



Abuse Of Dominance In A World Without Borders: An Analysis Of E-Commerce Retail

Tushti Ratnapriya Thakur

LLM Student

School of Law, Christ University, Bengaluru

ABSTRACT

The growth of a globally interconnected society that is accessible for use and manipulation at the click of a button is a fact that is well-known and debated in common parlance. This progress in networking through the use of cyberspace, a platform where the boundaries are fluid and exist virtually, has continued to attract the attention of legal scholars and lawmakers alike. While the advantages are countless, the associated exposure to an entirely new category of crime, “cybercrime”, and anti-competitive market practices by businesses that float through these mediums cannot be ignored. The abuse of dominance is predated by the two-step formula used alike by every major online corporation, whereby they first and foremost, acquire a large audience that relies on the services provided by them. Second, these internet-based corporations figure out how to profit from the clientele by justifying breaking the customary laws of business and exploiting loopholes or just defying the law, all of which typically serve as the source of unparalleled growth. This study primarily attempts to scrutinize the functioning of e-commerce retail websites by analyzing how through the control of the internet, sometimes by a sizable portion of the marketplace or the inventions, an unfair advantage is being gained by particular businesses at the cost of the customers as well as other competitors. The paper makes use of a multi-disciplinary approach where the operations of e-commerce platforms are analyzed by looking into the provisions of the Information Technology Act, 2000 in addition to laws regulating competition in the market. The application of anti-trust and other IT law regulations is becoming increasingly complicated as innovations are made every passing second. Therefore, the speed with which the legislative process works, the increasing susceptibility of consumers to fall prey to cyber frauds and search engine biases that redirect them to websites that already enjoy a competitively advantageous position.

Keywords: E-commerce, cyberspace, retail, abuse of dominance, marketplace, cyber law, crime crimes, anti-competitive behaviour

INTRODUCTION

Over the last twenty years, the worldwide electronic commerce sector, more frequently referred to as e-commerce, has seen a notable increase in its level of importance. The notable growth witnessed in India, as well as in several other countries, may be due to several factors including the fast development of the Internet, the rise of numerous start-up businesses, and the changing patterns of consumer behavior. The advent of e-commerce retail has brought about substantial transformations in the market and distribution system, facilitating communication between a large number of customers and merchants over the Internet. Numerous electronic commerce firms, including Bigbasket, Ola, Uber, Flipkart, and Myntra, operate on internet-driven marketing strategies and provide products at much lower rates in comparison to conventional brick-and-mortar retail shops. There are two primary rationales for this course of action. Firstly, it is important to note that the e-commerce industry in India is now in its early stages of growth and development. Given the highly competitive nature of the business environment, firms are using a variety of strategies to get a significant portion of the market. Therefore, price functions as the method used to accomplish this purpose. Additionally, Indian e-commerce start-ups get advantages from the substantial financial resources provided by private equity firms and investors, enabling them to provide significant discounts. In response to the significant cost savings provided by e-commerce platforms, traditional shops are implementing innovative services and experiences to attract customers, which were previously unavailable. In spite of providing these discounts, many shops engage in the practice of monitoring clients who visit their brick-and-mortar establishments only for the purpose of evaluating items before completing their online transactions.¹ This element signifies that the e-commerce sector is becoming increasingly dominant, leading to a dispute between competing networks. The disagreement at hand gives rise to legal complexities that need resolution via the implementation of antitrust legislation.

The primary objective of antitrust regulation is to foster a robust and beneficial competitive environment within the economy, serving as a preventive measure against potential abuses of market power to protect consumer interests. This goal is achieved through the enactment of measures aimed at preventing the improper use of dominant market positions and the establishment of the Competition Commission of India. The Commission is entrusted with various functions, including preventing actions that have adverse effects on competition, promoting and preserving fair competition, enforcing freedom of commerce, safeguarding consumer interests, and investigating breaches of the act. Individuals failing to adhere to the stipulations of the act may be subject to penal consequences. With the emergence of the e-commerce industry, the Commission has adapted its position and now functions as a regulatory entity within a thoroughly revamped organizational structure.

