Union of India which stated that an investigation under FEMA, 1999 was in progress.

- CAIT filed *W.P. (C.) No. 14400/2019* before the Jodhpur High Court, that sought the Court to direct the Ministry of Commerce and Industry of Government of India to take immediate measures for ensuring that e-commerce entities do not circumvent FDI policies. CAIT then purchased a Demand Draft for Rs. 50,000 deposited in the CCI to get Delhi Vyapar Mahasangh to file the present complaint before the CCI.
- The verdicts of the Supreme Court in *CCI v. Bharti Airtel Limited and Others* and *CCI v. SAIL and another* were relied on by the learned judge to hold that in view of the order passed by the Delhi High Court in *W.P. No. 7907/2018 Telecom Watchdog v. Union of India and Others*¹³, and the specific delineation of e-commerce business model in Schedule I Item No. 15.2.3 of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, notified by a notification dated 17.10.2019, Section 13 of FEMA would apply for levying a penalty consequent to findings of an investigation by the Central Government regarding FEMA violations.

3.5. Decision of Appellate Tribunal in *Competition Appeal (AT) No. 16 of 2019: Second Chance for Investigation*

Aggrieved by the CCI's 26(2) order in *AIOVA v. Flipkart*, AIOVA appealed against it in National Company Law Appellate Tribunal (NCLAT). The 26(2) order dated 6.11.2018 passed by the CCI in *AIOVA v. Flipkart* was overturned by NCLAT in its order dated 04.03.2020 in *Competition Appeal (AT) No.16 of 2019*. The CCI has been directed to direct the DG to carry out investigation taking into consideration the submitted information by Appellant, and observations in the above-mentioned order. Quoting NCLAT,

*"The CCI is directed to direct the Director General to cause an investigation to be made into the matter considering the information submitted by the Appellant and observations made by us in the present Judgement."*¹⁴

According to NCLAT, there existed a *prima facie* case against Flipkart. NCLAT has relied primarily on the observations of Assessing Officer (AO) in *Flipkart India Private Limited v. Assistant Commissioner of Income-Tax*. NCLAT has argued in its order that although the Income Tax Appellate Tribunal (ITAT) set aside the order passed by AO, yet the observations made by AO are still relevant as they are on record. NCLAT acknowledges that the ITAT considered the observations of AO in the light of Income Tax Act only, but observations of AO are on record and can be considered. NCLAT concurs with the observations of AO regarding predatory pricing of Flipkart India Private Limited, and the link between what Flipkart India Private Limited and Flipkart Internet Private Limited was doing.¹⁵ The AO captured the figures for net purchases and sales of Flipkart India Private Limited, referred as Assessee, for the previous relevant year and found that it incurred losses of 2.5 per cent due to selling of goods at prices lower than cost price. Based on this observation, which is not considered to be a normal business practice, AO called upon senior officials of Flipkart for examination. The remarks of AO are mentioned in ITAT judgement in para 7.

*“7. ... The sum and substance of the statement of the Vice-President according to the AO was that the **strategy of selling at a price lower (predatory pricing) than the cost price is to capture market share and to earn profits in the long run.** According to the AO the benefit to the online buyer in the short run in the form of lower price is to create indirect benefit to the Assessee in the long run.”¹⁶*

The AO concluded thereafter, as mentioned in para 9 of the ITAT judgement:

“9. ... losses incurred by the Assessee was to create marketing intangible assets and therefore the loss to the extent it is created due to predatory pricing should be regarded as capital expenditure incurred by the Assessee and should be disallowed.”¹⁷

3.6. Summary of the Cases

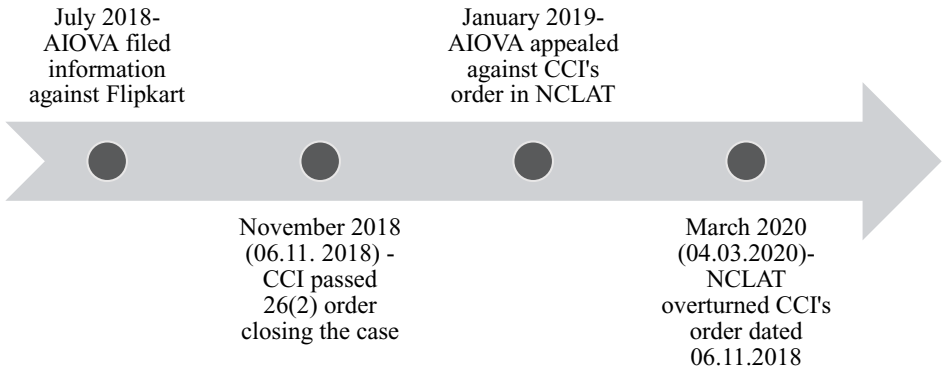
In this section, the researchers attempt to summarise the cases against e-commerce platforms in goods category along with their current status.

Table 1: Summary of Cases against E-commerce Platforms

Case Number	Informant	Opposite Parties	Alleged Violation	CCI's Response	Developments
17 of 2014	Ashish Ahuja	Snapdeal.com; SanDisk Corporation	Section 3; Section 4	<i>Prima Facie</i> no violation was found. Case closed u/s 26(2) in the order dated 19.05.2014.	Matter is closed now.
80 of 2014	Mohit Manglani	Flipkart India Private Limited; Jasper Infotech Private Limited, and others	Section 4	<i>Prima Facie</i> no violation was found. Case closed u/s 26(2) in the order dated 23.04.2015.	Matter is closed now.
20 of 2018	All India Online Vendors Association	Flipkart India Private Limited; Flipkart Internet Private Limited	Section 4	<i>Prima Facie</i> no violation was found. Case closed u/s 26(2) in the order dated 06.11.2018.	AIOVA appealed against the CCI's order in NCLAT (Competition Appeal (AT) No.16 of 2019) which overturned the CCI's order in its order dated 04.03.2020. CCI directed to direct the DG to carry out the investigation.
40 of 2019	Delhi Vyapar Mahasangh	Flipkart Internet Private Limited; Amazon Seller Services Private Limited	Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1)	<i>Prima Facie</i> case was made for contravention of Section 3(4) read with Section 3(1). The DG was directed to carry investigation u/s 26(1) in order dated 13.01.2020.	Amazon challenged the CCI's order dated 13.01.2020 in Hon'ble Karnataka High Court (WP 3363/2020). Hon'ble HC in its order dated 14.02.2020 stayed CCI's order in Case No 40/2019

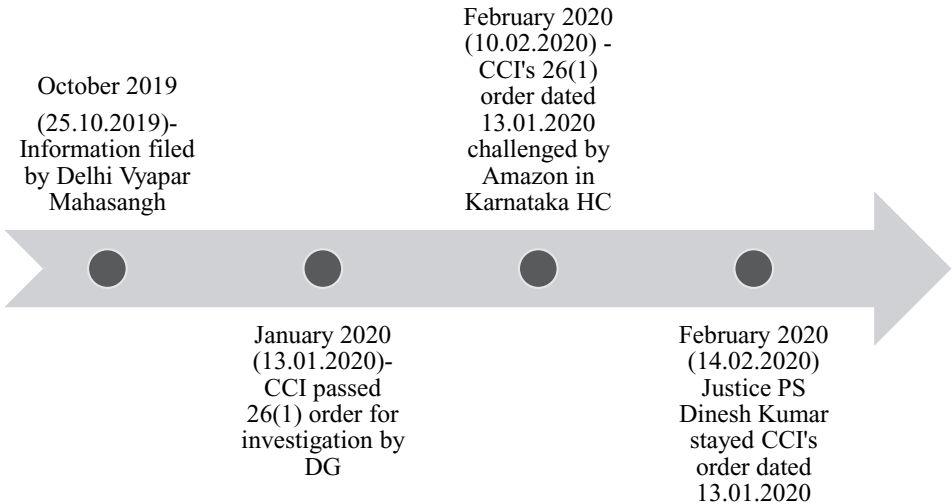
Source: Compiled by Authors.

Figure 6: Timeline in AIOVA v. Flipkart



Source: Drawn by Authors.

Figure 7: Timeline in Delhi Vyapar Mahasangh v. Flipkart and Amazon



Source: Drawn by Authors.

In the previous sub-sections, the researchers provided the details of the investigation process along with timelines in competition cases against e-commerce platforms in India. In *Delhi Vyapar Mahasangh v. Flipkart & Amazon*, the CCI directed the DG for investigation in 26(1) order dated 13.01.2020. This order was stayed by Honourable High Court of Karnataka in the order dated 14.02.2020. It is seen that judicial interventions and stay

ordered by Honourable High Court has derailed the investigation process. In *AIOVA v. Flipkart*, the CCI passed 26(2) order dated 06.11.2018. This was challenged in NCLAT which overturned the CCI's order and directed the CCI to direct the DG for investigation in its order dated 04.03.2020. It can be clearly seen that considerable time has elapsed in the process and, hence may defeat the purpose of the Act given the fast-moving nature of the online businesses.

4. LPA 137 of 2014 *Competition Commission of India v. M/s Grasim Industries Limited: A Way Forward for Holistic Investigation by Director General*

Taking into light the recent developments in *AIOVA v. Flipkart* and *Delhi Vyapar Mahasangh v. Flipkart and Amazon*, there is a situation where the DG has to investigate the matter pertaining to Section 4 violation against Flipkart. But, during the investigation, the DG may also find violations of Section 3. It becomes important to discuss existing jurisprudence in this regard, i.e. whether the DG can holistically investigate for all the violations, not limited to the views of the CCI, in an investigation referred to it by the CCI.

The investigative powers of the DG have been brought out very well by Honourable High Court of Delhi in *Competition Commission of India v. M/s Grasim Industries Limited (GIL)* in the judgement dated 12.09.2019. Quoting HC,

*"...an order of the CCI under Section 26 (1) of the Act 'triggers' investigation by the DG, and that the powers of the DG are not necessarily circumscribed to examine only such matters that formed the subject matter of the original complaint. No doubt, the language of the order passed by the CCI issuing directions to the DG will have a bearing on the scope of such investigation by the DG."*¹⁸

This means that the scope of investigation of the DG is not limited to the views expressed by the CCI. Let us look at some background facts to this case referred to in this judgement by HC.

On 30.05.2011, Section 19(1) information was filed against the manufacturers of Man-Made Fibers (MMF) for an alleged contravention of Section 3 of the Act. *Prima facie*, the CCI found a case against GIL and ordered an

investigation by the DG in its 26(1) order dated 22.06.2011. The DG carried out the investigation and found that there was no violation of Section 3, but interestingly it found that GIL has violated Section 4 and submitted the report accordingly to the CCI on 26.02.2013. This report was, however, challenged by GIL in HC of Delhi in *W.P. (C) No.4159/2013* alleging that scope of the DG was limited to the investigation for Section 3 violation, and the DG could not investigate, as it did, for any Section 4 violation. On 17.12.2013, the learned Single Judge quashed the DG's report and ruled that the DG could not investigate for a violation under Section 4 in this case.

This order of single bench was further challenged by the CCI in HC in *LPA 137 of 2014* which reversed the judgement of learned single bench in *W.P. (C) No.4159/2013*. To summarise, the major point of contention was that if the DG is directed to investigate any matter for Section 3, can he also investigate for Section 4 simultaneously if some violation is found during the investigation process? Quoting HC in *LPA 137 of 2014*:

*"...DG was within his powers in terms of Section 26 (1) of the Act read with Regulations 18, 20 and 41 of the CCI (General) Regulations 2009 (CCI Regulations), to submit a report regarding the violation of Section 4 of the Act by GIL, although the direction issued by the CCI under Section 26 (1) of the Act was with reference to information pertaining to violation of Section 3(3) (a), (b) and (c) of the Act."*¹⁹

In the aforementioned judgement in *LPA 137 of 2014*, the Honourable HC relied on various other judgements whose discussion also becomes important here. In *Competition Commission of India v. Steel Authority of India Limited*, the Honourable Supreme Court (SC) ruled:

*"The scope of investigation to be made by the DG cannot be limited by the prima facie opinion expressed by the Commission. Neither, the DG is bound by the views given by the Commission."*²⁰

The Hon'ble SC in this judgement has also pointed out the need for rapid investigation by the competition authority. Quoting SC,

*"In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out."*²¹

In *Excel Crop Care Limited v. Competition Commission of India*, SC ruled that although the complaint made initially may be limited but the DG during the investigation may look into other aspects as well, as it may come out during the investigation.²² Another important case that has been cited in the order is *Cadila Healthcare Limited v. Competition Commission of India*. In this case, HC has ruled that a party which was not the part of the initial complaint can also be investigated if the course of investigation points in that direction.²³

5. Conclusion

Based on the discussion of the cases and the features of e-commerce platforms in previous sections, it can be concluded that as per the dynamic situation of markets, it is imperative that a time-bound investigation may be completed so that the true picture comes out. In the cases discussed in previous sections against e-commerce platforms in goods category, the investigation process has been derailed due to judicial interventions by Appellate and Hon'ble HC, resulting in delays. In *AIOVA v. Flipkart*, the information was filed in July 2018, but the case has still not reached to its final outcome; similarly, in *Delhi Vyapar Mahasangh v. Flipkart and Amazon*, the information was filed in October 2019 but the case has not reached to its final outcome. Given the fast-moving nature of businesses of such platforms, this delay defeats the purpose of the Act. We suggest a possible way out to speed up the process in the form of an holistic investigation by the DG: it means while investigating one aspect, say alleged Section 4 violation, if the DG comes across for violation of Section 3(4), then the same should also be recorded rather than going back to Section 26(1) stage separately for that alleged violation and starting investigation de novo. However, the timeline should be followed in letter and spirit of 60 days as laid down by the Supreme Court in SAIL Judgement. This will save time and fulfil the intended objective of the Act. For example, in the current status of investigation against e-commerce, there is one case, *AIOVA v. Flipkart*, in which NCLAT has directed the CCI to direct the DG to carry out investigation into the matter for alleged violation of Section 4 by Flipkart. In the other case, *Delhi Vyapar Mahasangh v. Amazon & Flipkart*, the CCI's order for the DG to carry out the investigation for violation of Section 3(1) read with Section 3(4) has been stayed by the Honourable High Court of

Karnataka. A possible way out in this situation is that the DG may carry out the investigation holistically as stated above.

Apart from the suggested holistic investigation by the DG in such cases, negotiated remedies such as Settlements and Commitments are a good way to reduce the average duration of cases and ensuring timeliness. To pursue this recommendation, the provision of settlement and commitment may be included in the Act; this has also been highlighted in Recommendations of the CLRC. With such mechanisms in place, the CCI may be able to resolve cases faster. The settlement and commitment mechanism has helped competition authorities in other jurisdictions to reduce the average duration of procedures and closing cases. To quote some statistics, Belgian Competition Authority was able to reduce the duration of procedures from 36 months to 22 months using settlements process; whereas, in Italy about half of the cases were resolved by commitment mechanism (OECD, 2019, p. 46). While Settlement and Commitment may help in early disposal of cases, it will be successful only if the violators would be sure that it will be better to accept settlement rather than fight it out before the CCI and later in courts. This can happen only when the parties are convinced of the strength of the evidence gathered in the investigation or in their internal audit.

We see that the parties have been successful in stalling the proceedings of the CCI/DG by obtaining stay orders from HCs. We fully recognise the recourse to writ jurisdiction of courts and do not want to challenge it, but we suggest that courts should equally share the responsibility for ensuring that the CCI's proceedings do not get delayed or impeded unduly. Quoting SC in *Competition Commission of India v. JCB India Ltd. & others* relevant to the issue: "... The High Court should, in our view, be more circumspect before it restrains an investigation under the statutory authority of the Director General."²⁴

Some other general recommendations include capacity building and providing resources for NCLAT, which took more than a year to decide on an appeal in *AIOVA v. Flipkart*. An internal team may be set up in the CCI which could look specifically and build capacity for digital economy cases.

To sum up, there is a need for fine-tuning the current competition law regime in India so as to address anti-competitive conduct of firms in a timely manner in a technology-driven market.

Endnotes

- ¹ Tipping generally means increase in a firm's market share dominance caused by indirect network effects (Dubé, Hitsch, and Chintagunta, 2008).
- ² In the case of e-commerce platforms, indirect network effects, also known as cross-side network effects, are more pronounced. Due to indirect network effects, the value of service increases for one user group when a new user of a different user group joins the network/platform. In e-commerce platforms, if there are more consumers on the platform then platform is more valuable to service providers/sellers, and vice-versa (CCI, 2020, p. 11). A platform is said to exhibit data-network effects if the more that the platform learns from the data it collects on users, the more valuable the platform becomes to each user (Gregory et al., 2020; Ruutu, Casey, and Kotovirta, 2017, p. 121). See also Section 2.3.
- ³ See Section 2.2 for detailed statistics.
- ⁴ The scope of this study is limited to cases against e-commerce platforms in goods category also known as *online marketplace platforms* such as Flipkart or Amazon (All India Online Vendors Association (AIOVA) v. Flipkart India Private Limited and another, Case No. 20 of 2018, para 24, CCI, November 06, 2018, p. 9). This is different from food services, accommodation services, cab aggregator services, etc. See Section 2.2 for concept of e-commerce.
- ⁵ Multi-homing, in simple terms, means that a seller can post an item for sale on several market places, and buyers can browse the goods offered on several marketplaces (Tadelis, 2016).
- ⁶ Ashish Ahuja v. Snapdeal.com and SanDisk Corporation, Case No. 17 of 2014, CCI, May 19, 2014, p. 6.
- ⁷ All India Online Vendors Association (AIOVA) v. Flipkart India Private Limited and another, Case No. 20 of 2018, CCI, November 06, 2018, p. 9.
- ⁸ *Ibid.*, p. 10.
- ⁹ *Ibid.*, p.5.
- ¹⁰ Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities, Case No. 40 of 2019, CCI, January 13, 2020, p. 8.
- ¹¹ *Ibid.*, p. 9.
- ¹² Amazon v. Competition Commission of India, WP 3363/2020, High Court of Karnataka, February 14, 2020.
- ¹³ Telecom Watchdog v. Union of India and others, W.P.(C) 7907/2018, High Court of Delhi, March 18, 2019.
- ¹⁴ All India Online Vendors Association (AIOVA) v. Competition Commission of India (CCI), Flipkart India Private Limited, and Flipkart Internet Private Limited, Competition Appeal (AT) No.16 of 2019, NCLAT, March 4, 2020, pp. 13 and 14.
- ¹⁵ *Ibid.*

- ¹⁶ Flipkart India Private Limited v. Assistant Commissioner of Income-Tax, ITA No.202/Bang/2018, Hon'ble Income Tax Appellate Tribunal, April 15, 2018.
- ¹⁷ *Ibid.*
- ¹⁸ Competition Commission of India v. M/s Grasim Industries limited, LPA 137 of 2014, High Court of Delhi, September 12, 2019, p. 34.
- ¹⁹ *Ibid.*, para 1.4, p. 2.
- ²⁰ Competition Commission of India v. Steel Authority of India Limited, 10 SCC 744, Supreme Court of India, 2010.
- ²¹ *Ibid.*
- ²² Excel Crop Care Limited v. Competition Commission of India, (2017) 8 SCC 47, Supreme Court of India, 2017.
- ²³ Cadila Healthcare Limited v. Competition Commission of India, LPA 160/2018, Delhi High Court, 2018.
- ²⁴ Competition Commission of India v. JCB India Ltd. & others, Criminal Appeal No. 76-77 of 2019, Supreme Court of India, January 14, 2019, pp. 7 & 8.

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Intellectual Property, Competition, and Regulatory Policies: A Case of Bt Cotton Seed Industry in India

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Abstract: This paper explores the relationship between intellectual property rights, competition laws and regulatory policies in case of Bt cotton seed industry in India. Using timeline analysis, the paper tracks the events to understand the temporal scope and inter-temporal dependences of the events. This study illustrates that interaction of business model and regulatory policies resulted in anti-competitiveness in the industry. The study shows multiple regulatory enforcements due to the lack of clarity and foresight. Lack of clear legislative framework, specific criteria for assessment, transparency and public involvement in the regulatory decision-making process has led to these multiple enforcements.

Keywords: Bt cotton, competition, intellectual property rights, regulation, policies

1. Introduction

The relationship between intellectual property rights, competition laws and regulatory policies has received growing attention, particularly in the globalised economy (Correa, 2007). The interaction between these has resulted in a unique set of challenges for the policymakers, predominantly in developing countries. On the one hand, intellectual properties are supposed to provide an exclusive control to the owner, while competition laws aim to minimise the market entry barriers and benefit the consumers.

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Regulatory policies play a balancing act of ensuring both economic interest and welfare of the country as a whole. These contradicting objectives lead to conflicts and such conflicts are increasingly observed in developed countries (Raju, 2014). Though developing countries could use precedents from developed countries to absorb technologies for growth (Scherer and Watal, 2014), there are newer and emerging challenges unique to developing countries. UNCTAD (2016) has reviewed the interface between intellectual property rights and competition and suggested a balanced approach for innovation and competition in the market. There are provisions in the existing laws in India (Competition Act, 2002) to avoid conflicts; Section 3(5) (no interference of competition law on IPR policies), conditioned on interference if any violation such as abuse of dominant position (Section 4) (Chakraborty, 2015). On the other hand, conflicts between regulation and competition laws are observed in various sectors in India. Kathuria (2018) argued that when there is a conflict between a regulatory and competition agency, a third body could resolve the issue, where both agencies are bound to the decision. There are many reported cases where such conflicts are resolved through judiciary systems.

The study assesses Bt cotton¹ seed industry in India to illustrate the effect of interactions between intellectual property rights, competition laws and regulatory policies in the technology market and conflict resolutions through judiciary systems. Bt cotton is widely cultivated in India and it accounts for about 96 per cent of the total cotton area cultivated and produced in the country (ISAAA, 2017). Bt cotton industry has been mired with controversies. There was a strong opposition against the introduction of Bt cotton in India (Thomas and De Tavernier, 2017) even though the economic benefits of growing Bt cotton were well established (Subramanian and Qaim, 2010; Pray et al., 2011). Anti-GMO activism started immediately after the introduction of Bt cotton in India. The key arguments against Bt cotton were centred around the issues of increase in farmers' suicides, increased production cost, monopolisation of the seed market, patenting of seeds, and marketing strategy adopted by seed companies (business model). Cotton being a commercial crop grown by resource-poor farmers across dry-lands in India, it is alleged that Bt cotton is a key driver for increasing farmers' suicides (Thomas and De Tavernier, 2017). However, these allegations were questioned by Gruère and Sengupta (2011), who reported that there is no 'resurgence' of farmers' suicides due to the adoption of Bt

cotton. Other than the social and ethical controversies faced by Bt cotton, there was a series of litigations on regulatory procedures, monopolisation of the seed sector, litigation on intellectual property (Chawla, 2018) and the competition law (see CCI, 2015). Apart from these, the industry has also been under regulation through different government policies (Essential Commodities Act, Cotton Seeds Price Control Order) to protect farmers' interest. The implication of intellectual property, competition and regulatory policies on Bt cotton sector has been mentioned in few studies (Gupta and Chandak, 2005; Thomas and De Tavernier, 2017). Murugkar et al. (2007) in their study have discussed that government interventions by imposing a price ceiling (Cotton Price Control Order) had led to an anti-competitive effect in Bt cotton industry. Vithal (2018) attributed the lack of intellectual property law enforcement in India as the failure of Bt cotton (developed resistance against pink bollworm) varieties in India.

