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The Progress of E-commerce and Competition Law in India

RAHUL SHAW¹

ABSTRACT

Competition laws or Anti-trust laws are laws that generally deal with and regulate anti-competitive behaviour by and between different enterprises. The primary reason for monitoring and regulating anti-competitive behaviour is that it promotes market competition. Competition law supervises acquisitions and mergers of large companies and further prohibits agreements that restrict free trading & competition. Competition law is also responsible for curbing abusive behaviour by a dominant enterprise in any sector. These are the very principles which guide the Competition Commission of India (CCI) and which led them to conduct a thorough market study on the growth of e-commerce in India.

The CCI submitted its report on January 8, 2020, and released its findings to the public. The report addressed some specific areas which will be closely monitored by the CCI and which contain high-risk factors of corrupt trade practices.

This paper seeks to provide a brief analysis of the report on the market study conducted by the CCI, instances of anti-trust law breaches committed by enterprises in the e-commerce domain all over the world and preparedness of the CCI in dealing with the future potential of e-commerce in India.

Keywords: *Anti-trust Laws; Competition Law; E-commerce; CCI; Market Study.*

E-commerce is an umbrella term which includes the sale, purchase, marketing and distribution of goods and services through electronic networks and the internet. India is the fastest-growing market for the e-commerce sector globally. Revenue from the sector is expected to increase from \$39 billion in 2017 to \$120 billion in 2020, growing at an annual rate of 51%, the highest in the world.² This monumental growth of the e-commerce sector is chiefly due to the increase of smartphone and internet users in recent years. The number of internet users in India has increased from 445.96 million in 2017 to 665.31 million in 2019 and is expected to increase to 829 million in 2021.³ There has been a steady increase in investments in the e-commerce sector

¹ Author is a PhD Research Scholar at Department of Law, Aliah University, Kolkata, India.

² [E-commerce industry in India](https://www.ibef.org/industry/ecommerce.aspx), India Brand Equity Foundation (March 01, 2020, 5:25 PM), <https://www.ibef.org/industry/ecommerce.aspx>

³ [Indian E-commerce Industry Report](#), India Brand Equity Foundation (March 01, 2020, 5:40 PM),

since the year 2009, with an astounding 1650 companies entering the industry in 2015. It is estimated that presently around 4757 start-ups operating in the e-commerce segment are active in India.⁴

E-Commerce in goods category has grown at a steady compound annual growth rate (CAGR) of 57% in the last seven years and is expected to grow by 18.6% till 2022. The online retail market in India is estimated to be worth \$17.8 billion in terms of the gross merchandise value (GMV) as of 2017. The sales from online travel and hotel bookings in India is likely to reach \$39.09 billion by 2021, growing at a CAGR of 16% between 2015 and 2021. The food-tech industry in India is estimated to grow at a CAGR of more than 12% between 2016 and 2021.⁵

The Competition Commission of India (CCI) conducted a market study on electronic commerce in India and submitted its findings on 08/01/2020, in a report titled 'Market Study on E-Commerce in India'. The objective of the study was quoted in the report as- "*...the purpose of the study was to better understand the functioning of e-commerce in India and its implications for markets and competition.*"⁶

The CCI identified certain areas of the e-commerce ecosystem which are likely to come within the ambit of competition issues. Exclusive agreements between the online retailers (*e-tailers*) and the sellers, deep discounts offered on the online platforms which are oftentimes predatory in nature, platform neutrality and platform parity clauses, are some of the areas highlighted by the CCI in its afore-mentioned report.

In the year 2019, there had been several clashes between dominant e-commerce companies and the CCI. Google found itself under the scanner of CCI after paying a record 4.34 billion Euros⁷ in fine to the European Commission for breaching European Antitrust laws. Google was found to abuse its dominant position in the Indian smartphone mobile device market too and was fined accordingly. Uber, another giant of the e-commerce industry was found to engage in predatory pricing after a complaint was filed against it by Meru Travel Solutions, a local radio taxi operator. Uber was found to offer its services by suffering an approximate net loss of INR 204 on every ride.⁸ The Director-General (DG) of the CCI has also directed the investigation

<https://www.ibef.org/download/E-Commerce-October-2019.pdf>

⁴ Market Study on E-Commerce in India, Competition Commission of India (February 29, 2020, 12:00 PM), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

⁵ *Id*

⁶ *Supra* Note 3

⁷ Antitrust: Commission fines Google Euros 4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine, European Commission (March 01, 2020, 7:00 PM), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581