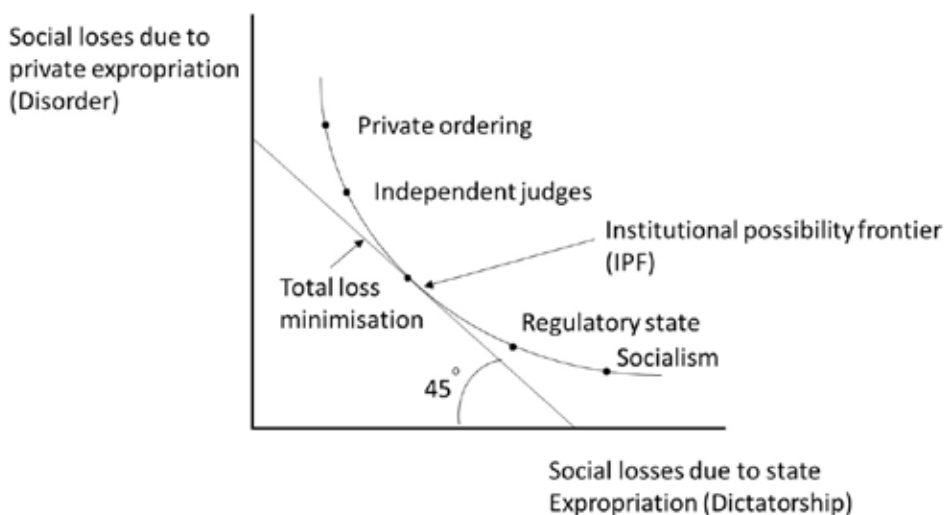
This study narrates the causes and consequences of various litigations on the intellectual property and competition and explores the effect of regulatory policies of the government on anti-competitiveness in the industry. The study is not to explore the jurisdictional overlaps between sectoral regulations, competition law, rather it explores the effectiveness of such multiple checks and balances on the Bt cotton sector in India.

2. Theoretical Framework

The core focus of this study is the regulatory policies in the Bt cotton sector. Economic theories of regulation are classified into two broad categories - public interest theories and private interest theories (Den Hertog, 2010). Public interest theories argue that government intervention could increase social welfare by avoiding market failures (Shleifer, 2005). These theories assume that the regulators have sufficient information and enforcement power to promote public interest effectively. These theories also assume that regulators are 'pro-public'. This has been criticised by followers of 'Chicago School of Law and Economics', who argue that the private ordering (Ellickson, 1991), and private litigation (Coase, 1960) can take care of market failures and there is no need of interfering through policies and regulations. They also argue that the government regulators are incompetent, corrupt and captured, as pointed out in Stigler's capture theory (Stigler, 1971). The fundamental assumption of these theories is that

the regulators do not necessarily have sufficient information about the firm with respect to cost, demand, quality and other behavioural dimensions. The theory establishes that the state regulatory agencies could imperfectly enforce public interest and are benevolent to their own interest even at the cost of public interest. As against the argument in public interest theories that the government intervention could increase the social welfare by avoiding market failures, the private interest theory maintains that regulations are the manifestation of interest group behaviour which results in the transfer of wealth to effective interest group engendering net social welfare loss. In this context, it is assumed that the competition would thereby replace regulation in the sector.

Figure 1: Regulation Strategies and Trade-offs



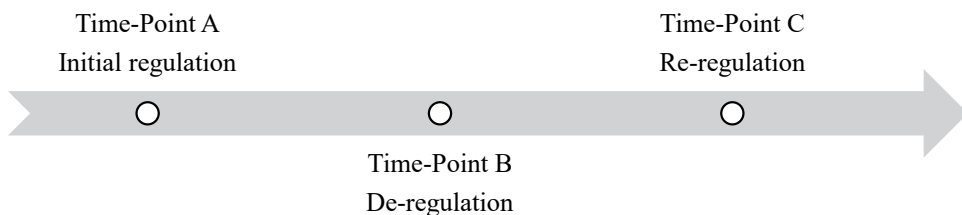
Source: Shleifer (2005).

Shleifer (2005) proposed enforcement theory of regulations, where he argues that the strategies (government regulation, private ordering and private litigation) are imperfect and optimal institutional design depends on the choice among these imperfect alternatives. The theory recognises trade-off, measured using institutional possibility frontier, between social cost in private and state expropriations (Figure 1). These theories are used as a base to explore our research question.

3. Methodology

This study uses timeline analysis, a qualitative analytical approach, to assess the interplay between different dimensions. A timeline of events² with respect to Bt cotton industry in India is build based on the review of newspaper articles, blogs and other published literature. Timeline analysis is used to understand the events in detail and concise the counterfactuals and consequences of the events. Molk and Rowell (2016) illustrated the use of timeline approach for analysing regulatory decision-making. Timeline approach could be a complementary alternative to the commonly used binary approach of the regulation (on or off; regulation or deregulation) (see Figure 2). Timelines could help in understanding the ‘temporal scope’ and ‘inter-temporal dependences’. Temporal dimension deals with the time period to be considered for the decision. While inter-temporal dependences deal with the dependence of multiple regulatory decisions at different time points.

Figure 2: A Simple Regulatory Timeline



Source: Illustration based on Molk and Rowell (2016).

Similar approaches have been used in other studies. Holgersson et al. (2018) studied the evolution of intellectual property strategy in mobile telecommunication system using longitudinal cases. In this study, a timeline of Bt cotton seed industry for the period 1986-2019 is constructed. The timeline is created using an extensive review of the literature (specifically Gupta and Chandak, 2005; Thomas and De Tavernier, 2017) for the period before 2006, and grey literature (newspaper articles, blogs) for the recent period. There were discrepancies on the sequence of events across the literature and such discrepancies are explicitly noted and others were solved by triangulating the events from multiple studies. Drawing on the timeline of events, this study explores the inter-temporal dependencies

of events to contextualise and understand the decision-making and its consequences over the period.

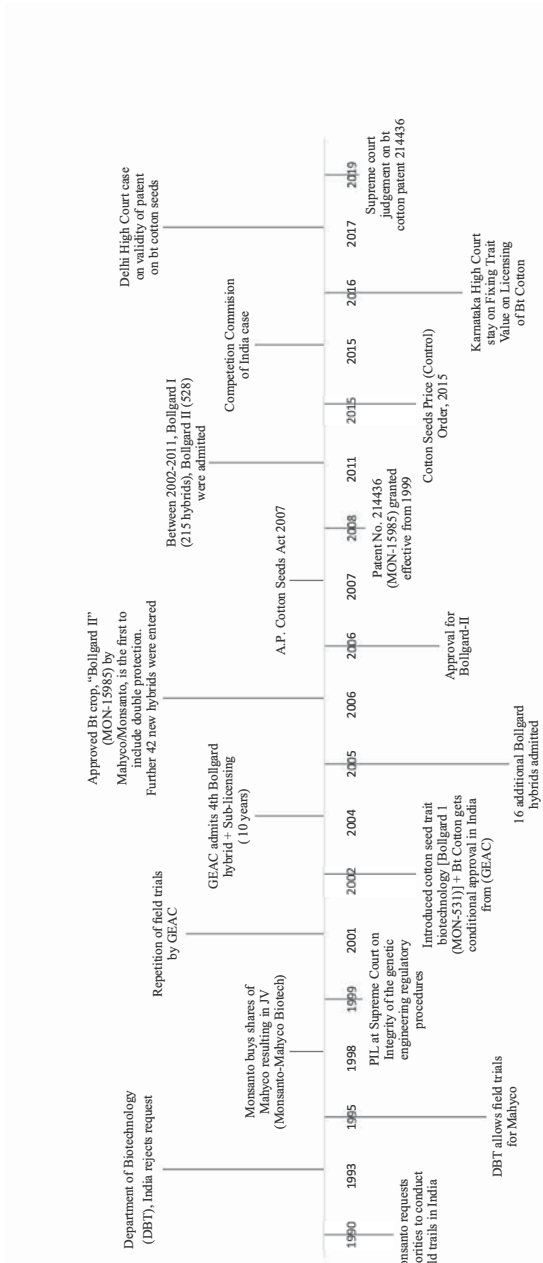
4. Results and Discussion

The timeline of events in Bt cotton industry in India is shown in Figure 3. The timeline is divided into three phases – phase 1 (1990-2002), phase 2 (2002-07), and phase 3 (2008-2019). Phase 1 is the initial regulation phase, where the regulatory authorities assessed the technology. In phase 2, the technology got widely adopted in the country with lesser regulatory interventions, and in phase 3, there was a series of litigations and emergence of strong re-regulations. There are quite a good number of literature writings on the earlier phase of Bt cotton development (Phase I) (see Cohen and Paarlberg, 2004; Gupta and Chandak, 2005; Thomas and De Tavernier, 2017). However, there is a dearth of literature discussing second and third phases.

In 1990, Monsanto Holdings Private Ltd. (MHPL) (henceforth Monsanto) requests the authority (Department of Biotechnology – DBT) in India to conduct field trials. There was a parallel negotiation with the Government of India for a technology transfer agreement. The request was rejected by DBT in 1993, citing exorbitant trait fees and issues with development of hybrids by crossing the exotic Bt varieties with indigenous varieties (Gupta and Chandak, 2005). On the other hand, DBT preferred incorporation of the Bt gene directly into indigenous variety.

In 1995, DBT allowed Maharashtra Hybrid Seeds Company Ltd. (henceforth Mahyco) to conduct field trials and approved import of 100 grams of cotton seeds containing Cry1Ac gene.³ Later in 1996, the Central Government also approved the import of Bt cotton variety (US Cocker 312). It's unclear whether Monsanto started negotiating with Mahyco before or after DBT allowed Mahyco to conduct trials. Monsanto initially acquired 26 per cent of the stake in Mahyco and started participating in the trials conducted by Mahyco. During the period 1996-1998, field trials were carried out in nine states (Andhra Pradesh, Karnataka, Tamil Nadu, Haryana, Maharashtra, Madhya Pradesh, Rajasthan, Punjab, and Gujarat). Though Gupta and Chandak (2005) reported that these field trials were carried out with permission, Thomas and De Tavernier (2017) stated that the field trials started before securing permission from DBT. In 1998, Monsanto and

Figure 3: Timeline of Events in Bt Cotton Industry in India



Source: Compiled by author.

Mahyco started a 50:50 joint venture (JV), named Mahyco-Monsanto Biotech Pvt. Ltd. (MMBL). Thomas and De Tavernier (2017) argued that Mahyco enjoyed preferential treatment from the regulatory authorities. He pointed out that the Mahyco's Director, who is also a World Food Prize recipient, had a good rapport with the Government and regulatory authorities (Scoones, 2003; Newell, 2007).

In 1999, Vandana Shiva and other activists and associations challenged the integrity of the genetic engineering regulatory procedures through a Public Interest Litigation in Supreme Court. The court ordered a temporary ban on the field trials until the Genetic Engineering Approval Committee (GEAC) guarantees the safety of the humans and the environment. In 2001, the GEAC refused to accept the observation of DBT and asked to repeat the trials. The GEAC trials were monitored by the Indian Council of Agricultural Research (Cohen and Paarlberg, 2004). At the same time, DBT amended the law empowering Review Committee on Genetic Manipulation (RGCM) and granted multi-location small trials to MMBL (Damodaran, 2005). This decision contradicts the Swaminathan Task Force report which suggested an independent regulatory set-up (Damodaran, 2005). Meanwhile, in 2001, MMBL discovered Navbharat Seeds Pvt. Ltd., selling Bt cotton seeds (Navbharat 151) in Gujarat. Subsequently, a case was registered with Gujarat High Court against Navbharat for violating the Environmental Protection Act/rules (Gupta and Chandak, 2005). Though Thomas and De Tavernier (2017) pointed out that 'GEAC banned the Navbharat 151 when it was discovered that the seed variety contained the illegally incorporated gene of Monsanto', it is to be noted that the incorporation of the Bt gene was not illegal as the event MON 531 was not patented. But growing them without GEAC was illegal which comes under the purview of Environmental Protection Act/rules. GEAC ordered Gujarat Biotechnology Coordination Committee to burn illegal plantation and also tried to procure back the illegal seeds, but the order was late and the seeds were sold out in the market before the intervention.

As said above, phase 1 was the initial period of regulation. Scoones (2003) had quoted Indian officials of the Department of Biotechnology admitting the lack of knowledge with respect to the technology. The lack of interaction with the critics of science policy also creates a sense of distrust in the regulatory process. They have also shared their skepticism in their ability to

enact the regulations. Though Herring (2014) points out that India follows a 'precautionary approach' in the case of genetically modified (GM) crops, it was not so before the introduction of GM crops. Government of India has issued bio-safety guidelines earlier in 1989. These guidelines were drafted before the GM crops came to India, so, explicitly it didn't embrace a 'precautionary principle' (Cohen and Paarelbergs 2004). There are three major inferences from the period I: (i) lack of clarity on the policy led to delay and distrust on the regulatory process, (ii) private litigation took care of the market and regulatory failures (Case of Navbharat seeds), and (iii) regulations also shaped the industry (Monsanto's JV with Mahyco). The initial regulatory challenges pushed Monsanto to enter into a partnership with an India entity (Mahyco). It's to be noted that India had just opened its economy during the same phase.

In 2002, GEAC conditionally approved the release of four Monsanto hybrids for commercialisation for a period of three years in South India (Qaim et al., 2006). It declined commercialisation in North India due to apprehension over the susceptibility of the seeds to leaf curl. MMBL launched its Bt cotton hybrid (Bollgard I, MECH 12, MECH 162, MECH 184) varieties. Though this was hailed as a regulatory breakthrough, there were apprehensions regarding the speed of adoption of GM crops due to the political nature of the bio-safety approval process (Cohen and Paarlberg, 2004). Later in 2004, GEAC approved four more hybrids and furthermore 16 hybrids using event MON 531 and MON 15985. Mahyco developed a second event by sourcing MON 15985 (Bollgard II) from Monsanto. There were two patents of Bollgard II - (1) Patent No. 214436 (Methods for transforming plants to express *Bacillus thuringiensis* delta endotoxins) and (2) Patent No. 232681 which provide IPR protection to Bt II technology. The patent 214436 was granted in 2008 effective from 1999. Similarly, other firms/organisations also developed events for the cotton crop. The events were approved by GEAC and various companies have released their hybrids (Table 1).

Though more than 10 events are patented, only five events of cotton are approved by GEAC - MON 531 (Maharashtra Hybrid Seeds Company), GFM Cry 1A Event (Nath Seeds), JK Event 1 (J.K. Agri Genetics Pvt. Ltd.), MON 15985 (Maharashtra Hybrid Seeds Company), and Event MLS 9124 (Metahelix Life Sciences Pvt. Ltd.) (GEAC, 2019). In the period 2002-2011, approximately 215 Bollgard I hybrids and 528 Bollgard II hybrids were

Table 1: Bt Cotton Events in India

S. No.	Event	Developer	Year of approval
1	MON 531*	Mahyco/Monsanto	2002
2	MON 15985	Mahyco/Monsanto	2006
3	Event-I	JK Agri Genetics Ltd.	2006
4	GFM Event	Nath Seeds	2006
5	Cry1Ac Event	CICR (ICAR) & UAS Dharward	2008
6	Event MLS 9124	Metahelix Life Sciences Pvt. Ltd.	2009
7	EVENT-10	JK Agri Genetics Ltd.	2013
8	CRY1F EVENT 281 24 236	Dow AgroSciences LLC	2014
9	Event 3006 210 23	Dow AgroSciences LLC	2014
10	Event PDAB4468.19.10.3	Dow AgroSciences LLC	2015
11	Cotton Transgenic Event MON 88701	Monsanto Technology LLC	2015
12	Elite Event EE-GH7	Bayer Crop Science NV/LP	2019

Note: *Mon 531 was not patented in India.

Source: Compiled by author based on inPASS database of Office of the Controller General of Patents, Design and Trade Marks, Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India.

released. In Phase II, during the short interval of five years, the technology slowly got assimilated in the Indian market. This is a case of private ordering where the market (firms) is self-regulating. This mechanism worked well within the industry, the agreement between domestic seed companies and MMBL was complementary, domestic companies needed the technology and Monsanto needed domestic firms to scale their technology. Irrespective of multiple organisations having the patent of the technology, MMBL captured the major share of the market through its unique business model. As discussed before, the initial regulations shaped this business model in India.

MMBL licensed the Bollgard I and Bollgard II technologies to approximately 50 Indian seed companies. These seed companies in turn introduced the

Bollgard technology into their own germplasm and manufactured over 300 different Bt cotton hybrid seed varieties eventually. As a result, MMBL established itself as the sole supplier of GM cotton seeds in India (more than 90 per cent of the cultivated cotton employ Monsanto’s technology). There was no patent over the Bt I technology. The companies signed a bilateral agreement by introducing a new category called “Technology Trait”, for which they charged a “Trait Fee”. The companies paid a lump sum amount of Rs. 50 lakh (negotiated individually) as trait fee initially. The royalty fee was charged on each packet of the cotton seeds sold by the company. During the period 2002-2005, the companies were charging Rs. 1600 for 450 gm of seeds, of which Rs. 1250 was charged as trait value on each packet (Table 2). This higher price led to a series of litigations and the emergence of regulatory reforms.

Table 2: Trait Value and Bt Cotton Seeds Price

(Value in Indian Rupees)

Year	Trait value (Rs./packet)		Seeds packet price (450 gms)	
	BG I	BG II	BG I	BG II
2002-05	1250		1700-1800	
2006			750 [@] / 900 ^{@@}	
2007 ^s	148.15		750	
2008-10*	50	90	650	750
2011-15**	50	90	830	930
2016-17 [#]	0	49	635	800
2018-19 [#]	0	20	635	730

Notes: BG I - Bollgard I, BG II - Bollgard II. [@] Government of Andhra Pradesh, vide its order dated 29th May 2006 fixed the Maximum Sale Price (MSP) of Bt cotton seeds. ^{@@}MRPTC interim order on Bt cotton seeds. ^sMMBL entered into a ‘Settlement and Release of Claims Agreement’ and consequent ‘Supplementary and Amendment Agreement’ with the Indian seed companies. *Price fixed by the State Government of Andhra Pradesh and Maharashtra, Gujarat fixed the same price but did not mention the trait value. **Price fixed by the Government of Telangana. [#]Price fixed by the Government of India under Cotton Seeds Price Control Order, 2015.

Source: CCI (2015), additional data compiled by author.

In 2006, the Andhra Pradesh Government intervened to file a case against Bt cotton seeds pricing to the Monopolies and Restrictive Trade Practices Commission (MRTPC) (CCI, 2015). Andhra Pradesh Government negotiated with the private companies to bring down the seed prices to Rs. 750 and fixed the trait value to Rs. 150. Concomitantly, various states such as Gujarat and Maharashtra enacted state legislations to control the cotton price. MRTPC in its order dated 11th May 2006 stated:

“There is a basic difference between royalty and trait value ...and are not synonymous... In any case, the lump sum payment of Rs. 50 lakhs may be considered as royalty for the same, but the future payments on sale cannot be termed as royalty” and held that “... by temporary injunction, the MMBL is directed during the pendency of this case not to charge trait value of Rs. 900/- for a packet of 450 gm of Bt cotton seeds and to fix a reasonable trait value that is being charged by the parent company in the neighbouring countries like China.”

Later, Andhra Pradesh government fixed price of Bt cotton seeds under the A.P. Cotton Seeds Act, 2007. Subsequently, there were several price interventions by state governments and subsequent litigations against them (see Table 3 cases 1-4). As a result of these interventions, in 2009, Nuziveedu Seeds Ltd. (NSL) (a sub-licensed company) refused to pay trait fee. MMBL then terminated the License of NSL and later reinstated it when NSL agreed to pay the dues. Subsequently, in 2015, MMBL terminated the agreements with seven seed firms (including NSL) after the firms stopped paying the fee. In October 2015, they sued NSL, Prabhati Agri Biotech Ltd. and Pravardhan Seeds Pvt. Ltd. for selling Bt cotton seeds, citing the non-payment of Rs. 165 crores accounting to the sub-licensing agreement. In 2015, the Department of Agriculture, Government of India issued the Cotton Seeds Price (Control) Order, 2015, under Section 3 of the Essential Commodities Act (1955) to regulate Bt cotton seed prices. The order came into effect from March 2016 and fixed the prices at Rs. 635 and Rs. 800 for BG-I and BG-II, slashing the royalty fee to an extent of 74 per cent.

Table 3: Key Litigations with Respect to Bt Cotton Seeds

Cases	Year	Parties	Court	Issue	Reference
1	2009	All India Crop Biotech Association of India v. State of Gujarat	The High Court of Gujarat	Validity of the provisions of the Gujarat Cotton Seeds Act, 2008	https://indiankanoon.org/doc/105919585/
2	2011	National Seeds Association of India v. State of Gujarat	The High Court of Gujarat	Cotton as an essential commodity	https://indiankanoon.org/doc/1991507/
3	2013	NSAI v. State of Maharashtra & Ors	The High Court of Bombay (Nagpur Bench)	Price control of cotton seeds	https://indiankanoon.org/doc/49622381/
4	2015	Seed Industries Association of Maharashtra v. State of Maharashtra	The High Court of Bombay (Nagpur Bench)	Maximum sale price of Bt cotton seeds	https://indiankanoon.org/doc/12222660/
5	2016	Association of Biotechnology Led Enterprises, Ors. v. Union of India and Ors.	The High Court of Karnataka	Price ceiling on Bt cotton seeds	https://indiankanoon.org/doc/181513040/
6	2017	Monsanto Technology LLC and Ors. v. Nuziveedu Seeds Limited & Ors.	The High Court of Delhi	Sub-license agreements, trademark sub-license agreements, intellectual property rights	https://indiankanoon.org/doc/143517948/

Cases	Year	Parties	Court	Issue	Reference
7	2018	Nuziveedu Seeds Ltd. and Ors. v. Monsanto Technology Llc and Ors.	The High Court of Delhi	Sub-license agreements, trademark, trait fee and intellectual property rights	https://indiankanoon.org/doc/27725858/
8	2019	Monsanto Technology LLC and Ors. v. Nuziveedu Seeds Limited and Ors.	The Supreme Court of India	Sub-license agreements, trademark sub-license agreements, intellectual property rights	https://indiankanoon.org/doc/116548206/
9	2020	Monsanto Holdings Pvt. Ltd. v. Competition Commission of India	The High Court of Delhi	Challenging CCI's order to investigate MMBL	https://indiankanoon.org/doc/158839264/

Note: References last accessed on 30-05-2020.

In 2015, the Ministry of Agriculture (Case No. 2 of 2015), Nuziveedu Seeds Limited (NSL), Prabhat Agri Biotech Limited (PABL), Pravardhan Seeds Private Limited (PSPL) (Case No. 107 of 2015) filed a complaint with the CCI against MMBL and Monsanto Group alleging abuse of their dominant position in the Bt cotton technology market (CCI, 2015). In 2016, the Ministry of Agriculture and Farmers' Welfare (MoA) came up with "Licensing and Formats for GM Technology Agreements Guidelines, 2016" and was open for comments for 90 days. The draft came up with new policies such as: once the genetically modified traits are transferred to plant, the transgenic variety per se cannot be patented and would be only protected under Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPV&FR Act). The draft also stipulated that the licensor cannot refuse licensing of the technology, and should grant license within 30 days. It also recommended a parallel adjudicatory authority (Controller of Seeds). The draft also fixed a cap on royalties (Rs. 25 lakh upfront fee) and from the sixth year the trait value would be depreciated by 10 per cent each year.

In 2017, MMBL filed a case in Delhi High Court (Table 3, case 6), but the court refused to put a stay on it. So the prices were kept the same as the previous year. MMBL alleged that NSL with other companies is continuing to 'Market and Sell' Bt cotton seeds after the termination of sub-license agreement including trademark sub-license agreement (on Bollgard I and Bollgard II) and patent (No. 214436). They accused them of three issues – breach of trust, non-payment of dues and attempted misappropriation of intellectual property rights (IPRs). Monsanto also approached Karnataka High Court through Association of the Biotech Led Enterprises (ABLE-AG)⁴ (Table 3, case 5). Karnataka High Court in its interim order, stated that the centre cannot fix the trait fee as it is an agreement between companies but it can fix Maximum Sale Price (MSP) on cotton seeds. In November 2016, High Court gave a restraining order on selling Bt cotton seeds using MMBL trade-marks. NSL moved to court against this order. NSL claimed that the power to fix royalty or 'trait value' lies with the Protection of Plant Varieties and Farmers' Rights (PPV&FR) Authority (Damodharan, 2016).

The argument was that according to Section 3 of the Indian Patents Act, 1970 any "method of agriculture or horticulture" and "plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals" are not patentable. Under Section 2 (a) of PPV&FR Act, 2001 plant variety includes "transgenic variety" (Damodharan, 2016).

The single bench of Delhi High Court (Table 3, case 6) issued an interim order and held termination of the sub-license to be invalid and also asked to fix the trait value based on the Central Government Recommendation (Cotton Seeds Price Control Order, 2015).

The court also observed that "the use of the suit patent, or trademarks of the plaintiffs by the defendants becomes unauthorised so as to give rise to a valid cause of action for infringement only if it can be held that the sub-license agreements have been legally terminated by the plaintiffs, such termination naturally rendering continued use of the sublicensed technology or trademarks without consent or permission of rightful owner." Chawla (2018) quoted the case as a situation of "dilemma between utilitarianism and capitalism".

This was followed by an appeal on the interim injunction, which was taken up under a Division Bench in the Delhi High Court. In 2018, the Delhi High Court Division Bench held in favour of NSL (Table 3, case 7). The court ruled that the patent (No. 214436) would fall under the exclusion criteria under Section 3(j) of the Patents Act (non-patentability of a living organism). But the court held that Monsanto can apply for registration under the PPV&FR Act and claim a benefit-share under the provisions of the Act.

MMBL challenged the Division Bench of Delhi High Court ruling in Supreme Court (Table 3, case 8). In 2019, Supreme Court reversed the order of the Division Bench on the grounds that Division Bench was supposed to consider the question on the grant of the injunction given by the single bench and not to decide on the patentability (Kuruganti, 2019). They remanded the issue back to the single judge at Delhi High Court. Meanwhile in 2018, enacting the Cotton Seeds Price (Control) Order 2015, the central government further reduced the prices of BG II (Rs. 740) but kept the same for BG I.

Period III points out a couple of interesting observations: (i) emergence of re-regulation is rooted in the several events from the previous period (Phase I and II), (ii) failure of private litigation as a regulatory mechanism, and (iii) conflict in the existing business model as a result of the regulatory process. As pointed out before, Murugkar et al. (2007) argued that government interventions through imposing price ceiling (Cotton Seeds Price Control Order) had led to an anti-competitive effect in Bt cotton industry. But the study shows that events in the previous period (intertemporal dependence) might have favoured anti-competitiveness and MMBL rather gained monopoly through its business model.

In the period I, first Bt cotton technology – BG I, was not protected under patent. The technology was transferred to domestic seed industry under the sub-licensing agreement. This created an ideal business process and the domestic companies opted for the model. It created a locked-in effect (domestic companies are already using the technology with lower fixed cost), and it worked in favour of them when the regulatory intervention (price cap) came to effect (companies were asked to pay the fees based on the licensing agreement). This created conflicts and resultant litigations between the two groups of companies. A group of domestic companies,

which was sub-licensing the technology, challenged the technology-providers with respect to the validity of the patent over the technology and anti-competitive measures taken by the technology provider. The conflict between patent law and competition law came up in the recent case *Monsanto Holdings Pvt. Ltd. v. Competition Commission of India* (Table 3, case 8). Honourable Justice Vibhu Bakhru quoting the earlier ruling on *Telefonaktiebolaget L.M. Ericsson v. CCI and ors.* (Table 3, case 8) argued that the CCI can examine alleged anti-competitiveness, and there is no repugnancy between the Patents Act and the Competition Act. He further clarified that the *CCI v. Bharti Airtel Ltd.*⁵ case where the Supreme Court rejected CCI's jurisdiction was due to the existence of a regulatory statutory body (TRAI). As of now the jurisdiction of the CCI is resolved, there could be follow up appeals in this regard.

5. Effect on the Cotton Seed Industry

These series of events have brought structural changes in the cotton seed industry. The share of Bt cotton seeds in the total cotton cultivated area increased from 45 per cent in 2002 to 96 per cent in 2017 (ISAAA, 2017). This shows that there is a faster spread of Bt cotton technology. Though in the short run, studies (Qaim et al., 2006; Subramanian and Qaim 2010) showed the benefit of adoption of Bt cotton by farmers (consumer), a recent study (Kranthi and Stone, 2020) has shown that in the long run with the increasing emergence of pests with Bt resistance, farmers are spending more on pesticides. Srivastava and Kolday (2016) have raised concerns over the long term growth in productivity at macro-level. Ramasundaram et al. (2011) in their article noted that Bt cotton in India is mostly hybrid⁶, which is shaped by the private sectors to ensure yearly income through seed sales to farmers. Hybrids are encouraged by the business model, which involves licensing and generation of income exploiting the technology. One of the key success highlighted is that the prices of Bt cotton seeds have decreased as a result of regulations. This has brought relief for the farmers, on the other, this also gave way to anti-competitiveness (Murugkar et al., 2007). Monsanto in their Annual Report 2019, stated aggressive regulator intervention as an institution risk they face with respect to their agricultural portfolio in India (p. 109). Through price regulations, governments are trying to control the price and, on the other, they are trying to make the industry competitive. These two strategies conflict as for increasing competition the prices

should be higher which contradicts the price regulations. Simultaneous use of both competition laws and regulations has adversely affected the Bt cotton seed industry.

6. Summary and Conclusion

Based on the timeline analysis, the study shows that the new business model (sub-licensing) resulted in barriers to entry for a non-patented product. Later, when the newer versions of the product emerged with patent, the business model discouraged other firms to pursue developing new varieties based on their patents. Government intervention through enforcing price cap also discouraged the firms from investing in R&D based on new patents. This study shows that interaction of business model and regulatory policies resulted in anti-competitiveness in the industry. On the other hand, the study concludes findings similar to Kathuria (2018), which argue that the simultaneous application of competition laws and regulations is over-enforcement, which is bad for the market, consumer and economy in the long run. The multiple enforcements observed in the sector is due to the lack of clarity and foresight. FAO and International Service for National Agricultural Research (ISNAR) list four elements for developing the regulatory framework for biotechnology: (i) legislative framework, (ii) criteria for the assessment of a product, (iii) transparency and public involvement; and (iv) approaches to risk assessment and risk management. As the study narrates, lack of clarity over jurisdictions, lack of specific criteria for assessment and lack of transparency and less involvement of the public in the regulatory decision-making process in the past had long term effects on the Bt cotton seed industry.

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Endnotes

- ¹ *Bacillus thuringiensis* (Bt.) cotton is a transgenic technology developed in cotton crop to combat insects. It is created by genetically altering the cotton genome by introducing microbial protein in bacterium called *Bacillus thuringiensis* (Transgenic). This process allows plants to create the toxic which when consumed by insects would dissolve the lining of the gut leading to death of the organism.
- ² Once the gene is transferred into the cotton plant, it is called an event. These events undergo rigorous testing under the Genetic Engineering Approval Committee (GEAC) for approval. Once the events are approved, hybrids and varieties of the cotton plant are developed using these events by crossing.
- ³ Cry1Ac is a gene from soil bacteria [*Bacillus thuringiensis* (Bt)] used to develop Bollgard I.
- ⁴ In 2007, four seed associations, namely Association of Seed Industries (led by Mahyco), All India Crop Biotech Association (led by other MNCs), Indian Seed Industry Association and Seed Association of India (led by Mandhari) merged to become National Seed Association of India (NSAI). There was a split in the seed associations in India as a result of this conflict. To name a few are ABLE-AG, NSAI and Federation of Seed Industry of India. Association of the Biotech Led Enterprises (ABLE-AG) is an association of 11 leading biotechnology companies in India.
- ⁵ <https://indiankanoon.org/doc/130504148/>
- ⁶ Hybrids seeds require replacement each year. The seeds from the next generation of hybrid seeds cannot be replanted (a certain percentage would lose their desired traits). So, farmers need to buy hybrid seeds each year, this is not the case with varieties, where the seeds can be replanted to 3-4 generations.

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Attempt to Monopolisation and Digital Markets: Enforcement Gap

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Abstract: Rapid technological development, particularly in the Information and Communications Technology (ICT) sector, has led to a significant change in the industrial structure as well. Regulatory bodies world over are struggling to adjust to these changing scenarios. There is a widespread discussion regarding the need to regulate technology-driven markets such as e-commerce, telecommunication, etc. The practices used by some business giants are going against the neoclassical economic theory that profit maximisation is the goal of every firm. Firms are opting growth over profit. A large number of investigations were opened in India against business giants. Some of them were able to find contraventions of the Competition Act, 2002 (the Act). However, a large number of investigations were closed due to the lack of cognizance of collective dominance in law or inability to prove dominance in the traditional economic sense. It can be seen from the current jurisprudence of the Competition Commission of India (CCI) that there are constraints in handling competition issues in technology-driven industries mainly on account of the extant legal framework which does not recognise the need of assessing an appreciable adverse effect on competition where the dominance of the firm is not apparent. Although, the Act takes into account attempt to cartelisation as a contravention of the Act, it does not envisage an attempt to monopolise as a contravention of the Act. The past and current jurisprudence of the CCI indicates that CCI's view is also undergoing radical change. This paper discusses the concept of "attempt to monopolise" as given in the Sherman Act and its applicability in the Indian context. The paper

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reviews the American antitrust literature existing on this subject and analyses the key factors which constitute antitrust violations under the clause “attempt to monopolise”. While the majority view emphasises on proving dangerous probability of success while determining an attempt to monopolise, as per the minority view, “attempt” connotes conduct and not a state of being. Unlawful intent can be inferred from the conduct as a proof of an “attempt”. The law does not require completion of a crime, it requires conduct. Thus, an attempt to monopolise is a conduct offence. This paper argues that borrowing the attempt to monopolise concept from the Sherman Act, 1890 will be helpful for the CCI in handling antitrust cases in technology-driven industries such as e-commerce, telecommunications, transport, etc.

It will go a long way in achieving competitive markets, increased consumer choice and welfare in the long-run.

Keywords: competition policy, attempt to monopolise, digital markets

1. Introduction

With the recent technological advancements, the business landscape is undergoing a substantial change. Digital transformation has become essential for businesses. Digitisation has changed the ways businesses operate. Digital platforms play an important role in these changes and have had disruptive effects in many economic sectors. Platforms such as Google, Amazon, Facebook, and Apple provide a variety of services such as search engine, market place, social networking and application stores. This platform economy is emerging as the “fourth industrial revolution”. It has been beneficial to the consumers by providing new products and services at their doorstep without any extra cost. This platformisation has also changed the ability of firms to scale rapidly, thereby affecting the structure of the sector. Rapid advances in cloud, mobile and analytics, and the falling cost of these new technologies, digital platforms are creating the next wave of disruption, growth and breakthrough innovation. Digital platforms bring together vast communities of customers and partners, including developers. They create markets of enormous scale and efficiency and they enable new levels of collaboration between companies from different industry sectors that can result in the conception of entirely new products and services.

Although digitisation has been beneficial for the consumers as well as producers, it also imposes various competition concerns. Competition concerns that arise in digital platform markets are mainly related to practices such as providing deep discounts to the consumers, control over data, mergers and acquisitions, etc. Competition policies which mainly concentrate on a consumer welfare approach are inadequate to handle the issues posed by digital markets.

The present paper analyses the applicability of an attempt to monopolise clause as mentioned in the Sherman Act 1890 of the United States in the Indian context especially for digital markets. Section 2 discusses various dimensions of digital platforms. Section 3 discusses competition issues arising in this sector and the response of various antitrust authorities. Section 4 deals with the attempt to monopolise as outlined in the Sherman Act. Section 5 discusses applicability of this concept in the Indian context. The last section summarises the paper.

2. Dimensions of Digital Platform

A digital platform is a technology-enabled business model that creates value by facilitating exchanges between two or more interdependent groups. Typically, platforms bring together end-users and producers to transact with each other. They also enable companies to share information to enhance collaboration or the innovation of new products and services. The platform's ecosystem connects two or more sides, creating powerful network effects whereby the value increases as more members participate.

Digital platforms function with algorithms which are designed to collect and process data. Such platforms require huge up-front sunk cost but low marginal cost. The technology required to store and process data is costly but once it becomes operational, the marginal cost goes on declining indicating large scale economies. Data can help to improve the algorithms to provide better and more personalised services to consumers. Digital platforms are characterised by high economies of scale and scope. Economies of scope exist when it is beneficial to produce two or more products or services within a single firm than by separate firms. Economies of scope exist due to the presence of shareable inputs in the production process, i.e. inputs that can be used to produce various outputs. For example, production platforms, human capital, knowledge, data, *etc.* Economies of scope can,

therefore, facilitate market concentration of big data in the hands of a few players.

The power behind digital platforms lies in their two distinct features, i.e. network effects and data. Network effect arises when more customers attract more number of merchants and partners and *vice versa*. This shifts the cost and risk burden of creating markets from the business to the network. As the network gathers its own dynamic momentum, the platform owner acts as a facilitator to spread that burden among a growing number of participants. Open and shared data can be used to create new forms of value. Data is a crucial element of the business model of digital platforms and control over data gives market power to such platforms. Further, platforms with a large user base are able to collect more data to improve the quality of the services which further enable them to attract new users. In addition, such platforms are able to improve targeted advertisement and monetise their services. Thus, a large user base provides an incumbent market player the edge over new entrants. A new start-up which enters the market faces competition from technology giants such as Apple, Google, *etc.* Those who cannot survive the competition eventually go out of the market. Whereas, start-ups which have the potential are acquired by dominant platforms. For example, Google has acquired 212 business entities since it was found in 1998 and the value of its acquisitions exceeds US\$ 17 billion (TWN, 2019).

Dominant digital platforms have expanded into other related businesses, with the objective of accessing more data. Digital platforms have challenged the neoclassical approach to doing business, which defines that the goal of a private company is to maximise profit. New business models prioritise growth over profits in the short to medium term. Frequently, platform owners emphasise critical mass over profit generation in the initial stages of platform development, while maintaining a focus on value creation. For example, Alibaba's Taobao platform used free listings to gain user momentum. Amazon, a 21st century e-commerce giant, posted consistent losses for the first seven years it was in business, with debts of US\$ 2 billion (CNN, 2002). In 2018, Amazon was ranked first in terms of company revenue among global publicly traded internet companies with annual revenue of almost US\$ 233 billion, the e-retailer ranked far ahead of its closest competitors, Google (US\$ 136.22 billion) and Facebook (US\$ 55.84 billion) (Clement, 2020). Although Amazon has been recording double-digit percentage increase in net sales annually, it reports meagre profits,

choosing to invest aggressively instead. The company has remained out of the radar of antitrust authorities by choosing to price below cost and expanding widely instead.¹

A similar phenomenon was observed in the case of telecom industry in India. Jio, a new entrant in the telecom industry provided free of charge services as a promotional or welcome offer. Telecom industry saw an unprecedented trend of mergers and consolidation with the entry of Jio. Thus, Jio Infocomm became the country's No. 1 telco by revenue market share (RMS) in April-June quarter of 2019, in less than three years since it launched mobile services (Pandey and Sharma, 2020). During the same period, Airtel and Vodafone Idea, two major competitors of Jio incurred heavy losses of Rs. 2,866 crore and Rs. 4,874 crore, respectively, in the April-June period (Parbat, 2019).

There are various dimensions of digital platform businesses. Over the years, this segment has witnessed a number of mergers and acquisitions, which have a bearing on the competitive structure of this sector. Strong interlinkages among various business segments enable these conglomerates to leverage their position in one market to enter into another market. Major technology giants like Amazon, Apple, Facebook, Google and Microsoft are aggressively involved in mergers and acquisitions. During 2008-2018, Google acquired 168 companies, Facebook acquired 71 companies and Amazon acquired 60 companies (Argentesi et al., 2020). In majority of the cases, the targets were young start-ups. These acquisitions have a large potential to benefit consumers by allowing innovation to be scaled-up and integrated into richer and better functioning platforms. However, such acquisitions might restrict competition and consolidate the acquirer's position in the market. The firm acquires a target which develops a technology that can be used to compete with its own products in the future and the acquisition kills the competitive threat. These acquisitions are particularly problematic in the context of digital markets, where due to strong network effects, competition is often for the market rather than in the market. In such markets, the competitive pressure exerted by new entrants is essential to discipline incumbents' market behaviour and foster innovation.

These acquisition patterns have implications for innovation, investment as well as consumer choice. The prospect of a takeover by an incumbent can

be an incentive for a start-up to develop potentially successful projects if it otherwise can't get enough external funding to bring the project to market. However, the incumbent may decide not to develop the project/product after the acquisition. Thus, such acquisitions can kill innovations and also restrict consumer choice.

Digital markets exhibit characteristics of conglomerates, i.e. a high degree of diversification into weakly related or sometimes even unrelated sectors. For example, Amazon which initially entered into the business of bookselling has expanded into sale of almost everything online, including payment systems, cloud computing and production and distribution of movies and series. Google which started as a search engine has ventured into maps, operating systems, mobile and personal computing devices and cloud services. Facebook has diversified into photo and video social networking with Instagram, messaging with WhatsApp and virtual reality with Oculus VR. Digital platforms prefer to diversify due to supply-side as well as demand-side synergies. Digital firms use or generate inputs such as consumer data that can be used for a variety of products. Operation of multiple product lines helps these firms to manage resources for optimal utilisation. Further, synergies also arise from the demand side. Consumers also prefer to purchase different products from the same seller due to a reduction in search cost/time.

As per market power theory, although conglomerates diversify into seemingly unrelated markets, this may indirectly increase their market power as a high degree of diversification increases multi-market contacts, thereby facilitating (tacit) collusion among conglomerate firms. Conglomerates may also use cross-subsidies between different lines of business to increase their market power in a given market, for example through predatory pricing. This is also referred to as the "deep pocket" theory. Another theory which seems more relevant to digital markets is resource theory. As per this theory, digital players have important resources such as data or technological expertise that may be at a moment of time in excess capacity, which would incentivise the firms to expand. For example, Amazon invested in the huge data centre to support the development of e-commerce. However, later due to excess capacity, Amazon decided to enter the market for cloud services through AWS (Amazon Web Services).

Competition concerns that may arise with digital conglomerates are of four types, namely, bundling, access to data, gatekeeper status and acquisition of start-ups. Supply-side and demand-side synergies facilitate bundling strategies, which may have both efficiency effects because they generate consumption synergies and anti-competitive effects particularly when incumbent creates entry barriers for the new entrants. Secondly, the firms controlling essential components such as data may have a competitive edge over potential rivals in diversifying into new product markets. Third, firms that develop as multi-product conglomerate entities may achieve a position where they become gatekeepers for access to their consumers by third parties like advertisers, sellers, *etc.*, giving them strong market power over these third parties. Finally, dominant firms might expand into new markets by acquisition of promising start-ups. These acquisitions can be efficient as large firms may bring complementary skills and resources to develop these new innovations. However, they could also be driven by pre-emptive motives and be harmful to competition and innovation, in particular, if these start-up projects are shut down after acquisition.

3. Challenges Faced by Antitrust Authorities

Rapid technological development has changed the business models as well as nature of marketplaces. This has posed new challenges for competition authorities worldwide. The current prominent approach in antitrust is the 'consumer welfare approach' which is based on measuring benefits or harm to consumers in the form of low prices or more value, respectively. Consumer welfare approach does not raise any concern over practices where predatory pricing is used to grow and monopolise the market. This practice results in lower prices for consumers in the short to medium term until competitors are driven out of the market. Therefore, it is plausible to argue that consumer welfare approach does not adequately address the anti-competitive business practices in the digital platforms.

New approach to competition investigation needs to be adopted. Some scholars have suggested that the competition authorities should focus on anti-competitive effects of the control of personal data by platforms whereas others have suggested reforms in competition policy. Khan (2017) stresses the need to adopt process-based approach which would focus on entry barriers, conflicts of interest, the emergence of gatekeepers and

bottlenecks, the use and control of data and the dynamics of bargaining power.

It is widely recommended to change competition policy when applied to digital markets. Market power assessment, theories of harm and modes of operation need to be improved. Considering the importance of innovation in digital markets, it is also suggested that dynamic efficiency should be prioritised over static efficiencies. Market power should be assessed more dynamically by focusing more on potential competition and entry barriers. It is also recommended to err on the side of disallowing potentially anti-competitive conducts and impose on the incumbent the burden of proof for showing the pro-competitive effect of its conduct. Competition authorities worldwide are making changes in their competition policies by taking into account the challenges posed by the digital economy. For example, Germany revised its competition law in 2017 to adapt its legal framework and tools to new features of the digital economy, and introduced a provision recognising free products or services provided by platforms as a market, stating that “the assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge” (Section 18(2a)) (UNCTAD, 2019).

4. Sherman Act: Attempt to Monopolise

Section 2 of the Sherman Act, 1890 reads *“every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”*

The phrase “attempt to monopolise” has been widely discussed in the US antitrust literature with a greater emphasis on what constitutes an attempt to monopolise. The US Supreme Court faced difficulty while dealing with this issue substantively given the complexity of the factors involved therein. The US Supreme Court in its judgement in *American Tobacco Co. v. United States*² stated: “[t]he phrase ‘attempt to monopolize’ means the employment of means and procedures which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous

probability of it.....” In *Walker Process Equipment Inc. v. Food Machine & Chemical Corp*³, the Supreme Court stated that monopolisation and attempt to monopolise require assessing the defendant’s ability to lessen or destroy competition in the relevant market.

The majority of the cases brought before the circuit courts in the United States followed the traditional approach set in 1905 by Justice Oliver Wendell Holmes of the Supreme Court in the first attempt offence matter in *Swift & Co. v. United States*⁴.

On the basis of jurisprudence set in *Swift & Co. v. United States* case, the three key elements to bring down an action under an attempt to monopolisation in the US antitrust regime are: (1) specific intent to monopolise, (2) conduct designed to implement that intent; and (3) a dangerous probability of success.⁵ A plaintiff in an attempt to monopolise case proves a dangerous probability of success by showing that the defendant possesses a sufficiently high share of the relevant geographic and product market.

The discussion over the past regarding the elements that constitute an attempt to monopolise indicates two different and divergent approaches. The majority is of the view that dangerous probability of success is an essential element of an attempt to monopolise case. A deviation from the dangerous probability of success test is unwarranted in view of the majority approach as the majority believes that giving up this test will open up a Pandora's box of nuisance cases. Secondly, removing this test would result into a chilling effect on competition. The majority view argues that requiring proof of the dangerous probability of success shelters firms with no real potential for monopolising the market from antitrust liability. Thus, small firms can compete with larger firms without the threat of antitrust liability. Further, the elimination of dangerous probability of success might encourage courts to crack down on aggressive business conduct. Thus, big firms will not engage in aggressive pricing to avoid risking antitrust liability. Dominant firms will hold back production, raise prices and create a “price umbrella” under which smaller firms may produce inefficiently yet still exist. This results in a non-competitive market and higher prices for consumers.