⁸ Avantika Arun et al., Competition Law Year in Review: Highlights of 2019, Mondaq (March 1, 2020, 8:00 PM), <https://www.mondaq.com/india/Anti-trustCompetition-Law/888072/Competition-Law-Year-In-Review-->

of the merger of MakeMyTrip and Golbibo, two dominant position holders of the online travel and hotel booking market and whether this merger is in the interest of fair competition practices. OYO, another online hotel booking intermediary is also under the scanner of CCI for using unfair means to curb competition and violating Sections 3 & 4 of The Competition Act, 2002.⁹

2. Antitrust Laws & E-commerce around the world-

Competition laws have been developing steadily throughout the different nations of the worlds since e-commerce has appeared and grown to be a novel market area, a serious boon to the economy. It will not be an exaggeration to say that e-commerce is the marketplace of the future. While the different countries all have their respective antitrust laws, it was also inevitable that they had some noteworthy encounters with the enterprises of the e-commerce marketplace.

In the year 2000, there was a long trial against Microsoft for antitrust violations related to its software marketing activities in the USA. The US government brought the case against Microsoft because, among other things, Internet Explorer was alleged to control the browser market since it was packaged as part of the Windows operating system. That made entry and maintaining market share complicated for competitors, even though any Windows user could load competing browsers. The court found that Microsoft unlawfully tied its Web browser to the Windows operating system, but the Department of Justice settled during the following appeal, so Microsoft was able to continue incorporating its browser into Windows. Another aspect of the case was that Microsoft limited its APIs, or application programming interfaces, to favoured "partners." The effect was that selected competitors were not able to provide software that worked with Microsoft's operating system, because without the APIs, companies could not create software that would operate with Windows. Ultimately, Microsoft was indeed found to have been engaging in antitrust practices and was fined heavily and further directed to report to the US government regarding any of its further product releases.¹⁰

Microsoft found itself under the radar of the European Commission (EC) too. The European Union (EU) sued Microsoft for anticompetitive actions, alleging that it forced every Windows customer to use only Internet Explorer. The browser competitors complained to the EU antitrust authorities, the EC. The result was that Microsoft agreed to create an option when implementing a new version of Windows that randomly offered several competing browsers

Highlights-Of-2019

⁹ The Competition Act (2002)

¹⁰ Vogel P.S., [Do 1800s Antitrust Laws Apply in the E-commerce Age?](https://www.ecommercetimes.com/story/83117.html), E-commerce Times (March 03, 2020, 3:00 PM), <https://www.ecommercetimes.com/story/83117.html>

for customers to select. That appeased the EC and allowed Microsoft to continue its business operations in the EU.

Google controls an estimated 90 per cent of the search engine business in the EU and about 67 per cent in the USA. These numbers are indicative of the dominant position Google enjoys in the search engine market. Many competitors have frequently raised concerns that Google must be using anti-competitive methods or it would not have that kind of market share. However, the search engine services offered by Google are free and no one is holding a gun to the head of the consumers requiring them to select Google. Some search engine competitors in the USA and elsewhere suggest that Google manipulates search results for pay, and as a result, the results are not natural. There is no proof of that, and since all search engine algorithms are the secret sauce of the search engines, no one knows how the results are cooked and presented to consumers. That information likely would remain secret even in litigation since it is Google's trade secret. But Google is notorious for being sketchy and sneaky in its operations and has been apprehended multiple times in recent years to have been engaging in unfair and anti-competitive practices. The Competition Commission of India (CCI) fined Rs. 135 Crore to Google for abusing its dominant position in the Indian market in the year 2018.¹¹ In the same year, the EC found Google guilty of abusing its dominant position in the Android market and fined it \$5 billion.¹² Google was found guilty of violating multiple data privacy laws in the year 2019 by the EC and subsequently fined \$57 million.¹³

Such conduct by a company like Google demonstrates that it is not a question of regulation or safeguarding. Any enterprise with such a huge market share and handling such sensitive data needs to be kept under constant surveillance and accountable for all its actions.

In the United States, the antitrust law was incorporated for civic and economic purposes, to foster an economy compatible with democracy as well as protect consumers from monopoly pricing. The idea was that having a decentralized economy with many small businesses will allow the country to comply with democratic self-governance and ensure a healthy competition among businesses.¹⁴ The antitrust law has created an environment where large corporations can use their market power and large size to undermine smaller businesses. Small businesses have

¹¹ Google told to pay Rs. 135.86 crore fine for abusing its power in India, The Economic Times (March 16, 2020, 4:00 PM), <https://economictimes.indiatimes.com/tech/internet/ci-issues-order-against-google-for-search-bias/articleshow/62838992.cms>

¹² Kottasova Ivana, Europe fines Google \$5 billion for abusing its Android dominance, CNN Business (March 16, 2020, 4:25 PM), <https://money.cnn.com/2018/07/18/technology/google-eu-fine-android/index.html>

¹³ Satariano Adam, Google Is Fined \$57 Million Under Europe's Data Privacy Law, The New York Times (March 16, 2020, 4:45 PM), <https://www.nytimes.com/2019/01/21/technology/google-europe-gdpr-fine.html>

¹⁴ Horton T.J., Antitrust or Industrial Protectionism: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts, Santa Clara Journal of International Law, 14 (2016).

faced difficulties when attempting to file lawsuits after feeling harmed by the anti-competitive practices used by large firms.