The minority view deemphasises the dangerous probability of success element. The minority is of the view that in an attempt to monopolise case, dangerous probability of success may be inferred from specific intent. In *A.H. Cox & Co. v. Star Machinery Co.*⁶, the Ninth Circuit Court stated that “[i]n most cases dangerous probability of success will be inferred from predatory conduct and specific intent to control prices or exclude competition”. In *California Steel & Tube v. Kaiser Steel Corp.*⁷, the Ninth Circuit Court stated that “when conduct and intent are not clearly predatory or anticompetitive, the plaintiff must present independent proof of dangerous probability of success by showing the defendant already controls a significant market share”. Thus, when the conduct is not anti-competitive, then only the plaintiff needs to prove dangerous probability of success by showing that defendant already controls a significant market share. As per the minority view, “Attempt” connotes conduct and not a state of being. Unlawful intent can be inferred from the conduct as a proof of an “attempt”. The law does not require completion of the crime, it requires conduct. Thus, an attempt to monopolise is a conduct offence. Market share analysis, the typical proof of dangerous probability of success is, thus, used to prove monopolisation. However, market share is not related to conduct and, therefore, should be irrelevant for the conduct offence such as the attempt to monopolisation.

In *United States v. Yellow Cab Co.*⁸, the defendant conspired to monopolise the sale of taxicabs in four mid-western and eastern cities. The Supreme Court held that proof of defendant’s market share was not necessary in a conspiracy to monopolise case. Although *Yellow Cab* involved a conspiracy to monopolise, the Supreme Court’s conclusion that the market share is not necessary in a conspiracy to monopolise action has persuasive authority.

Further, contrary to the majority argument, it was seen that the dangerous probability of success requirement impedes competition rather than promoting it. In *United States v. Empire Gas Corp.*⁹, the defendant was a large wholesaler and retailer of liquefied petroleum, charged with an attempt to monopolise the market for these fuels. Empire Gas Corp had engaged in a host of anti-competitive activities, including requesting competitors to raise their prices to meet its own and threatening to oust competitors from market if they refused to do so. It also retaliated against recalcitrant competitors by drastically reducing its prices in the competitors’ market and, on several occasions, by purchasing a competitor’s fuel supply

and then charging him prices so high that the competitor was unable to effectively compete. The record indicated that the defendant successfully forced at least one competitor to capitulate and sell at a uniform higher price. The Eighth Circuit Court found a specific intent to monopolise and a probable market share of approximately fifty per cent. The court did not, however, find an attempt to monopolise because it found no dangerous probability of success. Conduct like that involved in *Empire Gas* case *supra* seems to stifle rather than foster competition by reducing the amount of competition between the firm and its uncooperative competitors and new entrants in the market.

*Union Leader Corp. v. Newspaper of New England, Inc.*¹⁰ provides a good example of an intent to achieve monopoly. The case involved Haverhill, a small Massachusetts town which had been served by a single newspaper for almost a century. When the printers of the Haverhill Gazette newspaper went on strike, the Union Leader, a publisher from a nearby town, published a shoppers' guide for the town of Haverhill. Later Union Leader began to publish and distribute its paper in Haverhill on a regular basis. Union Leader filed suit against the Gazette alleging unfair practices to maintain monopoly power in Haverhill. In this case, the District Court of Massachusetts noted that Haverhill was a "one newspaper city" and the market could not support two high-quality daily newspapers. The Court further recognised that the intent to capture the market through skill, foresight and industry would not be a violation of the Sherman Act. Exclusionary conduct, however, could be proven through evidence of the use of unfair means to gain control in the natural monopoly market. In the extant case, Gazette secretly lowered advertising rates to compete with Union Leader's rates and Union Leader was indulged in secret payment to Haverhill merchants and also charged discriminatory advertising rates. The court ruled that actions of both the Gazette as well as the Union Leader were "not honestly industrial" and constituted attempt to monopolise. The appellate court took a view that the Gazette's actions were taken in self-defence and had no wrongful intention.

In *Paschall v. Kansas City Star Co.*¹¹ ('Star'), the courts have turned to economic analysis for guidance in making their decision in antitrust litigation. In this case, Star held the monopoly of its wholesale newspaper market in Kansas City, Missouri. The Star used independent carriers to

deliver the newspaper. When Star decided to discontinue its independent delivery system, the independent newspaper carriers filed a lawsuit alleging refusal to deal and attempted monopolisation of the carrier market. In this case, the Eighth Circuit Court used optimum monopoly price theory of the Chicago School of Economics and concluded that Star's decision to vertically integrate would lower prices and improve the quality of services to consumers. This case indicates that analysis of predictable effects rather than the means used to achieve those effects may be useful in natural monopoly settings.

Thus, an attempt to monopolisation is used very often in the natural monopoly industries due to large economies of scale. In such cases, intent to monopolise which can be interpreted from the actions of the firms and the effects of that monopolisation should be taken into consideration.

5. Attempt to Monopolise and Emerging Markets: Indian Perspective

Emerging markets such as telecommunication and e-commerce pose different challenges for the competition authorities globally. Competition law assumes that market power is not inherently harmful. It could result from efficiencies and also generate the same. It is believed that market power can be harmful only if it leads to higher prices or reduced output. This only emphasises on the effect and does not look into the ways resorted by the firm to amass the market power. This further makes it difficult to check the abuse of such power at a later stage. Further, antitrust injury cannot solely be assessed from a price yardstick, other factors such as quality of products, availability of choice, reduced service or impact on innovation also need to be taken into consideration. In this regard, the CCI's recent jurisprudence can be taken into consideration.

In *Bharti Airtel Limited v. Reliance Industries Limited & others*¹² case, it was alleged that the defendants, who owned the largest amount of spectrum for 4G LTE had newly entered the market and was providing promotional offers to subscribers under which data, voice, video and the full bouquet of applications and content were available to the subscribers absolutely free. Such predatory pricing tactics used by the defendants were leading to ouster the existing competitors from the market. However, the CCI found it difficult to construe the dominant position of the defendant as the

market share of the opposite parties were minimal in the relevant market on account of being a new entrant. The CCI was of the view that short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature. In the absence of clear dominance in terms of market share, the CCI preferred to abstain from taking cognizance of the predatory pricing strategy adopted by the defendants to capture the market which further led to ouster of small market players from the telecom industry.

In *All India Online Vendors Association v. Flipkart India Private Limited and Flipkart Internet Private Limited*¹³, it was alleged that Flipkart is abusing its dominant position by providing preferential treatment to certain entities and that unfair trade practices were being carried out by the Opposite Parties (OPs) for which corporate veil was required to be lifted to assess economic nexus and wrongdoings. It was further alleged that Flipkart had direct conflict of interest with other manufacturers selling on their platform and their own brands. The CCI, considering present market structure of online platforms market in India, did not find any one player to command a dominant position. The CCI also observed that the marketplace-based e-commerce model is still relatively nascent and evolving model of retail distribution in India. The CCI was cognizant of the technology-driven nature of this business model. Recognising the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the CCI was of the considered opinion that any intervention in such markets needed to be carefully crafted lest it stifles innovation.

In *M/s Mega Cabs Pvt. Ltd. v. M/s ANI Technologies Pvt. Ltd.*¹⁴ ('ANI'), it was alleged that ANI, a dominant player in the market, was abusing its dominant position. It was also alleged that ANI entered into anti-competitive agreements with the taxi drivers registered on its network which adversely affected competition in the market. ANI managed to raise huge investments in order to acquire a position of dominance in the Delhi-NCR region and engaged itself in abusive tactics like predatory pricing, offering periodical discounts to consumers and incentivising drivers with the sole aim to eliminate competition from the market. The CCI observed that the inability of existing players or new entrants to match the innovative technology or app developed by any player or the model created for operating in a particular industry cannot be said to be creating entry barriers in itself and hence, closed the matter.

In contrast with the view taken in earlier cases, the CCI, in subsequent cases involving technology-driven market players, has followed a cautioned approach. In *Mr. Umar Javeed and others v. Google LLC and others*,¹⁵ it was alleged that a wide range of Google apps such as Google Maps, Gmail, and YouTube were available only through GMS¹⁶ and could not be downloaded separately by device manufacturers. In order to obtain the right to install these applications and services on their Android devices, manufacturers had to enter into certain agreements with Google. The Informants also alleged that end-users could not avail such services directly. The Informants further alleged that Google engaged in different kinds of anti-competitive practices, either in the market in which they are dominant or in separate markets, to strengthen its dominant position in Online General Web Search Services and Online Video Hosting Platform (through YouTube). The CCI observed that the mandatory pre-installation of the entire GMS suite under MADA (Mobile Application Distribution Agreement) amounted to imposition of unfair condition on device manufacturers. It also *prima facie* appeared to the CCI that Google leveraged its dominance in Play Store to strengthen and protect its position in other relevant markets such as online general search in contravention of the Act. In view of the foregoing, the CCI ordered an investigation into the matter.

In *M/s Fast Track Call Cab Private Limited v. M/s ANI Technologies Pvt. Ltd.*¹⁷ (*ANI*) and *Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*¹⁸, it was alleged that ANI was using unfair trade practices such as unfair conditions, predatory pricing, etc., to establish its monopoly and eliminate otherwise equally efficient competitors who cannot indulge in such predatory pricing in the radio taxi services market. It was also alleged that ANI incentivised the drivers unrealistically by using money available with it due to the foreign investments which could not be matched by existing radio cab operators or potential indigenous enterprises desirous of starting such operations in India. Such practices resulted in the exclusion of existing players and created entry barriers for the new entrants. The CCI observed that ANI was spending more money on discounts and incentives (apart from the variable costs it may be incurring) on customers and drivers compared to the revenue it was earning. The CCI was of the *prima facie* view that the prices indicated predatory pricing aimed to oust other players from the relevant market and, hence, ordered detailed investigation. However, the CCI did not find ANI dominant in the relevant

market and, hence, no case of contravention of the provisions of the Act could be made out against the OP.

Later, Meru Travel Solutions Private Limited filed multiple information(s)¹⁹ against M/s ANI Technologies Pvt. Ltd., Uber India Systems Pvt. Ltd. and its parent entities alleging that Ola and Uber were individually and jointly dominant (on account of common ownership by institutional investors) in the relevant market in Hyderabad, Mumbai, Kolkata and Chennai. In the absence of any evidence indicating lessening of competition, the CCI closed these cases.²⁰

In *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities*²¹, the Informant alleged that these market places are distorting level playing field by providing deep discounts to their preferred sellers to the detriment of the non-preferred sellers. It was further alleged that both Amazon and Flipkart had exclusive tie ups with smartphone manufacturers and their private labels also get preference in sales through a few preferential sellers. In this case, the CCI recognised the fact that online intermediation services are key enablers of entrepreneurship which offer access to new markets to sellers/business users and increase the consumers' choice of goods and services. These services form a fulcrum of commercial success of the sellers who avail such services to reach consumers on the platform. At the same time, online platforms providing intermediation services result in the growing dependence of businesses on these platforms. The CCI, *prima facie*, found that exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition and ordered investigation into the matter.

Strategy of growth over profit is widely adopted to gain foothold in the market. New business enterprises are adopting such strategies with the backing of financial institutions. Competition authorities need to be careful while assessing such situations where new ventures are providing free of cost services to get a foothold in the market. Mistaking competitive pricing as predatory will tend to inhibit price competition in the economy. On the other hand, mistaking predation for competition may foster higher prices from increased concentration in the long run. In light of these

considerations, competition authorities should not take action unless the existence of predatory pricing can be established with a reasonable degree of accuracy and should recognise that it may be better to have no explicit rule prohibiting predatory pricing than to mechanically enforce such a rule. In such situations, competition authorities need to be careful while implementing the attempt to monopolise concept and it is essential to analyse the intent of the firm. If the firm is adopting growth over profit strategy in order to enter the market or to establish its own new market and there is no intention to remove competition, then there is no concern. However, if the intent or result of such strategy is to remove competitors from the market, then cognizance of such offence needs to be taken by competition authorities.

6. Conclusion

It can be seen that jurisdictional practice of the CCI has been evolving over the period. Earlier, the CCI closed cases in the absence of apparent indication of market dominance of the firm, i.e. lack of market share. In addition, consumer welfare was also taken into consideration as predatory pricing practices were actually beneficial to the consumers. However, in recent cases, the CCI is taking cognizance of the fact that companies are using business tactics such as providing deep discounts to customers, free services to oust competitors. Predatory prices and their market power are not getting reflected in their market shares. Further, it can be seen that the lack of legal provisions recognising an attempt to monopolise or collective dominance of the companies is restricting the powers of the CCI. Therefore, this paper is of the view that borrowing such provisions from the Sherman Act and without placing much emphasis on the dangerous probability of success could help in checking anti-competitive practices in the technology driven industries and will go a long way in promoting innovation as well as consumer welfare. The intent of the firm can be deciphered from the conduct. Further, as can be seen from the US antitrust cases in sectors where natural monopoly exists, the conduct of the firm for achieving monopoly, i.e. whether it has been achieved organically or by employing unlawful tactics should be taken into consideration.

Endnotes

- ¹ US Department of Justice (DoJ) has launched a wide-ranging review of the four tech giants, referred as “GAFA” – Google, Amazon, Facebook, and Apple to investigate the influence of big tech on the economy and in particular to understand how information is found and consumed (<https://www.technologyreview.com/f/614287/50-us-states-have-launched-an-antitrust-investigation-of-google/> accessed on 20.01.2020). Similarly, the European Commission, the executive arm of the European Union, has imposed a combined US\$ 9.5 billion in antitrust fines against Google since 2017, and Facebook, Amazon and Apple are also facing investigations across Europe. (<https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html> accessed on 20.01.2020).
- ² 328 U.S. 781 (1946).
- ³ 382 U.S. 172 (1965).
- ⁴ 196 US. 375 (1905).
- ⁵ The fourth element is of course the proof of antitrust injury.
- ⁶ 653 F.2d 1302 (9th Cir. 1981), United States Court of Appeals.
- ⁷ 650 F.2d 1001 (9th Cir. 1981), United States Court of Appeals.
- ⁸ 332 U.S. 218 (1947).
- ⁹ 537 F.2d 296 (8th Cir. 1976), United States Court of Appeals.
- ¹⁰ 218 F. Supp. 490 (D. Mass. 1963), US District Court for the District of Massachusetts.
- ¹¹ 695 F.2d 322 (8th Cir. 1982) and 605 F.2d 403 (8th Cir. 1979), United States Court of Appeals, Eight Circuit, 441 F. Supp. 349 (W.D. Mo. 1977), United States District Court, W.D. Missouri.
- ¹² Case No. 03 of 2017.
- ¹³ Case No. 20 of 2018.
- ¹⁴ Case No. 82 of 2015.
- ¹⁵ Case No. 39 of 2018.
- ¹⁶ GMS is a collection of Google applications and Application Programme Interface (APIs) that help support functionality across devices.
- ¹⁷ Case No. 06 of 2015.
- ¹⁸ Case No. 07 of 2015.

- ¹⁹ Case No. 25, 26, 27 and 28 of 2017.
- ²⁰ The order passed by the Commission in Case No. 96 of 2015 was challenged by the Informant before the Competition Appellate Tribunal (COMPAT). The COMPAT reversed the order passed by the CCI dated 07.12.2016 directing the DG to cause an investigation into the matter involving huge discounts and incentives offered by Uber in order to find out if the same is result of new efficient business model or there is any anti-competitive stance to it. Uber preferred an appeal against the order of COMPAT. The Hon'ble Supreme Court, vide its judgement dated 03.09.2019, dismissed the appeal and upheld the order of the COMPAT.
- ²¹ Case No. 40 of 2019.

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Competition Issues in Public Procurement: Is Tender Design the Solution?

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Abstract: Public procurement is one of the most important economic activities for any economy. The forward linkages and its impact on social and industrial policy give it “an engine of growth” dimension. In this attempt, we try to study why competition is crucial for the success of any procurement policy. The fundamental need for public procurement is to be efficient, as an “efficient” public procurement not only reduces public expenditure but also has positive externalities. The basic framework within which we try and study the competition concerns in public procurement is based on two types of concerns, namely collusive and non-collusive. These two types of concerns emanate from a combination of numerous factors like number of sellers, demand conditions, and market dynamics. The factors, which result in inefficient procurement, are often not amenable to quick changes to ward off the threats completely. Therefore, a multi-prolonged approach is needed for efficient public procurement outcomes. Tender designs draw the boundaries of the competition field where sellers compete for the market. Therefore, they can incorporate elements to address specific threats that a particular procurement market face. Hence, the tender design is a potential tool which can be utilised to mitigate and address these concerns.

Keywords: Bid rigging, cartels, multiplier effect, market allocation, open tenders, corruption, participation costs.

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1. Introduction

Business dictionary defines procurement as “the action of obtaining or procuring something”.¹ The process includes preparation and processing of demand as well as the end receipt and approval of payment. It often involves: (i) purchase planning, (ii) standards determination, (iii) specifications development, (iv) supplier research and selection, (v) value analysis, (vi) financing, (vii) price negotiation, (viii) making the purchase, (ix) supply contract administration, (x) inventory control and stores, and (xi) disposal and other related functions.

While procurement can be done by any entity, including individuals, businesses, non-profit making organisations and governments, the focus of the present article is on government purchases, i.e. public procurement. Governments need to buy goods and services for administrative purposes and for providing public services. At times, the government acts as an entrepreneur and requires supplies just like any other business concern – these supplies are also classified as public procurement. Thus, public procurement refers to the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies, the underlining basis, for which, is to secure the best value for the public money.

The nature and scale of public procurement can lead to a multitude of benefits for the economy. However, anti-competitive threats lead to inefficient market outcomes in public procurement and in turn diminish the positive aspects of it. Therefore, efficient public procurement and mitigating anti-competitive concerns which mar it are of utmost importance in a developing country like India. Hence, this article attempts to highlight the crucial nature of an efficient public procurement. We will also explore a potential solution, i.e. tender designs, for addressing anti-competitive threats in public procurement.

The article discusses the scale of public procurement in the second section. In the third section, we look at the importance of an efficient public procurement system. The fourth section discusses in detail, the competition issues that can occur in public procurement. In the fifth section, we discuss how and to what extent tender design can resolve the competition issues

in public procurement and in the final section, we draw conclusions from our discussion.

2. Public Procurement in India

The very nature of government requirements dictates that they usually need goods/services in large quantities; in turn, the size of public procurement is also huge in relation to the size of the economy. OECD (2007) estimates that public procurement globally amounts to approximately 15 per cent of gross domestic product, a figure that can even reach 25 per cent in the case of developing countries such as India.

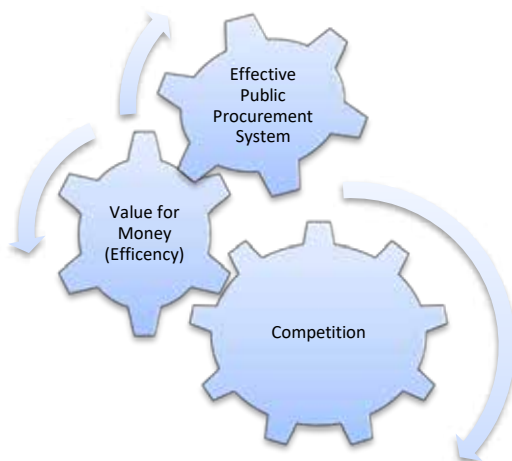
While the exact figures of public procurement in India are not available, there are certain estimates available which give us some idea of the scale of public procurement. In the World Bank Report “Enhanced Transparency in procurement through voluntary disclosure under the RTI Act 2005” (World Bank, 2009), the scale of public procurement in India is stated to be around 30 per cent of the GDP. It is important to note that some of the government departments like Defense, and Railways are likely to devote more than 50 per cent of their budget to public procurement. The Draft Public Procurement Bill 2011 estimated the value of public procurement in India to be in the range of Rs. 12-15 lakh crores per annum, or about 15-20 per cent of the GDP. Though these figures are not exact yet they give a rough estimate that public procurement in India is in the range of 20-30 per cent of GDP.

The implications of such a big scale of public procurement for a developing economy like India can potentially be many. An efficient procurement in India can help generate aggregate demand necessary for making India a five trillion dollar economy. It can also have implications for the efficient use of scarce resources and employment generation. Thus, public procurement is a tool for achieving multi-dimensional goals and needs to be treated with care.

3. Why does Public Procurement need to be efficient?

It is clear that the scale of public procurement makes it an important activity of the economy. However, there are other aspects related to public procurement which make it even more important. Firstly, the government spending on procurement creates a cycle of income and investment

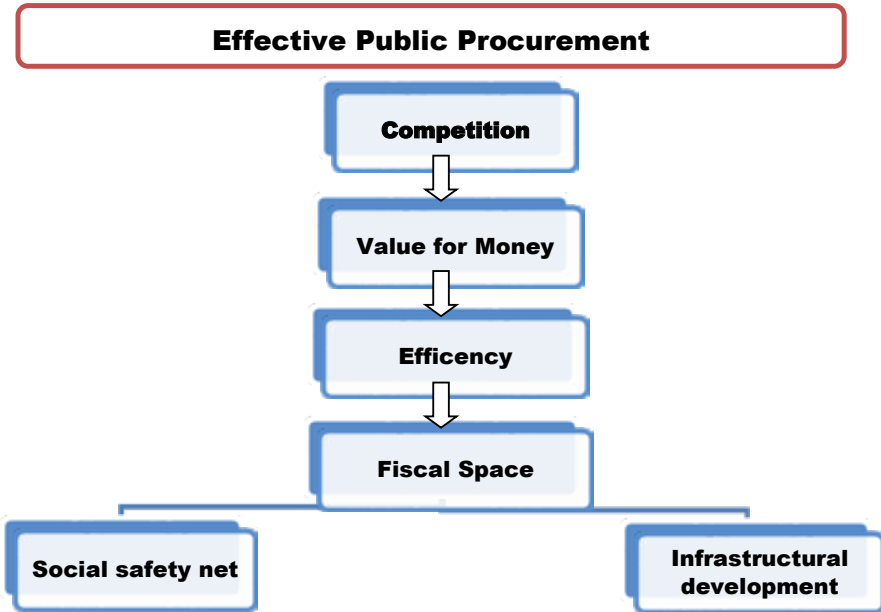
Figure 1: Competition as a Driving Force



which contributes to the economic growth of the country. Government expenditure increases the national income of the country by multiples. This phenomenon is called the “multiplier effect”. Government expenditure through public procurement also provides business opportunities to the private sector. Public procurement impacts the level of participation in the economy by creating “effective demand”, thus creating new opportunities. The general increase in the income in the economy in turn improves the business and investment environment. The increase in the level of participation also enhances competition in the market in the long run. Thus, public procurement has a growth aspect attached to it. Secondly, effective procurement has a direct impact on the quality of public services in the country. The effectiveness of government and its performance, hence, depend heavily on effective public procurement.

The above discussion reveals that there is an absolute need for public procurement to be efficient, as an efficient public procurement not only reduces public expenditure but also has positive externalities which affect many aspects of the economy. Here, efficiency essentially entails the selection of suppliers with the lowest price (with a given level of quality) which means achievement of the best “value for money”. If expenditure is made in an efficient way then, as stated above, all the secondary effects or externalities associated with public procurement can be realised. The relation may be depicted as in Figure 2.

Figure 2: Effective Public Procurement



The relation signifies that value for money or the least possible cost is essential for an effective and efficient public procurement. Another observation which can be made from Figure 2 is that competition is essential for efficient procurement. Competition among suppliers/manufacturers by providing them with a fair chance to participate in public procurement, as in any other market, ensures that the most efficient supplier is incentivised. Other economic efficiency features like investment and innovation are also spurred through competition. Thus, competition can be thought of as a core element for any efficient and effective public procurement.

The anti-competitive acts and conduct of sellers introduce many inefficiencies in the procurement market. Firstly, cartels don't breed cost-cutting and the focus of the cartels is on rent sharing. Secondly, protected markets don't generate innovations and are not known to be quality conscious. Therefore, any anti-competitive conduct or feature in public procurement puts the efficacy of procurement in jeopardy.

4. Competition Concerns in Public Procurement

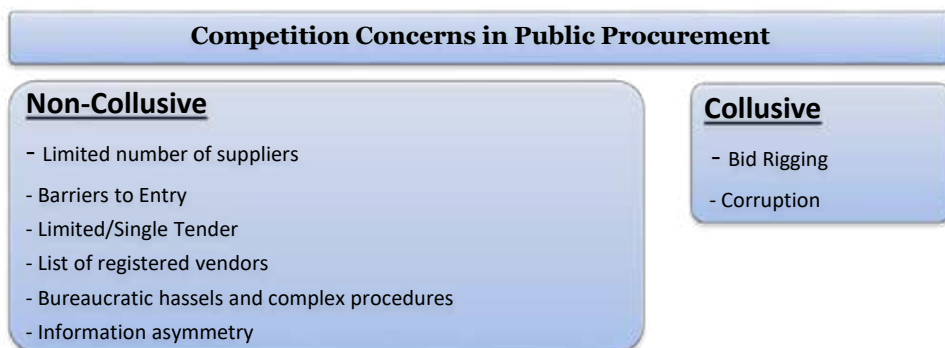
Public procurement differs from any other purchase in a fundamental way. Generally, a private purchaser has a wider set of strategic options for

purchase whereas the public sector is subject to government guidelines/rules/regulations which may be constraining. For example, public procurement in India is subject to General Financial Rules-2017 of MoF, GoI, CVC guidelines, manuals on procurement issued by PSEs, etc.

While transparency and non-discrimination obligations together with formal requirements with which procurement processes have to comply are set up as an attempt to avoid any abuse of discretion by the public sector, the resulting lack of flexibility limits the public purchaser's options in which procurement can be done (OECD, 2007). Therefore, the prominent way through which public procurement takes place is "bidding" especially if the procurement involves relatively larger amounts. Bidding essentially ensures that suppliers of the required goods come to the public procurer. Competitive bidding then ensures two things: firstly, it identifies the most efficient supplier of a certain good or service and secondly, it determines the efficient price. Thus, the "bidding" mode of procurement suits the transparency and non-discrimination commitments of the government and therefore, it is the most prominent way through which public procurement is conducted.²

The discussion above gives us a basic framework within which we would try and study the competition concerns in public procurement. This framework revolves around public procurement through the process of "bidding" or "tendering". Though competition concerns which may arise in public procurement are not drastically different from other markets, we can classify them as non-collusive and collusive (see Figure 3).

Figure 3: Competition Concerns in Public Procurement



Concerns from Collusive Behaviour

Collusive behaviour here implies understanding or agreement between two or more than two entities/people who are involved in the procurement process. Thus, understanding may be among suppliers of a particular product or between supplier(s) and procurement official(s).

The biggest threat to competition in public procurement is that of bid rigging. It defeats the basic purpose of the bidding process, i.e. determination of the most efficient price offered by the market. Bid rigging occurs when bidders act in concert and intentionally predetermine the outcome of the bidding process. Bid rigging may take many forms which are as follows:

- i. **Collusive bidding:** Agreement between firms to divide the market, set prices or limit production – involves kickbacks and misrepresentation of independence.
- ii. **Bid rotation:** Conspiring firms continue to bid but they agree to take turns being the winning bidder.
- iii. **Cover bidding:** It is also called complementary or symbolic bidding – here the bidder agrees to submit a bid which is higher than the designated winner bid or puts certain conditions which are known to be unacceptable to the procurer. It is designed to give the appearance of genuine competition.
- iv. **Bid suppression:** Bidders agree to refrain from bidding or withdraw bids in favour of the winning bidder.
- v. **Market allocation:** Competitors divide the market and agree not to compete for certain customers or in certain geographic areas so as to select the winner.

The next threat to competitive outcome in public procurement is that of collusion between bidders and the officials of the procuring agency. The primary aim of bidders is to win the bid and to capture the market. If there is competition in the market then the most efficient supplier is expected to win as it would be able to supply the tendered goods at the most economical cost. However, any participant can increase the odds of winning the tender if that participant can turn the tender process in its favour.

One of the ways to do this may be to get the officials responsible for the tendering on board and change the rules of the game. This is done to alter the tender process in such a way so as to ensure that a particular bidder wins the tender. The emphasis here is to fix the end result of the tendering process. Thus, instead of the most efficient bidder, the corrupt bidder, who managed to get procurement officials in his favour happen to win the tender. This way competition is adversely affected by corruption in the public procurement. It is important to note that this form of collusive behaviour is not technically bid rigging as the agreement is not between bidders. The officials acting in concert with bidders are doing unethical and illegal acts and therefore, the action comes under the ambit of corruption.

Bid Rigging as defined in the Competition Act, 2002

The Competition Act, 2002 defines bid rigging as “any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.”

Clearly for bid rigging to exist, an agreement has to be between bidders who are horizontally placed in the competition parlance and are engaged in identical or similar trading or production of products. Therefore, if one of the parties undermines the competition in the bidding process by indicting the officials involved in public procurement, it cannot be held accountable under the Competition Act.

Competition Concerns from Non-Collusive Aspects

Non-collusive concerns in public procurement arise when the bidding structure distorts competition, and as a result gains from competition do not occur in public procurement. Thus, the competition process is undermined not by any understanding or agreement between the parties but by the bidding structure itself.

The first thing which may undermine the efficient outcome is that the bidding structure limits the number of bidders. When procurement rules lay down very specific technical/financial specifications, then the process

of bidding renders a number of suppliers ineligible for bidding. This, in effect, means a limited number of suppliers can participate in the bidding.

Another way the number of bidders gets limited is by shortlisting suppliers beforehand in the garb of an approved suppliers list. Such shortlisting is done generally on technical and financial grounds. These short-listed suppliers become the only suppliers eligible for participation in the bidding process. This type of pre-selection is generally done by procurers where there are safety and security concerns or when procurer needs the goods delivered quickly. However, this becomes a barrier to entry in itself and undermines competition. For example, the Railways in India procure products only from suppliers who are on the approved list maintained by Research Designs & Standards Organisation (RDSO). It is not uncommon to observe that for many simple products there are just three or four approved suppliers.

Similarly, many a times there remains information asymmetry in the market for public procurement. Experienced and resourceful players often have access to information which other potential bidders in the market lack. This places better-informed players in an advantageous position and overtime it discourages small players from participating in the bidding process. Lack of proper publicity, advertising, and calling for limited tenders enquiries (LTE) are issues that come under this category. Another problem that information asymmetry introduces in the procurement is the problem of adverse selection. The buyers may fear a rigged trade (cartel) and it may result in delays and cancellation of the procurement process. A “safe and strong” tender design will help ward off these fears and can prevent the market from failure.

Bureaucratic hassles and complex procedures may take many forms, for instance, insufficient time for filling bidding documents or lengthy procedural requirements. The excessively tedious process for participation sometimes discourages participation in the bidding, thus limiting the number of bidders and undermining the competition. For example, paperwork involved, requirements of numerous NOCs (No Objection Certificates), etc., are expensive in terms of time and money. Therefore, over-reliance on them can discourage participation.

5. Tender Design: Possible Solution of Anti-competitive Concerns in Public Procurement

The above discussion has enumerated many competition concerns which have to be dealt in public procurement. We have also seen that corruption is not covered in the Competition Act, 2002. However, corruption has ramifications for the competitive landscape and, therefore, needs to be curbed in public procurement in order to realise the benefits of competition.

Hence, there are basically two main things we need to take care of, first limit the possibility of bid rigging and second increase competition primarily by ensuring that a sufficient number of bidders are there in the market. In this section, we would look into the question, how tender design can inculcate these qualities in public procurement.

Tender process or “Tendering” refers to extending an invitation to suppliers to send in proposals to supply specific goods or services. Tenders can basically be of the following three types:

- a. Competitive Tenders: All the bidders eligible to apply can participate in the process.
- b. Limited Tenders: Invitation is extended only to select few eligible suppliers.
- c. Single Tender: Invitation is extended to only one supplier at the discretion of the procuring agency.

All the aspects related to the proposals to be sent by the suppliers come under tender design. These aspects may include contract terms of supply, time by which proposals are to be sent, who can participate in the tender (eligibility criteria), how to send in proposals, etc. Let’s see how tender design can be utilised for addressing competition concerns in procurement.

Firstly, as far as possible procurement must use an open tender system instead of limited/single tender system. Competitive tenders attract wider participation than other forms of tenders. Single/Limited tenders limit the number of participants and thus undermine the full potential of competition. Sealed bid tenders, wherein bidders are required to submit their final best price offers, make selection somewhat uncertain. Thus, the

incumbency effect and advantage of big players are neutralised. Therefore, sealed bid tenders encourage small players to participate in the bidding process. It is important to note that open tender and sealed bid tenders also comply with the non-discriminatory principle which is one of the principles enumerated in GFR-2017. Therefore, advertised tender enquiry best suits to optimise competition in public procurements.

Secondly, technical and financial criteria to be fulfilled by potential bidders must not be exceedingly/prohibitively complex and stringent. Financial and technical standards in tenders must be in proportion to the criticality of the products to be procured. For example, for procuring simple products like computer hardware and electrical supplies, technical and financial standards for suppliers can be kept low to encourage wider participation. The high standards are usually kept to reduce the cost of evaluating bids and to ensure the stability and quality of supply. However, it may lead to high entry barriers for new entrants leading to inefficient outcomes. As far as possible rather than specifying minutely details of products, performance expected from products should be specified. One should not specify the minimum requirements pertaining to controls on the size, composition, or nature of firms as far as possible so that they do not create obstacles to participation.

It is important to note that the minimum requirements/standards of the firms must depend on the product being procured. Thus, it essential that procurement officials are all well versed with the market conditions of the product being procured. Prior information about demand and supply conditions and nature of firms in the market must be collected to set eligibility criteria for bidding firms.

Thirdly, in a number of tenders, eligible bidders comprise only a previously approved list of suppliers (for example, RDSO approved lists of various products and their suppliers who can participate in railways procurement). Thus, the set of potential participants in the bidding process consists of selected few. This in effect works as an entry barrier. For example, if the approved list for a product includes just four suppliers, then open tender in effect becomes a limited tender (because bidding is restricted to the four approved firms). A limited set of potential competitors also helps in cartel formation and sustaining them. Thus, bid rigging is encouraged by pre-

selecting potential bidders, especially if the approved lists are available in the public domain.

The above discussion makes it clear that the system of accepting bids from only a set of suppliers which gets approved, restricts competition by limiting the number of bidders. However, we need to appreciate the fact that for maintaining the quality of service, safety and continuity of supply must be ensured by procuring agencies. This aspect assumes more importance in certain cases like defence-related products, certain railway supplies like brake axels, etc., and health-related supplies like vaccines.

Therefore, the rationale of procuring critical and complex safety items through limited tenders is based on sound principles since ultimate objective is to procure quality material on time (Malhotra, 2012). These practices subsist in other countries as well, for instance the Association of American Railroads in the US follows similar practice (CUTS, 2012).

Hence, the solution lies in streamlining and expediting the procedures for approval of firms for supplying products and enabling them to be able to participate in the bidding processes. The approving mechanism must be objective, clear and time-bound. This will help interested and eligible firms enter the bidding market. Thus, the approval system must be so designed that it does not become an entry barrier in the bidding market rather it should help in expediting the approval of firms for participation in the bidding process.

Therefore, as far as possible, a system of maintaining approved/registered lists of suppliers must be avoided. In cases where, for safety and other considerations it is necessary to pre-select suppliers, the approved lists must be updated periodically.

Tenders must be designed with a view to keep the participation costs of the bid to a minimum. The costs of participation may be monetary in nature or otherwise (labour and time). This can be accomplished in a number of ways:

- By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).
- By packaging tenders (i.e. different procurement projects) together to spread the fixed costs of preparing a bid.

- By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
- Tenders must state the requirements as clearly as possible in the tender offer documents. Specifications should be independently checked before final issue to ensure they can be clearly understood by all the potential participants.³

In this context, it must be said that the time span between issues of the request for proposal to submit bids must be sufficient for potential bidders to prepare and submit the bids. It should be taken into consideration that time span is not short so that incumbents or big players who have prior experience and resources to quickly prepare bids, have an advantage.

Large monetary guarantees which limit participation by small firms should be avoided by those issuing tenders. As a general principle upfront payment of depositing amount must be avoided and monetary guarantees should be used. Monetary guarantees must also be just high enough to ensure guarantee and not block entry.

Repetitive and predictable cycle of tenders encourages collusion and bid rigging. A predictable and regular bidding frequency helps members of a bid rigging agreement to allocate contracts among themselves. In addition, the members of a cartel can punish a cheater by targeting the bids originally allocated to him⁴ in the next round of bidding. Thus, as far as possible, predictability in tenders is best avoided. Innovative ideas can be adopted for this, for example, clubbing together two or more tenders.

Another important factor in tender design is to limit the possibility of cartelisation among the bidders. If bidders have information regarding all the bidders who participated in the tender, their quoted offers, the winning bid amount, etc., of past tender offers, they can easily indulge in collusion, especially if the number of firms in the market are few. As said by Marshall and Marx (2012), '*[a]s a general rule, the more information the [contracting authority] conveys about bidder identities, the bids submitted, and auction outcomes, the easier it is for a ring to be effective in its work of suppressing rivalry among members*'. The availability of information about the winning bid and

the winner helps in detecting cheaters in case of collusive bidding. Thus, one of the crucial conditions for sustaining cartels, i.e. punishing cheaters, is made enforceable by easy access to such information. Therefore, full transparency related to all aspects of the tender process encourages bid rigging and should be avoided by tender designers.

Collusion may also be reduced by introduction of some degree of uncertainty, and secrecy, in disclosing information of the outcome of the procurement process.

However, this aspect of tender design comes in conflict with the transparency and disclosure commitments of the government. Transparency and disclosure in the tendering process are crucial elements to fight corruption in procurement. Thus, there is a need to balance out these different aims in the tendering process. It is important to note that there is no standard tender design which is “fit for all”. There is a need to design tenders according to the market structure and the existing competition in the market. Therefore, the procurement process must decide on some crucial questions in this regard like what is to be disclosed at the time of bidding, what information is to be disclosed at the time of publishing the results. As a general principle, sensitive information must not be disclosed to players in the market.

For instance, if potential bidders are large in number then free flow of information may not encourage collusion, but the situation would be different if there are only 3 or 4 potential participants. In such a scenario, it would be necessary that if interested suppliers are invited for a pre-tender primer by the procuring agency for the technical and administrative specifications of the procurement opportunity, they must not be primed together. Tender document can also make it mandatory for bidders to disclose all communication with competitors relating to the bidding project.

Tenders should avoid sub-contracting by the winner of the tender and this should be stated clearly in the tender offer. Sub-contracting is often a tool to share excess profits generated through bid rigging. Similarly, the practice of splitting the quantity into bidders decreases the incentive to compete in the bidding. In such circumstances, when supply order is split, there is little incentive for competition among tenderers, as L1, in any case, may not get supply order for the 100 per cent quantity. Similarly, the L2 firm

anyway gets a substantial portion of the order. In such a situation, there is an incentive to keep the bids at a higher level for collusion, therefore, the benefits of competition are not realised fully in such a scenario. Thus, as far as possible every contest must be a “winner takes all” contest (System of placing developmental orders, e.g. 5 per cent of supply orders to non-RDSO approved firms in Railway can be an exception).

The Practice of conducting negotiations with bidders after receiving the bids also affects the competition in the market. Though, the Central Vigilance Commission (CVC) guidelines allow negotiations in rare and exceptional situations and that too only from the lowest technically suitable tenderer, in Railways tenders negotiations are held in almost all high-value items. Negotiations discourage quoting of competitive rates. In fact, firms tend to quote inflated rates which result in negotiation to reduce rates and the same process continues in subsequent tenders. In such cases, the market rate is never received and the last accepted rate is taken as the basis for the settlement of future tenders, which may not be correct rate in the first instance.

The tender offer must include a strict warning regarding the sanctions for bid rigging. This is even more important in the case of countries where competition law is rather in a nascent stage like in India. The tender offer must also make it mandatory for bidders to sign a declaration that they are aware of the bid rigging provisions and have not indulged in bid rigging as defined in the Competition Act, 2002. The help of Certificates of Independent Bid Determination (CIBD) can also be taken in this regard. CIBD requires bidders to certify that they have arrived at their tender price absolutely independent of other bidders.

6. Conclusion

We have seen above the tricky nature of the tender designs. It is seen that certain aspects of the tender design may increase intensity of competition in the market but at the same time may increase chances of corruption in the market. We have also seen that complete transparency may make it easier for bidders to form a cartel and indulge in bid rigging, but if we move away from it then chances of corruption may increase. Thus, there is only one thing that can be stated with conviction in regard to tender design is that “there is no one size fits all approach”. The structure of the market,

the product being tendered, interaction between the bidders in the market, frequency of tenders, etc., dictate the way a tender should be designed. Therefore, competition authorities are unable to provide model tenders for procurement agencies. However, for ensuring vibrant competition the public procurements officials must be made aware of the benefits of competition and the non-competitive issues which generally arise in public procurements.

It is also equally important to raise awareness on how corruption affects competition in public procurement. Without an honest public procurement system, no competition authority can ever dream of helping the system realise the benefits of competition. However, we have noticed above that corruption in public procurement is out of the purview of the Competition Act, 2002. Thus, strong and effective advocacy with the lawmakers and procurement agencies can have an impact in eliminating competition concerns which stem out of corruption. This way an honest and competitive procurement system will help in fully realising benefits of competition and would help in nation-building.

Endnotes

- ¹ <https://www.lexico.com/definition/procurement>
- ² General Financial Rules (GFR) 2017 of the Ministry of Finance, Government of India, stipulate open tender in case of procurement above Rs. 25 lakh (rule 161).
- ³ For more details see OECD Guidelines for Fighting Bid Rigging in Public Procurement and FTC's Detecting, Mitigating and Fighting Bid Rigging in Public Procurement: Guidelines and Checklist.
- ⁴ OECD Guidelines for Fighting Bid Rigging in Public Procurement.

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Competition Law and Employment

Rajat Moudgil* and Suhaib Bandey**

Abstract: Since inception ‘consumer welfare’ has defined antitrust laws in many jurisdictions. The first antitrust legislation in the United States, enacted on the recommendations of the Temporary National Economic Committee, was in response to the consumer harm caused by big trusts and monopolies. The subsequent legislation in the United States and the antitrust regimes adopted by other countries focussed on protecting consumers and competitors. Consumers and consumer welfare were perceived from the demand side. The intermediaries on the supply side that are considered as factors, including labour for production remained ignored by antitrust authorities for a major part of the 20th century. The trend of a limited number of employment-related antitrust litigations has continued thereafter.

The anti-competitive practices of fixing wages, predatory hiring, non-poaching agreements, non-compete obligations, etc., affecting workers, competitors and consumers, have escaped the same level of scrutiny that antitrust authorities adopt in traditional product/service market(s).

This article aims at examining these anti-competitive practices in the labour market, their application in India and the responsibility of antitrust regulators.

Keywords: Antitrust, competition law, employment, labour market power imbalances, predatory hiring, anti-poaching agreements, unilateral conduct

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1. Introduction

In 1995, the restraint on *Jean-Marc Bosman* by his Belgium first division club '*Royal Football Club de Liège*' from joining a French football club '*Dunkirk*' without payment of a transfer fee paved the way for free movement of players in the European Union.¹ Consequently, it invested more power in the players to decide their future and bargain their wages. This change was only possible because the European Court of Justice was willing to analyse the restriction outside the strict interpretation of the contract which restrained *Bosman* from joining the French football club. The Court ruled that the system, as it was constituted, placed a restriction on the free movement of workers and was prohibited by Article 39(1) of the EC Treaty. It meant that players could move to a new club at the end of their contract without their old club receiving a fee. Without explicitly stating, employees and their rights were brought to the forefront and the shackles of contractual obligations were removed. The effects of this ruling are tangible to this day. The transfer window in the European football league is the most lucrative period for footballers and importantly the footballers are equally placed to bargain for their contractual terms, as the big football clubs.

In spite of the overwhelming impact on 'labour welfare' due to regulatory intervention, as is clear from this case, the competition authorities globally have largely ignored the importance of antitrust regulation in labour markets. There are more than one reason for this inattention. The inception of antitrust laws focussed on 'consumer welfare'. Regulators restricted the primary application of antitrust laws to reach this end. The first clear statute expanding the ambit of the antitrust regime to labour markets was the Clayton Act, 1914. Twelve years after this enactment, the Supreme Court of the United States held² that Section 6³ of the Act, unequivocally applied to 'Wage-Fixing Conspiracies'. Even thereafter, consumer welfare and labour welfare could never get the same attention of the authorities.

Conservative scholars like Stutz (2018) in the United States believed that labour and antitrust policy are conceptually different and cater to competing values. Moreover, higher wages resulting from antitrust intervention process can harm downstream product-market competition by raising marginal costs and reducing output. The inverse correlation between these two values could be a reason for giving preference to the consumers placed

at the end of the downstream market over a factor relevant in the supply chain. Additionally, most countries adopted their own labour laws. To some extent, these statutes or other non-statute exemptions may combine to shield collusive behaviour on both sides of labour negotiations (Jerry and Knebel, 1984).

Another reason that may have created the impression that consumer welfare in the product and service market(s) is more significant is the negligible antitrust litigations against employers, across the globe. The absence of antitrust litigations in the employment sector also leads to the perception of non-application of antitrust laws in labour markets. However, there are various reasons for the limited antitrust litigations in the labour market. Unlike the product market litigations, which are either initiated by competitors, large companies, etc., with the resources and incentives to bear the high costs of complex antitrust litigations, aggrieved workers may not always have the resources or incentives (Weil, 2017). The straightforward analysis based on the rise in prices is inapplicable in labour market antitrust litigations. Class action suits also become tough as workers would usually have diverse interests and be at different positions in life and employment. The small number of successful antitrust litigations in the labour markets have taken place in highly specialised settings like sports leagues, fashion models market, doctors and nurses. These litigations will be discussed in the following sections. These cases show that so far litigations have been brought forward by sophisticated and high earning workers (Naidu, Posner and Weyl, 2018).

However, in the recent past, competition law and labour market issues have been addressed by various antitrust agencies globally. In 2016, the U.S. Department of Justice (DoJ) even announced its intention to initiate criminal prosecution in anti-competitive agreements affecting the labour market.⁴ Similarly, the Hong Kong Competition Commission (HKCC) also released an advisory bulletin⁵ indicating that it has encountered several situations where businesses have engaged in employment-related practices which may give rise to competition concerns. In 2018, the Japan Fair Trade Commission (JFTC) released a report with discussions on the application of the Antimonopoly Act on human resources.⁶ The Organisation for Economic Cooperation and Development (OECD) also held a session in June 2019 to discuss antitrust concerns in the labour markets with a

focus on the factors contributing in the creation of monopsony powers. Another follow up session was held in February 2020.⁷ In India, though concerns have been raised in the sports industry, this issue largely remains unattended by all stakeholders.