Countries like the United States and the United Kingdom and even the European Union (EU) have developed antitrust laws to monitor the actions by companies that would maintain or expand monopoly powers through improper means in the e-commerce sector. Monopoly may be formed if an enterprise or firm has exclusive ownership and control over e-resources, by government regulations which may prohibit the entry of new firms into the e-commerce market, a merger between two or more companies and agreements concerning mutually exclusive trade. The governments have a role to control monopoly due to various reasons such as, to prevent excess prices imposed on consumers, to promote competition, and to ensure quality products are delivered to consumers. Furthermore, e-commerce invariably enables the companies to collect sensitive data about the consumers which in turn are used by the companies for targeted advertisements and discounts and other predatory pricing methods.

3. Analysis of the Market Study on E-Commerce conducted by the CCI-

The Indian competition law regime is in its nascent years. Therefore, it is not a surprise that there exist very few comprehensive works on this subject and even fewer dealing with the relation between competition laws and e-commerce. The report of CCI on its study titled 'Market Study on E-commerce in India' (hereinafter referred to as the 'Market Study') is perhaps the most crucial and updated resource which will guide the future of competition law and e-commerce in India.

The Market Study was pretty in-depth and thorough, which allowed the CCI much needed insight into the current e-commerce scenario of India. The CCI has identified and called out several issues to light in its report of the study and although the CCI has refrained from calling any measure anti-competitive or justified in a proper context, it has advised the business owners and enterprises to impose some self-regulation if they wish to conduct their respective businesses without any hindrances or complications.

The CCI has identified four chief areas in its report that are of concern and which will be closely monitored by them in the future regarding all e-commerce platforms.

The first area is of Platform Neutrality. The concern regarding platform neutrality arises from situations where the online platforms serve as both a marketplace and a competitor on that marketplace. Platforms essentially vertically integrate when they operate in the products traded on it, which may be through manufacturing/selling of private labels or by having a direct or indirect interest in retail or through operating their cloud kitchen brands. Such vertical

integration may create an incentive to improve the platform's own/related entity's market position relative to its competitors by engaging in preferential treatment on the platform.¹⁵

The CCI also observed in its market study that lack of transparency in the e-commerce platforms' functioning and practices can, on the one hand, allow for possible distortion of competition on the platforms and on the other hand, consumer choice may not reflect consumer preference with perfect information. The three elements, which according to the business users of the platforms, are susceptible to manipulation/exploitation by platforms, are search results, sellers'/service providers' data and user review/rating mechanisms. Without a formal determination of a violation of the provisions of the Competition Act, 2002, improving transparency in these areas can reduce information asymmetry, which in turn can positively influence competition not only on the platform but also between platforms. Making more information available on the search ranking criteria, collection and sharing of data, and review and rating mechanisms will thus help address the concern of the business users of platforms to some extent. The CCI also recognised that sharing of all data and high levels of transparency will be detrimental to the e-commerce platforms themselves. The CCI seeks to find a balance between the growth of healthy competition and minimising the risks of transparency and opacity in e-commerce businesses.

The second area of concern according to the market study of CCI is Platform-to-Business Contract Terms.

E-commerce platforms create significant market opportunities and offer great potential for businesses to widen their market access. This also leads to a growing dependence of businesses on these platforms. A fragmented supply-side and only a few major intermediary platforms create a situation of asymmetry of bargaining power. As the study reveals, this bargaining power imbalance and information asymmetry between platforms and their business users may be prejudicial to the interest of business users. Moreover, the possibility of multi-homing by businesses does not appear to act as a competitive constraint since all major platforms have similar practices on the sellers'/service providers' side of the marketplaces, which similarly affect the businesses. The issues of unilateral revision in contract terms and imposition of 'unfair' contract terms by the major platforms have led to growing unease and tension in platform-business relations. Such an environment of conflict and mistrust may not be

¹⁵ CCI, [Market Study on E-Commerce in India](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf), Competition Commission of India (March 18, 2020, 5:15 PM), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

conducive for realizing the full potential of digital commerce, which promises myriad benefits to consumers, businesses and the economy.¹⁶

The CCI further stated in its report that it can intervene, on a case-by-case basis, in matters where unfair conditions or prices are imposed through contractual provisions, by an enterprise that is dominant in the e-commerce market. Further, terms in a contract may directly or indirectly lead to an exclusionary effect on the competition while also being exploitative/ unfair to the business users and such terms or clauses will also be under the CCI's radar.