Macroeconomists began to use models of monopolistic competition to explain how small costs of adjusting prices could give rise to business fluctuations (Akerlof and Yellen, 1985). This trend has started influencing labour economics with the argument that employers also have market power in the setting of wages (Bhaskar, Manning and To, 2002). The imbalances prevailing in the labour market have been compared to the traditional buyer power in a product market by Scheelings and Wright (2006). Criminal liability for anti-competitive agreements in employment is logical and prudent due to the economic effects of these practices; the justification for this was given by Davis (2018). Naidu, Posner and Weyl (2018) recommended the most suited antitrust remedies for labour market power. The restraints in the labour market and the evolving antitrust treatment in the United States were discussed by Stutz (2018). The extension of antitrust practices against workers in the gig-economy space has been brought forward by Steinbaum (2019). These discussions have primarily focussed on the situation in the United States. However, the challenges faced by the antitrust authorities in the employment sector worldwide still require extensive discussion.

Through the analysis of different labour market conditions in India and other jurisdictions, this research aims to understand the application of competition law in employment in India and the need for all the stakeholders including the Competition Commission of India to be versed with its implications. A qualitative research methodology is adopted to examine the challenges faced in enforcing competition in the labour market through traditional tools and the measures to overcome these challenges. The anti-competitive practices resorted to by employers in the labour market have been divided into the following three parts for reaching a considerate conclusion:

- 1) Predatory Hiring
- 2) Anti-Poaching Agreements
- 3) Unilateral Conduct

2. Labour Markets

It is important to understand the difference between traditional product/service markets and labour markets. Factors relevant to both these markets are different. In economics, labour falls under the category of 'factor market'. Also known as the input market, it refers to the factors of production or resources that companies require to produce their goods and services. In products markets, consumers are the buyers and businesses are the sellers; whereas in factor markets, businesses are the buyers. Anything relevant for making the final product like labour, raw material, capital, land, etc., is part of the factor market. Economic relationship of demand and supply is also different (Bhaskar, Manning and To, 2002). In a product market, high demand leads to an increase in the number of goods produced until the demand is met. However, this is not the case in the labour market where labour cannot be manufactured. Increase in wages will not automatically cause an increase in labour supply.

From a competition law perspective, the same rules should apply for the procurement of goods and services as well as the acquisition of labour. Firms that compete for hiring or retaining the same labourers are competitors in the labour markets, regardless of whether these firms also offer goods and services that are in competition with each other (Yüksel and Salan, 2019). The factors which may be relevant in delineating a relevant labour market comprise skill, education, experience, wages, relocation, mobility costs, working conditions and other non-price factors. In several industries like Information Technology, Legal, Medical, specific skills are required, and the employees need to clear several stages for gaining qualifications and licences. A labour market can be defined as a group of jobs, between which workers can switch with relative ease, located within a geographic area usually defined by the commuting distance of these workers.

Buyer Power

Buyer power plays a particular role with regard to creation or strengthening of a dominant position. It can create a dominant position directly in the procurement market concerned. The monopsony model has established itself as the standard instrument for examining buyer power. It is based on the assumption that one powerful buyer comes across many suppliers (Burdett and Mortensen, 1998). In such a situation, the buyer can reduce

his demand to cause a reduction in the procurement price. This simplistic model may fail in situations where both sides of the market are concentrated to a certain extent. The bargaining model applies in such situations, where bilateral negotiations determine the terms of the contract. Any gap between the strength enjoyed by the buyer and seller can allow the buyer to dictate the terms.

In procurement markets like the labour markets, buyer power is less often expressed in the classical sense as market power affecting the opposite market side as a whole but more often in the form of bargaining power exercised bilaterally vis-à-vis individual suppliers. It is also suggested that only a player who can influence both sides of the market can be a dominant player in these markets. Dominant position on one side of the market has also been used to prove the dominance on the other side. The European Commission (EC)⁸ and Bundeskartellamt⁹ have relied upon this theory in the past. In one case, dominance in procurement markets was used to prove the existence of dominance in sales markets (and vice versa).

Thus, one major source of market power in all types of markets is 'concentration', where only a few firms operate in a given market. Buyer concentration in the labour market creates monopsony or oligopsony in favour of employers. Traditional monopsony is clearly unrealistic since employers obviously compete with one another to some extent. 'Oligopsony' or 'monopsonistic competition' are the more accurate descriptions of such labour markets (Akerlof and Yellen, 1985). These can exist when only one or a few employers hire from a pool of workers.

Once market power is gained by the employers, the perils of exploitation tend to creep in. As Adam Smith recognised, businesses gain in the same way by exploiting product market power and labour market power, enabling them to increase profits by raising prices in the products market or by lowering costs in the labour market (Smith, 1776).

This exploitation is akin to the treatment of workers denounced by Karl Marx. He argued that workers were underpaid and subjected to poor working conditions (Marx, 1867). This treatment was possible to the 'reserve army' of the unemployed, replacement remained available at will for the employers. The extraction of the surplus derived by the employers by paying low wages was called exploitation. Anti-competitive practices are just more sophisticated forms of these exploitations.

3. Predatory Hiring

In competition parlance, 'employees' are equivalent to assets of an organisation. One of the many ways in which a competitor can disrupt the functioning of an organisation is by inducing the employees including the key-managerial employees to terminate their relationships with their employer and join him. Antitrust concerns arise when this inducement is done with the purpose of harming rivals and attempting to monopolise. In the Indian context, if a competitor only hires the employees of its competitors to ensure that the competitor is unable to survive in the market such a practice would be 'Abuse of Dominance' as per Section 4 of the Competition Act, 2002.

Predatory Hiring has been held to be anti-competitive as per Section 2¹⁰ of the Sherman Act, 1890. The meaning of predatory hiring as defined in *Universal Analytics, Inc. v. MacNeal-Schwendler Corp*¹¹ is still applied. As per this ruling *predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor*. In this case, *Universal Analytics, Inc.*, filed a claim alleging that *Macneal Schwendler Corp.* hired five of its key technical personnel only to cause harm to them. They relied upon a memo from the executive vice-president of *Macneal* which read "*by hiring UAI employees, we wound UAI again*". The Court while adjudicating held though it appeared that one of the reasons for hiring these employees was to harm the plaintiff, however, due to the fact that these employees were sufficiently used by the hiring company ensured that no case of predatory hiring was made out. Two prong test was laid down by the Court which required the plaintiff to establish that (i) the hiring was made with predatory intent, (ii) clear non-use in fact.

The test laid down in *Universal Analytics* continues to be applied, though in some cases the Courts have deviated on the reasoning that as per the Sherman Act, even an attempt to monopolise is enough for its breach. In *West Penn Allegheny Health System, Inc. v. UPMC*¹², the Court held that UPMC being the dominant hospital in Pittsburgh attempted to monopolise the market for hospital services when it hired key physicians from the plaintiff. Court noticed that the salaries offered were well above the market rates and the finances available with the defendant were insufficient to pay

these salaries without suffering losses. Resultantly, the Court held it to be a clear attempt to drive out the second largest hospital system out of the market. Critics like Page (2017) have even argued that a new “bona fide intent to use” test should be adopted in dealing with such allegations.

Even before the enactment of the Competition Act, 2002, such a dispute arose between two leading beverage companies, namely ‘PepsiCo’ and ‘Coca-Cola’. The global rivalry between the two extended to India also in the early 1990s. PepsiCo alleged that Coca-Cola was unlawfully inducing its groups of key marketing and other strategic employees to breach and/or terminate their employment contracts with PepsiCo and enter into employment contracts with Coca-Cola. The relief of injunction sought by PepsiCo was eventually not allowed by the Delhi High Court¹³ on the reasoning that *‘In a free market economy, everyone concerned, must learn that the only way to retain their employees is to provide them attractive salaries and better service conditions. The employees cannot be retained in the employment perpetually or by a Court injunction’*.

The matter before the Delhi High Court was agitated under the laws of Contract and the relief sought was under the law of Torts. The findings of the Court, as such should only be read in those contexts. The unfair practice of inducing employees of PepsiCo to drive the competitor out of the market could have been agitated under the Competition Act, 2002, if applicable, and may have led to different reasoning and conclusion by the Court. Other aspects of such a hiring would have become relevant under the Antitrust laws.

Interestingly, there has been no case in the Indian context, wherein an enterprise has been found to be infringing the provisions of the Competition Act by indulging in predatory hiring. In 2016, Air India had approached the Competition Commission of India alleging that one of its rival airlines Indigo had indulged in predatory hiring by poaching its pilots. This case¹⁴ was closed under Section 26(2)¹⁵ of the Competition Act, 2002, holding it to be an employment issue raising no competition concern. When this case was heard in appeal¹⁶ by the erstwhile Competition Appellate Tribunal, the principle of predatory hiring was discussed in light of Sections 4(2) and 3(3)(b) and (c) of the Competition Act, 2002, however, the Appellate

Authority was of the opinion that there was not enough data/information to establish predatory hiring. The appellants were given the liberty to approach the Commission once again, provided they could gather enough material to substantiate their claim.

The jurisprudence on predatory hiring has not evolved in India thereafter.

4. Anti-Poaching Agreements

On 20th October 2016, the Department of Justice (DoJ) of the United States released a guidance note for *'Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation.'*¹⁷ Similarly, the Hong Kong Competition Commission and the Japan Fair Trade Commission have also released advisories¹⁸ indicating that they have encountered a number of situations where businesses have engaged in employment-related practices which may give rise to competition concerns.

These advisories frown upon any agreement between competing firms which restricts employment from rival firms, sharing of remuneration details, fixing wages to lessen competition by stagnating transfers. Employees have been treated as consumers in the labour market and any agreement between firms to restrict movement of labour has been held to be causing an adverse effect on the employees by restricting their choice, salaries and other benefits.

In September 2010, the Antitrust Division of the US DoJ filed a complaint¹⁹ against Google, Apple, Adobe, Intel, Pixar and Intuit before a district court in San Jose, California, alleging that their agreements not to solicit/hire each other's employees through 'cold calling' violated antitrust law. Cold calling is any solicitation for employment (by phone, email, letter or otherwise) directed to an employee who has not applied for an open position. Companies executing these agreements agree to notify each other when making offers to each other's employees. The top executives of these companies were alleged to be involved in this conspiracy. The DoJ held that these agreements eliminated a significant form of competition to attract skilled employees, distorting the labour market and causing employees to lose opportunities for better jobs and higher pay. The companies agreed to pay US\$ 415 million (Rs. 2,755 crore) claims in the class action lawsuit. Consequently, Apple and Google's board of directors were hit with a

shareholder derivative lawsuit for breach of fiduciary duty and harming the company by engaging in illegal anti-poaching agreements (Choukse, 2016). Some of the recent updates issued²⁰ by the US DoJ show how no-poaching agreements are addressed by the US Antitrust Agency.

On 3rd April 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG²¹ and Westinghouse Air Brake Technologies Corporation (Wabtec). As per the complaint, these companies along with a third company Faiveley entered into no-poach agreements in 2009 and continued till 2015. These agreements were stated to be in violation of Section 1²² of the Sherman Act. Private lawsuits were also filed by current and former employees of the companies. The defendants also moved a motion to dismiss the complaint and argued that no-poach agreements should be assessed under the rule of reason. This motion was dismissed²³ and the defendants agreed to pay US\$ 48.95 million in settlement.²⁴

The DoJ has even extended the applicability of no-poach agreements to franchisor-franchisee agreements²⁵, where the franchisor restrains the franchisee from poaching employees from the other franchisee of the same franchisor. DoJ maintains that a franchisor and franchisee are not automatically deemed to be a single entity and can be separate entities capable of conspiring within the meaning of Section 1 and such naked, horizontal no-poach agreements between rival employers within a franchise system are subject to the per se rule. The decision in this case is still awaited.

The principle of no-poaching is not limited to an agreement to not hire from competing firms but it also extends to 'wage-fixing'. Akin to a cartel which decides the prices or supply, in a 'wage-fixing' agreement the competitors try to reduce their costs by deciding upon the salaries and perks payable to their employees. Most recently, on 31st July 2018, the Federal Trade Commission (FTC) and the Texas Attorney General charged Your Therapy Source, a Dallas-Fort Worth²⁶ company that provides therapist staffing services to home health agencies, with unlawfully colluding to limit pay for therapists and inviting other competitors to do the same.

The European Union Member States have also been averse to no-poaching and wage-fixing agreements. Undue restrictions placed on anaesthesiologists by 15 hospitals in the Netherlands through a

non-solicitation agreement were held to be in violation of the Dutch Competition law. The hospitals agreed not to poach each other's trained anaesthesiologists with an additional restriction on employing any anaesthesiologist for a period of 12 months after his/her leaving a hospital part of the agreement.²⁷ In 2010, in Spain, eight transportation companies were penalised for implementing co-ordinated strategies which included conditions on hiring employees.²⁸ They were held liable under Article 1 of the Competition Act of Spain and Article 101 of the Treaty on the Functioning of the European Union. In yet another case of wage-fixing, arising from the same cause of action in 2016, modelling agencies were fined by both Italian and British Competition Authorities.²⁹

No-poach agreements also surreptitiously get a nod from the antitrust agencies at the time of approval for mergers. In most mergers notified pursuant to an agreement between the parties, there is usually a non-solicitation clause. This non-solicitation is used to restrain the acquired party from dealing with past clients and at the same time used to restrain the acquired party from poaching employees transferred to the acquirer. Such clauses may seem to be non-ancillary to the combination notified but a deeper look into such agreements may warrant scrutiny of the antitrust authorities.

The European Commission permits non-solicitation clauses if they are directly related and necessary for the implementation of a merger.³⁰ In *Kingfisher/Großlabor*³¹ merger, the sale-purchase agreement was supplemented with non-solicitation restrictions on two managers of *Großlabor*. The EC accepted the reasoning provided by the parties to hold that such restrictions were necessary and in line with the objectives of the deal. Likewise, in the *Imperial Chemical Industries/Williams*³² merger for the acquisition of the home improvements division of Williams, the EC allowed the restriction on soliciting certain employees of Williams for a period of two years after the closing of the deal.

At present, the Competition Commission of India also analyses the non-compete clauses forming part of the proposed combination. Such non-solicitation clauses are part of the non-compete agreements and depending upon the scope of restrictions, the Commission may approve such clauses. The rationale is to allow the acquirer to derive the maximum benefits

arising out of the combination. Due consideration is provided to the scope of these restrictions based on the time span and the geographic area for such restrictions. As per the guidance note³³ published by the Commission, usually, the time period should not exceed 3 years and the scope should be limited to the current activities and the area covered by the acquired party. The Commission also initiated a consultation to decide if non-compete obligations should even be assessed at the time of competition assessment. The applicable law on the assessment of non-compete obligations in merger notifications may even change in the future.

India hasn't witnessed any case wherein two rivals have entered into a non-poaching agreement independent of a combination as contemplated under Section 5 of the Competition Act.

5. Unilateral Conduct

The power of enterprises to control the activities of their employees/affiliates gives rise to unilateral anti-competitive conduct in employment. Sports authorities which usually have a monopoly over the administration of a particular sport have been found to be on the wrong side of the competition law, both in India and globally.

On 12th July 2018, the Competition Commission of India penalised the All India Chess Federation (AICF) for banning four registered players due to their participating in an unapproved tournament.³⁴ The chess federation was affiliated to the World Chess Federation and solely responsible for all chess activities in India. The players were always subservient to the federation as the ratings and selections were controlled by the AICF. This order in itself was sufficient to caution all sporting bodies against unilateral control over player participation in independent tournaments.

Internationally also, such restriction on players from participating in sporting events is frowned upon and penalised by antitrust authorities. In December 2017, the European Commission came down heavily on the International Skating Union (ISU) for imposing severe penalties up to a lifetime ban on athletes participating in speed skating competitions that are not authorised by the ISU.³⁵ It was held that these rules that are in place since 1998 restricted the commercial freedom of athletes and potentially foreclosed the market for competing organisers. This action was brought

up by two Dutch ice skaters who were threatened by the ISU with a life ban on participating in a league in Dubai. The ISU was directed to stop its illegal conduct within 90 days or pay up to 5 per cent of its average daily worldwide turnover in case of non-compliance.³⁶

Following this in January 2019, another leading world sporting body the *Fédération Internationale de Natation* (FINA) allowed its swimmers to participate in race meetings organised by independent organisers.³⁷ FINA, recognised by the International Olympic Committee (IOC) for administering international competition in water sports, was under pressure after independent suits were filed against it by the threatened swimmers and the independent league organisers for violating antitrust law. Blocking any new competitive league from entering into the market by not allowing premium players from participating was again the cause of action.

The Board of Control for Cricket in India (BCCI) has also indulged in unilateral conduct to restrain its players from participating in rival cricket leagues or in cricket tournaments deemed to be unapproved as per the guidelines of the International Cricket Council. In 2007, when Zee Entertainment Enterprise attempted to foray into the world of cricket by organising a domestic league tournament named the Indian Cricket League (ICL), the BCCI took swift action and banned all players who participated in the league. State members were not allowed to provide grounds for matches and broadcasters who showed allegiance to this competing league were not allowed to participate in its own telecast rights bidding. The effects of abuse of dominant position by the BCCI were felt in real and the Indian Cricket League could not survive with such restrictions in the market. The league was ultimately disbanded in 2009.

The BCCI was ultimately penalised by the Competition Commission of India and was directed to pay Rs. 522.4 million for abusing its dominant position for imposing restrictions that denied access to the market for '*Organisation of Professional Domestic Cricket League/ Events*'.³⁸ However, the interest of the players was never the consideration for the decision of the Commission in this case. Consequently, even though the Order was passed and the appeal is pending, the BCCI did not hesitate in banning,

in May 2019, a first-class cricketer Rinku Singh for participating in a T-20 tournament in Abu Dhabi without the prior permission of the BCCI.³⁹

The cases in the sports industry signify that unilateral conduct is possible when employers possess some labour market power that allows them to dictate terms. Labour market power in many ways is similar to a product market power. In the case of product market power, one seller or very few sellers having the product can determine the price of the product. Similarly, in case of employment which is governed by only one or few employers, it allows the employers to exert some pressure on the employees.

Another situation where unilateral conduct harms the employee more may arise in sectors governed by the Government. Independent workers could be dictated when their employment is dependent. The farming sector in India is a prime example of such a situation. As per the Agricultural Produce Market Committee (APMC) regulation, farmers could only sell their crop to buyers who were licensed by the State Government. This restricted the free flow of the farmer's crop as well as his will to engage with different traders. Consequently, buyers could exert pressure and decide the terms. In September 2020, the Parliament of India enacted two Acts, which allow the farmers to sell their produce directly to anyone in the country without an intermediary. Though the actual effects of these legislations are yet to be recognised, they have significantly increased their options and removed the adverse buyer power that was prevalent in favour of the traders. It is interesting to note that these legislations have faced agitation by the farmers themselves, mainly on the issue of continuity of Minimum Support Price (MSP).

Labour Issues in Gig Economy

In addition to these traditional setups, anti-competitive practices are also applicable in gig economies. It is often defined as labour that provides organisations or individuals access via online platforms to pool of workers willing to carry out paid tasks (Valenduc and Vendramin, 2016). This normally takes the form of fragmented micro-tasks provided through platforms that connect online-based workers with hiring firms. A platform is a business which creates interactions between producers and consumers and provides an open participative infrastructure that facilitates the exchange of goods and services (Parker, Alstynne and Jiang, 2016). As such,

it can be considered an online labour-brokerage that acts to coordinate the market of a worker with a requester (Collier, Dubal and Carter, 2017). The process, therefore, enables independent workers to provide services through online platforms rather than traditional employment.

Independent contractors seem to be hired under the garb of freedom and independence. Online business platforms like Uber, Swiggy, Ola, Zomato, Amazon, Urban Company, etc., employ independent workers without any protection derived from labour laws. At the same time, they may be entirely controlled by employers/customers. The ability of these platform owners to dictate the terms of the transaction and review the relationship based on subjective ratings given by the customers allows unprecedented power to the employers. Independent workers cannot even avail the benefits of collective bargaining.

In a United States case in 2016, an Uber customer initiated antitrust suit⁴⁰ against the company alleging price and wage-fixing conspiracy with its drivers. It was claimed that Uber decides the price of the ride, the share of the driver and the allocation of customers to each driver. Cartelisation through the hub and spoke arrangement was the alleged modus operandi of the company. Uber refuted these allegations by contending that it is only a software company that provides its platform for customers and independent drivers to connect. That they neither provided transportation services to the customers nor employed the drivers. The case never proceeded to trial due to the arbitration clause, however, Uber commissioned two economics papers to suggest that the control exercised over the drivers benefits 'consumer welfare'.

Like the traditional markets, consumer welfare appears to have gained importance over labour welfare and used as a defence. These platforms are looked upon as providing services that make lives convenient. Antitrust agencies are also hesitant in intervening by suggesting that these markets are at nascent stages and the actual scope is yet to be realised.⁴¹

Interestingly, even in the gig economy space, the antitrust cases have been brought by customers with allegations of cartelisation and not by the workers dealing with unilateral conduct by the companies. The discussion in the introduction on the lack of employee-initiated antitrust litigation is relevant here also. India witnessed strikes⁴² and protests against unfair

treatment by cab ride apps but no antitrust litigation was initiated by the drivers. Again the lack of resources and ignorance regarding the applicability may be the reasons.

One antitrust litigation against an online platform that has received some attention from the Competition Commission of India in the e-commerce sector is against 'Make My Trip'. In two separate information(s) filed by the Federation of Hotel & Restaurant Associations of India and Treebo Hotels, the Commission ordered⁴³ detailed investigation after observing that the exclusionary practices adopted by the platform *prima facie* appear to be anti-competitive and abuse of dominance. The informants in these cases are also hotel owners and hotel management companies.

The antitrust investigation initiated against Amazon and Flipkart by the Commission on the complaint filed by Delhi Vyapar Mahasangh⁴⁴ comes closest to resembling an employment-related antitrust litigation. The members of the informant society comprise many Micro, Small and Medium Enterprises (MSMEs) traders who rely on the trade of smartphones and related accessories. These traders alleged discrimination in favour of the preferred sellers of Amazon and Flipkart. Though not employment in the traditional sense, the relationship between the traders and the platform for connecting with the buyers is akin to the labour market in the gig economy.

All the above situations arise in cases where the market is concentrated allowing the concentrated player more power to unilaterally decide the terms and conditions.

6. Conclusion

Importance of competition in employment has not been fully appreciated by the regulators. Whilst the authorities have focussed on the traditional factors influencing competition, labour market power and its consequences have largely been ignored. Unlike the new challenges posed by technology, labour market power has existed from the times when antitrust laws were coined to break big trusts in the United States. Those big trusts like the e-commerce giants in the modern era exerted similar pressures in the employment sector. Disintegrating the highly concentrated trusts may have even indirectly had an impact on the free flow of labour without

stringent terms and conditions in the past. However, the recent cases of anti-competitive practices in the labour market require a course correction.

Imbalance in labour market power is also against the principle of equality and can have far-reaching consequences like political conflicts. A recent tragedy in the Indian Film Industry has even raised questions on the onerous terms of a contract⁴⁵ on the mental health of individuals. Impact on the economy is akin to the impact caused by product power imbalances. The modern economic landscape dominated by e-commerce does not allow the employers the benefits of the traditional labour laws. Collective bargaining as a remedy has also failed.⁴⁶ The onus is upon the antitrust regulators to share the burden and in combating the adverse effects of power imbalance in the labour market. The relation between labour antitrust claims and consumer welfare needs an immediate focus of the regulators.

The current competition framework seems adequate to address any anti-competitive conduct in the employment sector. It is primarily the focus which needs to be stretched towards this matter in addition to the traditional topics of antitrust discussions. Recent trends have shown the inclination of several jurisdictions to venture into the systematic scrutiny of competition issues in employment.

The world is witnessing convergence of economies allowing unprecedented movement of both skilled and unskilled workers. The antitrust regulators have the opportunity to play an instrumental role in ensuring that the balance is maintained in the labour market and anti-competitive practices in employment are not excused behind the veil of economic growth.

Endnotes

- ¹ See *Belgian Football Association v. Jean-Marc Bosman*; *R.F.C. de Liège v Jean-Marc Bosman and others*; *UEFA v. Jean-Marc Bosman*; Judgement of the Court of 15 December 1995, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415>
- ² See *Anderson v. Shipowners' Association of Pacific Coast* 272 U.S. 359.
- ³ See 15 U.S. Code § 17.
- ⁴ Press Release Number: 16-1230, available at: <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals>

- ⁵ Competition Commission Advisory Bulletin, available at: https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf
- ⁶ Report of Study Group on Human Resource and Competition Policy, available at: <https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html>
- ⁷ Details of the session available at: <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>
- ⁸ See Commission Decision of 3 February 1999, Case No. IV/M.1221- REWE/Meinl.
- ⁹ See Cf. Bundeskartellamt decision of 30 June 2008, B2-333/07, – “Edeka/Plus.
- ¹⁰ Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
- ¹¹ See 914 F.2d 1256 (9th Cir. 1990).
- ¹² See 627 F.3d 85, 2010 U.S.
- ¹³ See Pepsi Foods Ltd. and others v. Bharat Coca-Cola Holdings Pvt., 81 (1999), DLT 122.
- ¹⁴ Case No. 108 of 2015.
- ¹⁵ Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under Section 19, the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- ¹⁶ Appeal No. 32 of 2016 decided on 29th April 2016.
- ¹⁷ Antitrust Guidance For Human Resource Professionals, Department of Justice, Antitrust Division, Federal Trade Commission (October 2016).
- ¹⁸ Supra Notes 5 & 6.
- ¹⁹ United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar (Case: 1:10-cv-01629).
- ²⁰ See No-Poach Approach, <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach>

- ²¹ United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation.
- ²² Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
- ²³ 2019 WL 2542241 (W.D. Pa. 2019)
- ²⁴ <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>
- ²⁵ See Harris v. CJ Star, LLC, 2:18-cv-00247, Richmond v. Bergey Pullman Inc., 2:18-cv-00246, Stigar v. Dough Dough, Inc., 2:18-cv-00244.
- ²⁶ In the Matter of Your Therapy Source, LLC, a Texas limited liability company; Neeraj Jindal, an individual; and Sheri Yarbray, an individual. FTC MATTER/FILE NUMBER: 171 0134.
- ²⁷ BM3366 (Court of Gerechtshof's - Hertogenbosch) HD 200,056,331, 05.04.2010.
- ²⁸ VS 0120/08 Transitarrios.
- ²⁹ Associazione Servizi Moda or Assem, coordinated prices relating to models' salaries, transfer costs, image rights and agency commissions between 2007 and 2015, after leading agency IMG successfully filed for immunity.
- ³⁰ Commission Notice on Restrictions Directly Related and Necessary to Concentrations, OJ C 188 (04 July 2001), 2001/C 188/03 20.
- ³¹ Case No. IV/M.1482 - Kingfisher/Großlabor (12 April 1999).
- ³² Case No. IV/M. 1167 - ICI / Williams (29 April 1998).
- ³³ Guidance Note on Non-Compete Restrictions, available at: http://cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf
- ³⁴ Case No. 79 of 2011.
- ³⁵ Antitrust: International Skating Union's restrictive penalties on athletes breach EU competition rules, Press Release, available at: http://europa.eu/rapid/press-release_IP-17-5184_en.htm
- ³⁶ Appeal filed by ISU pending before the General Court [Case T-93/18].

- ³⁷ PR 1 - FINA meets with NFs on Athlete participation in international competitions, Press Release, available at: <http://www.fina.org/news/pr-1-fina-meets-nfs-athlete-participation-international-competitions>
- ³⁸ Case No. 61 of 2010, CCI.
- ³⁹ BCCI Press Release. Retrieved from <http://www.bcci.tv/news/2019/press-releases/18134/rinku-singh-suspended-by-bcci-for-3-months>
- ⁴⁰ Meyer v. Kalanick 2d Cir. 2017.
- ⁴¹ Case No. 20 of 2018, CCI.
- ⁴² Ola, Uber drivers threaten strike across NCR from September 1, <https://www.hindustantimes.com/delhi-news/ola-uber-drivers-threaten-strike-in-ncr-from-september-1/story-HAX3eUsGue5RK07HeNrI3L.html>
- ⁴³ Case No. 14 of 2019 and Case No.1 of 2020, CCI.
- ⁴⁴ Case No. 40 of 2019, CCI.
- ⁴⁵ Yash Raj Films submits copies of Sushant Singh Rajput's contract to Mumbai Police, <https://economictimes.indiatimes.com/magazines/panache/yash-raj-films-submits-copies-of-sushant-singh-rajputs-contract-to-mumbai-police/articleshow/76481918.cms>
- ⁴⁶ Uber, Ola drivers strike in India, demanding higher fares, <https://in.reuters.com/article/uber-ola-strike/uber-ola-drivers-strike-in-india-demanding-higher-fares-idINKCN1MW1X1>

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Book Review

The Curse of Bigness: Antitrust in the New Gilded Age.

By Tim Wu. New York,

NY: Columbia Global Reports, 2018.

Pp. 170.

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As the title itself suggests, this book captures complete journey of the United States antitrust law from its inception to the present age of digital economy. The author has narrated this in a lucid and captivating form replete with short stories and instances interwoven in a classic rhetoric. To make the book appealing, interesting, realistic and impactful for the readers, the author has borrowed quotes of various eminent personalities and luminaries to capture their exact thoughts. The author has in fact succeeded to a large extent in leaving the readers spellbound with his captivating thoughts over excessive concentration as not only a threat to competition but also on policy, polity and democratic process.

The author has peeked into the genesis of the oldest antitrust laws prevalent in the United States and informed us how these laws came to see the light of the day. The author, through this book, takes us to a splendid journey of antitrust law from 1890 till date and has demonstrated that how closely the political will of a country, economic factors and public sentiments were connected to the rigours with which the enforcement of antitrust law took place. The author goes on to discuss and demonstrate the effects of what happens when a nation like the United States weakens its laws meant to control the size of the industrial entities and the impact

of allowing unrestricted concentration of economic power and removing the sanctions on antitrust conduct. The author has concluded by ringing alarm against repeating the signature errors of the first gilded age in the twentieth century.

The author has initiated the discussion around concentration and antitrust by discussing the concentration of private power among a few big entities resulting in a renewed concentration of wealth and wider gap between the rich and the poor. The initial focus of the author is on the idea of Louis Brandeis, a lawyer by profession, who played a significant role in the mid-course correction of the enforcement of the antitrust laws of the United States. Louis Brandeis called this concentration as the 'curse of bigness' and a threat to democracy. He warned against industry having enhanced influence over elections and law-making processes than the citizens. The author opines that till the mid of the last century antitrust laws played a role in containing the excessive industrial concentration and policing monopoly conduct. However, over the span of time, the laws have shrunk to a shadow of themselves and ceased to have a decisive opinion on the concerns of monopoly.

The antitrust law once called by the US Supreme Court as "*a comprehensive charter of economic liberty aimed at preserving free and unfettered competition*" no longer prevents such concentration, rather has grown ambivalent to monopolies. The author argues that the present enforcement of the United States antitrust law is suffering from the over-reliance of the ideas propounded by Robert Bork and others at the University of Chicago over the 1970s. These ideas emphasised that antitrust law came into being to address only one form of harm – high prices to consumers and that the '*consumer welfare*' approach promising greater certainty and scientific approach has in fact discarded the role the antitrust law intended to play in checking accumulation of unchecked private power and preserving economic liberty. The author quoted Robert Pitofsky, past Chairman of FTC who warned that it is "*bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.*"

The author describes the early twentieth century period when the United States came under the grip of a powerful movement called the *Trust Movement*, also the era of the reorganisation of American and the world economy. Almost every major industry in the US was either already under

the control of single monopolist or was coming under such control while John D. Rockefeller's Standard Oil remained the popular monopoly, bankers such as John Pierpont Morgan merged hundreds of steel company into US Steel, created a shipping monopoly called International Mercantile Marine Co., developed rail road monopoly and also a force behind AT&T's monopoly journey.

Such monopolists of that gilded age believed in – *Social Darwinism* – elimination of the weaker through the process of survival of the fittest which will make a place for the better one. The politics also embraced this ideology in the form of *laissez-faire*. The vision of the trust movement wanted an economy to be centralised in the hands of few great persons, without any government restraint, to promote the fittest while being indifferent to the downfall/ degradation of the weak and meek.

Outrage against the trust movement arose in myriad forms like strikes by labours, farmers' Grangers movement, founding of anti-monopoly party and also paved the path for the enactment of a law, i.e. the Sherman Act of 1890. The law was named after its original propounder Senator John Sherman, an Ohio republican.

Though the law addressed varied issues apart from trust problem, as the language of the law was very broad to include every contract, combination, restraint of trade and banned the act as well as the attempt to monopolise, Senator Sherman proclaimed on the floor that no problem "*is more threatening than the inequality of condition of wealth and opportunity*".

The author emphasises the role played by Louis Brandeis, an advocate, a reformer and later a Supreme Court Judge, in resisting the trust movement. The author has tried to renovate the lost tenets of Brandeisian economic vision who broadly advocated the *right to live and not merely to exist*. Brandeis believed in decentralised manageable economic entities and that the new trusts formed by combining the entire industry were not really progressive as were projected and promised, rather he felt that economy dominated by giant corporations gave rise to certain inhumanity. He once wrote about the oppressive conditions and long working hours at the new industrial firms giving rise to, "*a life so inhuman as to make our former Negro slavery infinitely preferable.*" Conditions of work such as a threat of being fired, long working hours, access to washroom, personal safety, harassment at

workplace, social security, etc., matter significantly for the human rights to live and not merely to exist. He opposed abusive consolidation campaigns, where businesses were forced to sell themselves to avoid bankruptcy or from getting ruined by a powerful competitor.

While this trust movement was gaining momentum (J.P. Morgan announcing the creation of the US Steel Trust and so forth) in clear violation of the Sherman Act, President McKinley's unannounced *laissez-faire* was the economic policy of the United States as it considered antitrust laws merely symbolic. However, the next Whitehouse descendent President Theodore Roosevelt rejected the then existing *laissez-faire*. He confronted the two greatest monopolists of that time who provided the very foundation of the trust movement – J.P. Morgan (Railroad, Steel) and John D. Rockefeller (Standard Oil).

Unlike Brandeis, President Roosevelt was considered less wary of size as a danger but what really concerned him was a threat caused by growing power of trusts over political democracy. He rightly said that *“when aggregated wealth demands what is unfair, its immense power can be met only by the still greater power of people as a whole”* and ignoring the economic misery or public outcry may give rise to extreme/anarchist revolutions. To him, the vital question was whether the government could control the trusts. He ordered a probe into the Western Railroad Trust Monopolisation. In one of his speech, President Theodore Roosevelt mentioned that *“trusts are the creatures of the State, and the State not only has the right to control them, but it is duty bound to control them wherever the need of such control is shown.”* In the context of President Roosevelt, the term *“Trust Buster”* or *“Octopus Hunter”* became popular. Not to forget to mention that such battles against the giant corporations lasted for years and strained huge public resources, but ultimately the Western Railroad case went to the US Supreme Court and the merger was successfully blocked under an attempt to monopolise in violation of Section 2 of the Sherman Act. Justice William Douglas once put it *“Power that controls the economy should be in the hands of elected representatives of the people and not in the hands of an industrial oligarchy.”*

The author demonstrates through anecdotes that too much concentration of economic power breeds anti-democratic political pressure and firm(s) guided by too much industrial concentration may also seek to control public means to serve its own purpose.

Roosevelt's government blocked the Western Railroad monopoly and also came heavily upon the existing ones like Standard Oil – the oil trust. President Roosevelt got the trigger to target Standard Oil's monopoly by a thoroughly done research publication titled *The History of the Standard Oil Company* which uncovered the story of its rise to power and quashing of those who posed threat to its rule. He directed the Bureau of Corporations (predecessor of the Federal Trade Commission) to investigate Standard Oil's practices. The two major points in the report were – exclusionary cartels and aggressive acquisitions. Standard Oil along with two other large refineries collectively struck deal of lower price for themselves and ensured higher price for anyone outside the conspiracy, i.e. small and independent competitors. Small refineries sold out to Standard Oil at a loss and larger ones were brought under its trust and in just a decade its share rose from 10% to 90%. It built a monopoly and defended it for the next 30 years. In phase of the disruptive new technologies like an oil pipeline, Rockefeller ensured the ruin of new pipeline challengers by preventing them from being built up or bankrupted them or acquired them and also asserted political influence whenever required. The Justice Department of the United States (DoJ) filed detailed complaint highlighting the violation of both the sections of the Sherman Act. This withstood legal scrutiny as the Supreme Court concluded that Standard Oil was an abusive and anti-competitive trust and affirmed the remedy of breaking it up into 34 smaller companies. Out of them, Standard Oil of New York (Mobil), Standard Oil of New Jersey (Exxon) and Standard Oil of California (Chevron) remained popular and doubled their stock value within a year of breakup.

Another side of this curse is associated with the growing corporate power because as a business grows big, the focus shifts from efficiency to the ability to gather and use economic and political power to maintain its position and keep competition at bay. One such method is to invest in moats, i.e. barriers, in the form of control of scarce resources, long-term exclusive/preferential contracts, licenses from the governments, etc. Growth of firms through mergers increases concentration which also makes coordination easy so that few majors can together extract a cost from the society, they also have incentive to invest in joint moats, kind of walled city to protect them from would-be invaders. The giant firms have great incentive to invest in the political process to obtain favourable passage of laws to fortify such moats.

The author is of the view that private checks on bigness may and do fail but breaking up of a monopoly by the government has been proved to be a boon in disguise. Consider government antitrust intervention in Standard Oil, AT&T and IBM which provided momentum to the oil industry, telecommunications and computing. The government's war against trusts continued in the next few regimes in the United States and strengthened the US antitrust law by enacting Clayton Act, forming Federal Trade Commission (FTC) and empowering it to bring suits against unfair methods of competition.

The author moves further to the post-world war era of the 1950s and 1960s and quotes Daniel Crane, an antitrust scholar, *"the post-war currents of democracy-enhancing antitrust ideology arose in the United States and Europe in reaction to the role that concentrated economic power played in stimulating the rise of fascism."* As also a report of Secretary of War concluded: *"Germany, under the Nazi set up, built up a great series of industrial monopolies, soon got control of Germany, brought Hitler to power and forced virtually the whole world into war."* Concerns about excessive corporate concentration guided the Congress in the United States to further strengthen antitrust laws by bringing in a new anti-merger Act – the Celler Kefauver Act and provided new tools to proactively prevent the formation of giant corporations in advance.

However, a new intellectual opposition to the active antitrust enforcement was finding its place in the University of Chicago through professor Aaron Director and his student Robert Bork. Director criticised Supreme Court case laws of being counterproductive in terms of *consumer welfare* and was of the view that it can be demonstrated in a measurable way usually evident through lower prices. He endorsed the view that the goal of competition might be to only protect weaker and less efficient companies from efficient ones which can lower price for consumers. His school of thought gained prominence among his students and colleagues such as John McGee, Robert Bork, etc. For them, antitrust was unnecessary and that problem where existed would work themselves out in due course and in this manner, the *laissez-faire* policy has reincarnated. He also insisted upon the thought that courts shall be guided exclusively by consumer welfare which meant that in antitrust litigation, the plaintiff/ government had to prove that alleged behaviour could lead to higher prices for the consumers.

The author opines that radically narrow reading of the Sherman Act by Bork ignored the broader concern that had long mandated its existence and enforcement, i.e. a democratic choice of economic structure and a check on the power of monopolies. With the rise and triumph of Chicago School, also joined by Harvard School later, the antitrust enforcement weakened as per the author. The author highlights the instances of cable, airlines, pharmaceutical, chemical industry, global beer industry to indicate growing concentration and stated that enforcer felt powerless to stop the ongoing concentration in the age of widely accepted Chicago School and Harvard School.

In the early stages of the technology world, the enforcer believed that it was fast and dynamic and no position lasted longer. In cyberspace if a firm managed to get temporary dominance, it was believed that it will be overturned by other in a short span of time like Myspace – the social media pioneer, first was everywhere and later nowhere. The new firms of the 2000s, Google for access to information, Amazon to buy books for cheap, Facebook for building a global community, which did not charge a high price and in some instance did not charge at all but even after a decade, these firms did not disappear contrary to the belief that technology firms did not last longer rather the author demonstrates the journey of these tech giants which are built upon the numerous takeovers of every nearby challenger. Facebook first acquiring Myspace in America later WhatsApp and then Instagram; Google's notable acquisition of YouTube; Amazon taking over Zappos, Diaper.com and Soap.com. The author indicates that these firm strengthened and build monopoly through a range of acquisitions, Facebook (67), Amazon (91) and Google (214). The author emphasises on a need to relook at the tech giants which claim themselves to be in existence only for consumers – connecting them (with the world), enriching them (with lots of information) and serving them (round the clock). The author has endeavoured to demonstrate that by application of antitrust laws keeping consumer welfare as the only touchstone for assessment of complex business transactions develops a tendency to get trapped in a narrow zone where the cause of competition is merely an eyewash.

Taking cues from the past antitrust enforcement experience in the United States, the author reinforces that foundational laws of democrats around

the world were all created with the idea that power should be limited so that no person/institution could enjoy unaccountable power.

It is worthwhile to discuss the modes suggested by the author through which the global antitrust authorities can evade themselves from repeating the errors and omissions of the past century and promote competition in times to come. At the outset, as per the author, adequate weightage must be given to the fact that a given transaction may result in the elimination of a future competitor or potential competition. In other words, the author calls for tougher standards for merger review, at least in case of giant mergers. The author rightly argues that the failure to adequately consider the aspect of the post-merger state of lessening/elimination of competition, has to a large extent, contributed to the formation of the present-day digital giants like Google, Facebook and Amazon. Further, the author points out that merger review is a quasi-judicial administrative process, which needs to be more transparent rather than secretive.

Further, the author makes another pertinent observation which deserves attention is the role of structural remedies in merger reviews, which are currently invoked in extreme and rare circumstances. He asserts that structural remedies should be used more frequently and aggressively while reviewing mega/giant mergers in case there is a potential of lessening or elimination of competition post-merger. The two clear reasons for the same are: firstly, a large business constitutes of various sub-units organised on the basis of functions or territory or products or services, etc., and it is not impossible to spin off or break up a large corporation which can foster competition and innovation. Sometimes large corporates internally organise their functions for better growth and management (break up of Standard Oil is a classic example here which fostered competition as well as business growth). The author suggests that the simplest way to break the power of a conglomerate is to break the conglomerate. For instance, had Facebook not been allowed to take over WhatsApp and Instagram, the state of competition in social media space would have been different than the present one like greater privacy protection, less concentration of power, protecting democracy from manipulation, etc. Secondly, structural remedies are easy to administer rather than behavioural remedies, as the author aptly asserts that expertise of the antitrust authorities lies in investigation and enforcement rather than compliance and monitoring.

In addition to the above, the author also suggests market investigations as a useful tool in antitrust enforcement. Citing the example of market investigation by the UK competition authority among major airports, the author emphasises that market investigation can be used to assess the state of competition in a particular sector, experiencing a persistent dominance or lacking convincing competition. The author is of the view that market forces may not always be able to remedy the market situation and appropriate intervention by the agency is critical to protect the process of competition.

It is emphasised by the author that while examining conduct, the court should see that whether the conduct under examination promotes competition or suppresses or destroys it. The author calls for the using the test of “protection of competition” with focus on the protection of the ‘process’, in contrast with maximisation of an abstract value called consumer welfare.

Opinion

The views strongly expressed by the author in this book, citing the experiences of the previous century, hold a lot of relevance in the present times when the whole world is amazed at the rise of the digital giant corporations and the threats that follow from such unprecedented concentrated power. Globally, the antitrust authorities have been relooking at their quiver to find mechanism(s) to deal with issues and contain the concentrated power of the digital giants. The author has rightly asserted that concentration of power in the hands of a few giant corporations is not only a threat to the process of competition but to the process of democracy. It is indicated that the rise in economic concentration has been an outcome of the paradigm shift of antitrust goals from ‘prevention of concentration and democracy concern’ to ‘consumer welfare’. The author has repeatedly emphasised throughout the book that the goal which can be inferred from congressional records behind the Sherman or Clayton or Anti-Merger Act was preserving competition by making a choice between competition and monopoly, and did not even contain the words such as allocative efficiency or consumer welfare which have crept into the present day’s anti-trust analysis.

It is felt that such radical and thought-provoking views on the concentrated power of digital behemoths have rung the bells worldwide. It is also known that the United States Department of Justice has launched a wide-ranging review of the “GAFA” – Google, Amazon, Facebook, and Apple in 2019.¹

The book is written in an easy to comprehend and coherent manner that it succeeds in making a place for itself in the ‘must read’ list of everyone apart from those closely connected with antitrust in some manner or the other.

- Jyotsna Yadav
Joint Director (FA), CCI

¹ <https://www.technologyreview.com/2019/09/09/238574/50-us-states-have-launched-an-antitrust-investigation-of-google/> accessed on 05.09.2020.

Book Review

Competition Overdose: How Free Market Mythology transformed us from Citizen Kings to Market Servants.

By Maurice E. Stucke and Ariel Ezrachi.

HarperCollins Publishers LLC, 2020.

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Competition does not always yield good, fair or just outcome and can be outright toxic at times.

Stucke & Ezrachi

Authors of the book under review have earlier coauthored many papers including 'Artificial Intelligence & Collusion' winning the Antitrust Writing Award, 2016 by Concurrences Review and a book titled '*Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*' (Harvard University Press, 2016).

Free market and competition has brought immense benefits to the economy, innovation and society. Competition has acquired a central place in public discourse as a panacea for almost any malady in the economy and society and for any sector where a market can exist. Nevertheless, at times, this reductive view of competition causes many problems. To overcome such problems even more competition and lesser regulations

Prof. Stucke is at the University of Tennessee, USA; co-founder of the Data Competition Institute and a law firm the Konkurrenz Group. He received Jerry S. Cohen Award for his article Behavioral Economists at the Gate: Antitrust in the Twenty-First Century.

Prof. Ezrachi is the Director of the Oxford Centre for Competition Law and Policy. He is co-editor-in-chief of the Journal of Antitrust Enforcement (JAE), Oxford University Press. The second special issue of JAE (Vol. 5, Issue 2, 2017) was on India.

(for freer markets) are prescribed. In the book, “Competition Overdose: How Free Market Mythology transformed us from Citizen Kings to Market Servants”, authors take a stock of side-effects of competition overdose. In their candid expose of various problems caused by or in the name of reductive ideology of free unbridled competition turning toxic, Stucke and Ezrachi come up with many anecdotal evidences and case studies. As they say, *excess of almost anything is not good*. Authors state that the same applies squarely on competition also - often touted as a magical mean of an end which is social welfare. Competition has acquired such a sacrosanct status in the imagination of policymakers and public that it has become an end in itself. It has turned into a master from a servant.

The book is divided in three parts, namely (i) When is competition toxic; (ii) main actors pushing toxic competition, and (iii) what can we do about it.

The reductive view of more and more competition for more welfare has been used/abused by many players of the game for their advantage at the expense of consumers and other stakeholders without safeguards. At times, it is to the detriment of market players themselves. The authors elaborate and try to prove their point by varied examples ranging from schools, universities, food products, digital platform markets and other business sectors especially from the US, the UK and Europe.

For instance, the general understanding is that free competition among schools gives better quality education at more affordable rates for all. But excessive competition pressure has forced many school managements/teachers towards grade inflation to portray/maintain better rankings and funding. This has also forced schools to throw out low grade scoring students usually from poor families on one pretext or another.