The third area of concern as identified by the CCI is Platform Parity Clauses.

The CCI's review of the antitrust literature on price parity clauses revealed that these restrictions can give rise to competition concerns. Firstly, existing platforms, in the presence of parity clauses, may not have sufficient incentive to compete on commission rates. Secondly, a new platform could charge lower commissions to service providers that offered a discounted rate, to gain a toehold in a concentrated oligopolistic market where incumbent platforms enjoy scale economies and network effects. Platform parity clauses imposed by incumbent platforms may serve as a barrier to entry by such low-cost platforms. Thirdly, these clauses can also help cement coordination or tacit understanding that may exist between platforms, by de-incentivising deviation from a consensus rate of commission. Thus, platform parity clauses can potentially lead to higher commission rates and discourage entry.¹⁷

The fourth area of concern according to the CCI is Exclusive Agreements.

The CCI admits that exclusive agreements are not *per se* anti-competitive. However, they raise potential competition concern when used as an exclusionary tactic to foreclose competition to rivals or to impede entry. Such concern would be pronounced when there is insufficient competition in either the platforms' market or the market where sellers/service providers compete. A platform with market power, by forging exclusive contracts, may be able to prevent the market from being more competitive. Thus, the benefits accruing from competitive markets such as lower prices, better products or more choices may be lost. Exclusive agreements may make rival platforms incur significant additional cost to induce the brands/service providers to give up the exclusive contract with the major platform. Listing of only a single brand/service provider in a given product category on a major platform can make it difficult for rival brands/service providers to get their products before the consumers. The CCI also acknowledges that in some cases, exclusive agreements can also generate efficiencies and

¹⁶ *Supra* Note 14

¹⁷ *Supra* Note 14

improve competition among the brands of different manufacturers or service providers.¹⁸ Thus the CCI has said that it will evaluate the cases dealing with exclusive agreements on a case-by-case basis.

The fifth and final area of concern as identified by the Market Study done by the CCI is Deep Discounts.

This is perhaps the most controversial area among all the other mentioned factors. Deep discounts are what sustain the e-commerce sector primarily. The reason behind deep discounts is that the e-tailers save a lot of money since they are marketing, advertising and selling their goods on the digital platform, thus reducing their cost and ultimately enabling the consumer to make purchases at a cheaper price. But the giants who dominate the e-commerce sector can often afford to offer goods below their purchase costs to curb and discourage competitions. This leads to predatory pricing and the establishment of e-cartels and ultimately against the spirit of fair trade and competition. Thus the CCI has stated that it will conduct a competitive assessment of discounts offered by the e-commerce companies on a case-by-case basis to ascertain whether the discounts offered by them are fair or not.

4. Conclusion-

The e-commerce sector is a booming and lucrative industry, and the few heavyweight enterprises in this sector keep finding different avenues of bypassing the existing laws and exploiting their dominant position. With the increase in users of e-commerce and the evolution of artificial intelligence-based targeting and personalisation algorithms, exploitation of these types should be expected to be on the rise. Since the industry and market is ever-evolving in nature, the application, interpretation and scope of the laws dealing with them also need to keep improving.

The Market Study conducted by the CCI is a first step in the right direction and an overall appraisable initiative to further regulate and groom the expansion of the e-commerce market.

The development of e-commerce has been heartily welcomed by consumers. E-commerce has ushered in a new wave of competitive benefits such as lower prices of air tickets, books, clothes, CDs and Insurance policies. The fact that e-commerce merchants do not need traditional brick-and-mortar shop-rooms to sell their goods means that people with less starting capital can also trade on the digital marketplace. The digital marketplace has virtually global reach and thus enables the e-commerce merchants to access a wider geographic market. The

¹⁸ *Supra* Note 14

digital marketplace also allows consumers with a wider variety of choices at better prices.

The antitrust laws in both normal trade and e-commerce, share the common purpose of promoting innovation, competition and enhancing consumer welfare.

The Draft Competition (Amendment) Bill, 2020¹⁹, has proposed to broaden the definition of an 'enterprise' in Section 2(h) of the Competition Act, 2002²⁰, which significantly increases its scope and effectively encompasses a wider array of trades including e-commerce.

Thus it is evident that the CCI is not underestimating the exponential progress of the e-commerce industry in India and taking some right measures to ensure its steady growth.

¹⁹ The Competition (Amendment) Bill (2020)

²⁰ *Supra* Note 8