Authors point that ranking systems involve self-fulfilling loops (better ranking attracts more applications leading to further better ranking and so on and *vice versa*). It is difficult for any competitor or a subset of competitors to de-escalate from toxic competition to healthy competition unilaterally. For de-escalation all or vast majority of competitors should agree but such an arrangement may infringe antitrust laws as evident in the court case

against ceiling of compensation to university football/baseball coaches and support staff.

Coming to the business world authors give example of horsemeat scandal in the hamburgers in the UK wherein excessive competition pressure among industry players including Tesco for lower prices lead to partial replacement of beef by horsemeat by suppliers. It remained undetected for years till a National Food Safety Authority found out about it. Authors also provided examples of injection bred growth of animals for meat/eggs in unclean cages and arsenic (a carcinogenic element) in chicken feed. They highlighted the dirt cheap labour exploitation in inhuman conditions without any social security and use of child/slave labour in garments/coffee industries in poor countries even in the knowledge of companies such as Nestle, Cargill, Archer Daniels, etc.

Authors have highlighted the flaw in the standard main stream economics assumption of perfect rational human being as not true in view of advances made by behavioural economics in recent decades. Related to bounded rationality and human weaknesses concepts such as sunk cost fallacy; social proofing, feedback loop, hidden costs; drip/partition pricing by online travel agents (OTAs), etc; tendency of quicker gratification compared to delayed but larger gratification; deceptive/misleading presentation and information about terms and costs, etc., have been elaborated along with examples. *UK competition authority has found hidden costs and special limited time offers as most hurtful for consumers.* Further, they have highlighted widespread practice of exploitation of human weaknesses by companies using creative/deceptive marketing practices such as catchy slogan of 'reassuringly expensive' or 'perfection has a price'. Uses of addictive additives to food products have also been pointed out.

In Chapter 4, authors elaborate about the problem of Choice overload. Choice is an important factor of competition and normally more the choice better it is. But huge unmanageable number of choices leads to '*choice overload*' problem sometimes leading to avoidance of choice by a consumer or choosing of the easiest available alternative instead of best or most suited alternative. In the guise of helping them, merchants utilise it to their benefit at the expense of customers by nudging the customer to products with high profit margin. They have also highlighted certain other

practices such as recruitment of popular reviewers by giant e-tailers for the products of their group in exchange of free products to affect the choice of consumers.

Authors have stated more than once that economists have since long outlined numerous instances when markets don't deliver a positive social outcome: such as four conditions of market failure, i.e. asymmetric information, externalities, public goods and abuse of market power. Competition laws address market failures due to market power whereas environmental, health, safety and consumer protection laws address other kinds of market failures.

Main actors pushing toxic competition

In Part II authors highlight actors responsible for prescription and pushing of competition overdoses. First are competition ideologues. They keep on pushing the reductive competition ideology believing that competition is necessary and always good in all conditions starting from schools, colleges, colleagues and companies. 'More competition always better' ideology has been enshrined in legislations and policies so much so that even the US Supreme Court has stated that the statutory policy precludes inquiry into question whether competition is good or bad.

Powerful companies use competition ideology to control the market and as a shield against regulations, to dictate the rules of game and eliminate threats to their profits at the expense of wider social good and welfare. Wide use of lobbying by corporations/merchants to frame exploitative practices as pro-competitive innovation, freer markets and lesser regulations for vested interests has been pointed out.

Reductive competition ideology is also used by *privatisers* to push for privatisation in the name of increased/free competition, choice, autonomy, innovation and efficiency. Authors have given many interesting examples such as American Prison System; UK Forensic Services and UK National Health Service, *etc.* Oliver Hart, Economic Nobel Laurette for his contribution in contract theory, has found that for private contractors cost reduction for profit maximisation almost always trumps quality which is usually not quantifiable easily by public. The siren song for privatisation,

‘whatever government/public sector can do, private sector can do much better’ is very alluring but deceptive at times. In many sectors private players indulge in cream skinning, i.e. grabbing high value segment of business and leaving responsibility for high cost and often loss incurring segment of business on public sector showing that public sector is inefficient and loss making. There are many examples such as healthcare, banking and financial services sectors. International Monetary Fund has also warned about ‘*fiscal illusion*’ that arises when governments on face value improve fiscal position by lowering the immediate debt and deficits but reducing net worth and assets over time.

After the above three actors, i.e. ideologues, lobbyists and privatisers authors explore about the role of most sinister actors whom they call Gamemakers such as Google, Facebook, etc. Gamemakers who design and control the whole ecosystem orchestrate a toxic competitive dynamics that exploits the participants including consumers, advertisers, app developers, etc., while maximising the benefits for themselves. Apparently, the Gamemakers offer services for free. But they guzzle your attention and personal data with complete disregard to privacy leading to surveillance capitalism through unprecedented asymmetric information and power.¹ Gamemakers designed the system in such a manner that all competitors compete to stalk and extract our personal data in most clever and hideous ways to deliver it back to the Gamemakers. Gamemakers manipulate the attention of users so that they see more and more ads. A review of patent filings of Facebook by New York Times reveals capacity and intention of tracking almost all aspects of users lives. In this, interests of Gamemakers, advertisers and app developers are aligned. More data with Gamemakers lead to more advanced analytics leading to higher ad bidding conducted by Gamemakers on opaque advanced automated bidding platform. With most users locked in they refuse to share data warding off any potential competitor. For example, Facebook cut off access to Vine of Twitter. If advertisers or publishers try to do collective bargaining they may be liable for huge antitrust fines. The lengthy jargon ridden privacy policies by Gamemakers are actually extracted permission for violation of users’ privacy. Authors have compared the Gamemakers to Big Tobacco and Big Sugar companies.

What can we do about toxic competition?

In the last part of the book authors try to find out some solutions for problems related with competition overdose. Authors challenge the assumption of self-interest/greed repackaged as virtue as the sole driver of economy bereft of any societal, moral and ethical values. Authors propose that competition, cooperation and fairness can coexist.²

The authors compare the present hyper toxic competition dynamic to that of drug abuse wherein when one adapts to a level of consumption once then (s)he wants even more: *an endless journey to no end*. Behavioural economics tells us that most of the humans are neither purely selfish nor purely altruistic and care about being treated fairly and treating others fairly. Authors borrow example of Ultimatum Game wherein one person is given a sum of money which he has to divide with another person with the caveat being that if the other person refuses his offer both get nothing. Surprisingly most persons offer 40-60 per cent defying greed assumption and normally if offered below 20-30 per cent the other person declines the offer defying the assumption of mechanical perfect rationality. Authors argue that value of fairness or fair competition should be championed often alongside efficiency and propose to move from competition as zero-sum warfare to positive sum competition in creating value.

In the last chapter of the book authors give a concept of noble competition. There is no unanimous definition of competition itself and it reflects moral, ethical, economic, political and societal values of given time and place. They tell that competition laws of different countries have different objectives as argued by Ezrachi in Sponge³. They trace the origin of competition in Latin word *competere* having a meaning of mutual striving for excellence. Our policymakers, companies and we as voters and consumers should redesign competition game to bring out our best rather than our worst traits.

State has two key roles: promoting healthy competition by legislations, regulations and policies and provision of public/merit goods which competition can't deliver satisfactorily. For industry, they propose independently verifiable self-regulation. They say goal to encourage ethical, fair and for benefit of all stakeholders of society has to be practiced much deeper than companies' logos. Noble competition unlocks social purpose,

benefiting society and also benefitting company's bottom line sustainably. Regarding citizens' responsibility they advocate bottom up democracy and give example of 2018 California privacy protection initiatives by citizens forcing legislators to enact some privacy protections.

Authors give an interesting example from the US Coast Guard Academy which refused to accept conditions of a grant (meant for award to best cadet attaining highest grades in chemistry and physics). As per the academy it would have engendered unhealthy competition, honor code offence, favour of science at the expense of other majors, erode the class interpersonal relationships and team spirit; would have taught the cadets that reward for a job well done in public service is cash rather than satisfaction of doing well one's duty as an officer. Academy modified the terms so that more cadets receive smaller cash awards and research grants/fellowships and court agreed in an exceptional instance that under some circumstances competition can be unhealthy.

The book though repetitive at times to emphasize its points adequately which are seemingly counterintuitive to the mainstream takes one on a roller coaster ride of wider competition dynamics in a non-conventional manner. Problems identified by the authors are also not novel and have been in economics literature from a long time and most of the solutions proposed by authors appear to be utopian. The book has myriad elements of various disciplines including philosophy, psychology, behavioural economics, competition, marketing, ethics, morality, etc. It is also one of the reasons that the book does not appear to be very coherent at times. Nevertheless, the book gives a kind of pleasant breeze to highlight the limitations of competition and markets which appear to have not been emphasized enough in mainstream literature and policy making.

It can be prescribed for competition practitioners and persons related with public policy, regulations, behavioral economics, business, research, advocacy, students and broader public. The book has been listed as Publishers Weekly Top 10 Business & Economics books for Spring 2020.

- Yogesh Kumar Dubey
Deputy Director (Eco), CCI

Endnotes

- ¹ The attention guzzling addictive nature of digital environment has given rise to many psychological social disorders such as nomophobia (No mobile phobia), ring-xity (Anxiety related to not being able to take up calls including phantom rings), FOMO (Fear of missing out), etc.
- ² They draw attention to ‘The Theory of Moral Sentiments’ book of Adam Smith over the famous invisible hand theory given in his most famous book Wealth of Nations.
- ³ (JAE, Volume 5, Issue 1, April 2017, PP 49-75), <https://academic.oup.com/antitrust/article/5/1/49/2525569>

Report

National Conference on Economics of Competition Law

Competition law is intrinsically linked with the discipline of Economics. Competition law essentially involves the study of markets to ensure that there is fair competition in markets and that this competition benefits consumers. At the day-to-day level, applying competition law involves identifying markets and assessing whether competition is working well in those markets. The economists carry out these studies from various perspectives including allocation of goods and services to different consumers in markets, how consumers benefit when there are more or fewer competitors, why firms behave in certain ways, impact of any merger, among others. Understanding economics, thus, gives clarity on how markets operate and if the behaviour of firms would result in fair competition in the market thereby benefitting consumers or otherwise. Economics is, therefore, being recognised as an essential tool to assess and analyse markets. At the Competition Commission of India (CCI), we are well aware of the importance of economics in competition law and thus in order to cater to the need for a meaningful dialogue between law and economics so that the legal principles and economic perspectives are harmonised towards efficient, precise and prudent decision-making, we started the National Conference on Economics of Competition Law in 2016.

Since then, the CCI has organised five National Conferences on Economics of Competition Law. The latest being the 2020 Conference which was organised on 6th March 2020. The Conference endeavours to develop and sustain interest in the economics of competition law and create a critical mass of antitrust economists. The Conference brings together scholars, practitioners, academicians and experts working in the area of Economics of Competition Law.

1st National Conference on Economics of Competition Law

Shri Jayant Sinha, Hon'ble Minister of State, Ministry of Finance, Government of India inaugurated the 1st National Conference on Economics of Competition Law held on 3-4 March 2016 in New Delhi. The

Inaugural Session was addressed by Shri Tapan Ray, Secretary, Ministry of Corporate Affairs. Shri Devender Kumar Sikri, Chairperson, CCI made the Introductory Remarks. Shri Augustine Peter, Member, CCI delivered the Welcome Address.

2nd National Conference on Economics of Competition Law

Smt. Nirmala Sitharaman, the then Hon'ble Minister of State (Independent Charge) for Commerce and Industry, Government of India inaugurated the 2nd National Conference on Economics of Competition Law held on 2-3 March 2017 in New Delhi. Shri Arvind Subramanian, Chief Economic Adviser to the Government of India delivered the Keynote Address at the Inaugural Session. Shri Devender Kumar Sikri, Chairperson, CCI made the Introductory Remarks.

During the course of the Conference, twelve research papers on a diverse range of issues relating to the economics of competition law were presented by senior economists from various research institutes and institutes of higher learning of the country.

3rd National Conference on Economics of Competition Law

The 3rd National Conference on Economics of Competition Law was held on 5th April 2018 in New Delhi. The Conference was opened by Shri Augustine Peter, Member, CCI. Shri Devender K. Sikri, Chairperson delivered the Inaugural Address. Dr. Aditya Bhattacharjea, Professor, Department of Economics, Delhi School of Economics delivered the Keynote Address.

Apart from the Inaugural Session, the Conference also featured two technical sessions where research papers were presented and a special session on 'Merger Control - A Practitioner's Perspective.'

4th National Conference on Economics of Competition Law

The 4th National Conference on Economics of Competition Law was organised on 1st March 2019 in New Delhi. Dr. Krishnamurthy Subramanian, Chief Economic Advisor, Government of India was the Keynote Speaker at the Conference. Shri Ashok Kumar Gupta, Chairperson, CCI delivered the Special Address. Dr. Sangeeta Verma, Member, CCI made the Opening Remarks. The Conference, in addition to the Inaugural Session, had two technical sessions where research papers

on economics of competition law were presented, and a Special Session on 'Contemporary Antitrust Issues and a Plenary on Digital Markets: Antitrust and Beyond'.

5th National Conference on Economics of Competition Law: Summary of the Proceedings

The 5th National Conference on Economics of Competition Law was organised on 6th March 2020 in New Delhi. Dr. Bibek Debroy, Chairman, Economic Advisory Council to the Prime Minister delivered the Keynote Address. The Conference consisted of a Plenary Session on Competition for the Market, a Special Session and two Technical Sessions. Six papers were presented during the technical sessions covering a wide range of relevant topics. A brief overview of the sessions is presented below.

Inaugural

Dr. Sangeeta Verma, Member, CCI opened the Conference. Dr. Sangeeta Verma, in her Opening Remarks, emphasised that the discipline of economics provides a common enforcement framework to global competition authorities but the application of this economic framework is constrained by national contexts, the level of economic development and the market realities. Referring to the e-commerce market study conducted by the Commission, she stressed on the importance of market studies for facilitating an evidence-based approach to antitrust policy. According to her, market studies would go a long way in achieving better market outcomes and mitigating potential competition concerns without the need of antitrust intervention.

Shri Ashok Kumar Gupta, Chairperson, CCI, in his Special Address, emphasised on the need for antitrust authorities to catch up with the economic realities of the time. "In digital markets, enforcement priorities and remedies should generate optimal deterrence of anti-competitive conduct while preserving the incentives for innovation," he said. Highlighting the Commission's currently ongoing advocacy initiatives, Shri Gupta mentioned that seventeen legislations/rules/regulations were undergoing an assessment from a competition perspective to identify inadvertent policy-induced restrictions on competition, if any. "On the combination review front, around 30 per cent of the cases notified to

the CCI this year were under the recently introduced deemed approval system of Green Channel," he apprised, while adding that the Commission hopes that this channel will promote a speedy and transparent process for approval of combinations as also create a culture of self-compliance.

Dr. Bibek Debroy, Chairman, Economic Advisory Council to the Prime Minister, in his Keynote Address, highlighted that the issues of competition extend beyond the ambit of competition law. "Functioning of markets and the extent of competition are predicated on the institutional structure and system of laws that undergird markets," he said, while adding that there are elements in several statutes in India that inhibit competition. Economic reforms, he emphasised, have almost always been about markets and increasing competition. "Nonetheless, while entry has been eased in manufacturing pursuant to economic liberalisation, barriers still exist in services as well as agriculture," he pointed out. Referring to the structure-conduct-performance framework, he mentioned that the market structure and market shares do not provide a holistic picture of competition. He further alluded to the inherently dynamic nature of markets, and also underlined the need to account for the level of evolution of markets in India in comparison to the markets of the developed economies. "Recognition of these differences is important for the application of competition principles," he emphasised. In his final remarks, he cautioned against looking at markets and conduct as the two extreme outcomes of perfect competition and monopoly. He thus wished to call attention to the fact that allowing for various strategic market interactions in oligopolistic markets would help harness innovation for consumer welfare. Moreover, self-regulation by industry could preclude the need for regulatory intervention. Government or the CCI needs to step in when the requisite action is not taken by the industry. In this context, he alluded to Kautilya's Arthashastra, during which markets used to function by self-compliance rather than government's intervention.

Plenary – Competition for the Market

The plenary session was chaired by Shri Ashok Kumar Gupta, Chairperson, CCI and was moderated by Ms. Payal Malik, Advisor, CCI. Mr. Tuhin Kanta Pandey, Secretary, Department of Investment and Public Asset Management (DIPAM); Mr. Ajit Pai, Consultant to Vice Chairman, NITI

Aayog; Dr. Sebastian Morris, Professor, Indian Institute of Management Ahmedabad (IIMA); Mr. Ashok Kumar Agrawal, Executive Director (Tech), Airports Authority of India; Mr. Pradeep S. Mehta, Founder Secretary General, CUTS International; and Mr. Shailesh Pathak, CEO, L&T Infrastructure Development Projects Limited were the panellists in the session.

Ms. Payal Malik initiated the discussion by highlighting the issues faced by the Commission during enforcement, i.e. operators who have been awarded concession rights of certain infrastructure which include building up of the physical asset, operating the asset and selling the service to the government, indulged in anti-competitive conduct in the downstream markets of provisioning of services relating to the physical asset. She stated that all stages of structuring, granting and implementation of concession agreements are subject to jurisdiction under the CCI.

Another issue observed was that of the design of bid documents for the purpose of an outright sale of public assets such that sufficient competition is ensured in the market for the public asset in question. She emphasised the importance of an incentive-compatible design for that bid which could ensure sufficient market participation and market discipline, while simultaneously improving the efficiency and bringing about the proficiency of management and price discovery in sale of that asset.

Shri Ashok Kumar Gupta reiterated the important issues observed by the Commission. He highlighted that “Competition for the Market” occurs when products and services exhibit characteristics such that “Competition in a Market” is not feasible in such scenarios. He gave examples of natural monopolies and public-funded monopolies. He stated that the success of the process lies in the design of the concession agreement which brings us to the broader question to be addressed, i.e. how should a concession agreement be designed so as to maximise efficiency and minimise post-award abuse. He emphasised that the concession granting authority should foresee all the concerns which could arise at the implementation stage and incorporate the same in the concession agreement itself. The core elements of a concession agreement include the length of contract, horizontal or vertical bundling and splitting of services, renegotiation possibilities, etc., all of which require far-sighted analysis.

Another issue that was highlighted was “renegotiation” where the concessioner can take advantage of loopholes in a particular clause and indulge in opportunistic renegotiation which could nullify the benefits of competitive bidding. He also stated that competition law applicability should be incorporated in the agreement itself.

Dr. Sebastian Morris mentioned that one of the greatest developments in modern times has been to breaking up of natural monopolies and cited the example of electricity to substantiate his claim. He stated that in this domain of created markets, competition for the market is also important such that there is a link between competition in the market and competition for the market. He further stated that anticipated competition in the market can inform bids and lead to risk reductions. He explained that in India, we are prepared to have full-fledged electricity markets and it can lead to tremendous benefits.

Mr. Pradeep S. Mehta explained that there are two types of concessions, i.e. policy concessions and contractual concessions. In contractual concession, he spoke about civil aviation, i.e. contractual concession agreement in the context of airports where the jurisdiction defined in law is very limited in terms of its scope. He mentioned that downstream competition is equally important to protect. In his concluding remarks, he highlighted, the need to ensure adherence to the clause of competition in a concession agreement.

Mr. Ajit Pai, at the very outset, defined objectives of the entire process that NITI Aayog is associated with so as to achieve its broader goal of making public assets more productive via investment, asset monetisation, asset recycling and PPP. He stated that competition has very significant implications in each of these areas. In this context, he explained the two goals for the CCI, i.e. maximising consumer benefits and ensuring fairness in the process.

Mr. Shailesh Pathak spoke from a private sector perspective. He is a part of the development team of L&T. He stated that the biggest problem faced by them is that they signed over 25 concession agreements with different agencies of the government but not a single has been implemented in its entirety till date. He went on to highlight that lawyers are creating products which will probably never be put to use. He was quick to point out the

emerging fascination for infrastructure investment trusts (InvITs) which have been getting a leg up from the government of late.

Mr. Ashok Kumar Agrawal spoke about civil aviation. He explained how civil aviation is a service with two verticals, i.e. an operational part (aviation activity) and a non-operational part (passenger activity). He mentioned that performance of airports in India is monitored by many bodies, i.e. national as well as international such as the CIA, etc. Also, the civil aviation in India abides by the international norms and the government is taking necessary steps to further improve the performance at large.

Mr. Tuhin Kanta Pandey spoke about the mandate of DIPAM that encompasses competition in the market rather than for the market. He mentioned the two broad pillars in disinvestment policy, i.e. Strategic Disinvestment and Sale of Minority Stake. Strategic disinvestment broadly refers to the delegation of management control and involves parting away with the organisation's assets. He went on to explain how the process is carried out in DIPAM. The starting point of the process is when NITI Aayog looks at a multitude of factors like national security, sovereign functions, market imperfections, etc., irrespective of whether or not the disinvestment being pursued is a strategic one. Based on this evaluation, it decides whether it needs to be treated as a priority or not. DIPAM then decides as to whether partial or complete disinvestment is required. In this process, all the transactions that are carried out require approval of the CCI as well as the concerned ministry. He highlighted that we should understand how only ownership changes hands between different sectors and everything else remains within the economy. He concluded by saying that "It is not the business of the government to be in business."

The Chair concluded by summarising the points of the speakers and talking about issues faced by the Commission which primarily revolve around information asymmetries and public-funded monopolies.

This was followed by two technical sessions in which a total of six papers were presented.

Call for Papers

The Competition Commission of India (CCI) is a statutory body established under the Competition Act, 2002 with the objective to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interest of consumers and to ensure freedom of trade carried on by other participants in markets in India. The CCI is also mandated to take suitable measures for promotion of competition law through organising various advocacy programmes for the stakeholders. In furtherance of the above, the CCI as a public institution, is engaged in encouraging scholarship in the field of competition law and policy so as to develop a better understanding of competition issues relevant in the Indian context, to draw inferences for implementation of competition law and to create a culture of competition in India. In pursuit of the same, the Commission has published this annual **Journal on Competition Law and Policy** in both print and online version.

Submission of Papers

The Commission invites original high quality research papers, articles, case law and book reviews on competition law, economics of competition law and contemporary antitrust issues for publication in this journal. The orientation of the papers may be theoretical, empirical or case studies based. The journal would cover a wide range of related themes. However, research papers/ articles/ book reviews on the following themes, in the Indian context and based on empirical research, would be encouraged:

- A. Cartel
- B. Vertical restraints and competition
- C. Market definition, measuring market power and abuse of dominance
- D. Merger and acquisition
- E. New age economy, platform markets and challenges for antitrust enforcement

- F. Intellectual property rights and competition law
- G. Recent development in competition law and policy
- H. Any other issues related to competition law and policy

Selection Process

Papers received for publication in the journal shall be selected through a rigorous two stage review process. At the initial stage, the Joint Editors will carry out a blind review to determine the eligibility of the paper for further review. On clearing the initial stage, the paper will be sent to the editorial board. A double blind review process will be followed at both the stages. Based on the editorial board recommendations, the paper will be **rejected or accepted or sent to authors for revision.**

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There is no specific deadline for submission of papers. Papers cleared by the Editorial board will be published in the next available issue of the Journal.

Guidelines for Authors

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 - Introduction
 - Literature Review
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Maximum word limit (including research questions, methodology, conclusion and foot notes)	Research Paper : 8000 words Article : 6000 words Book Review : 2500 words
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I, **Dr. Anil Singh** hereby declare that the particulars given above are true to the best of my knowledge and belief.

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Fair Competition
for Greater Good

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