¹ Anshuman Sakle and Nandini Pahari, The Interaction between Competition Law & Digital and E-Commerce Markets in India, 16, *Indian J. L. & Tech.* 18 (2020).

UNDERSTANDING E-COMMERCE DYNAMICS AND DOMINANCE ABUSE

Electronic commerce, sometimes referred to as e-commerce, is a kind of commercial activity that involves the exchange of goods and services using electronic means, specifically utilizing the Internet as a medium. The aforementioned concept refers to a nascent framework for a sales and merchandising instrument, whereby purchasers have the opportunity to engage in every stage of a transactional determination while undergoing electronic procedures rather than physical ones typically conducted inside a brick-and-mortar establishment. Internet commerce encompasses a range of procedures, including the provision of product information to consumers, the selection of things for purchase, the safe transaction of purchases, and the subsequent financial settlement of these transactions. The definition of e-commerce lacks universal consensus, but it generally refers to the practice of transacting business electronically as opposed to traditional methods. This entails utilizing internet-enabled devices such as computers, laptops, and cell phones to facilitate the "click and buy" approach to commerce.

The matter concerning the exploitation of a dominant position or abuse of dominance by a corporation or group of corporations is addressed in Section 4 of the Indian Competition Act. The purpose of the legislation is to prohibit specific companies or groups from utilizing their market dominance to potentially exclude competitors and exert pricing control. Two fundamental criteria are established in this section of the statute. A company must initially occupy a position of dominance. Additionally, the organization should implement strategies to capitalize on its dominant position. It is imperative to emphasize that the mere possession of dominance does not inherently amount to abuse and is, thus, not prohibited. The statute targets the misuse of a dominant position in particular.²

The abuse of a dominant position is defined by Section 2(a)(i) and (ii) of the Competition Act as the imposition, either directly or indirectly, of unfair and discriminatory conditions on the purchase or sale of goods or services by a business entity or group. Additionally, it includes circumstances in which individuals manipulate prices during the exchange of goods or services for cash. Nevertheless, it is imperative to underscore that attaining a dominant position ought to be accomplished in a lawful manner—through substantial business endeavors, product innovation, enhanced manufacturing quality, or effective distribution strategies—are all viable alternatives. The presence of dominance is not exclusively determined by the capacity to increase prices or exclude competitors. Conversely, its central focus is on the ability of a corporation to exert its jurisdiction over price increases and competitor exclusions at will. Two fundamental elements comprise the evaluation of a dominant position: market share and entry conditions. The Competition Commission of India assesses the dominant position of agreements in accordance with the principles outlined in Section 19 of the Competition Act. The application of these criteria safeguards the interests of both consumers and businesses and promotes fair competition.

² Lina M. Khan, Amazon's Antitrust Paradox., 126, 3 The Yale Law Journal, 710–805 (2017).

MARKET DEFINITION IN THE ERA OF E-RETAIL

The determination of the relevant market is a crucial step in antitrust investigations and forms the foundation for the analysis. In the case of *All India Online Vendors Association vs Flipkart India Pvt. Ltd. & Ors*³, the Competition Commission of India (CCI) acknowledged the distinctive nature of online marketplace platforms, which can be substantially different from traditional brick-and-mortar establishments and even online retail stores. This recognition is significant in the context of understanding digital marketplaces and antitrust concerns. Here are some key points to consider:

1. Adapting to Digital Disruption: This case highlights the necessity for antitrust authorities to adapt to the digital age. The presence of market disruptors, such as online marketplaces, can challenge traditional market definitions. Antitrust regulators must adopt a flexible approach to ensure that relevant markets are accurately defined within the context of evolving business models.
2. Challenges in Defining Geography: There also exists the challenge of assessing the geographical reach of online platforms. This challenge is a common issue in the digital economy, where businesses often operate on a global scale. Determining the relevant geographical market is crucial for assessing market dominance and competitive dynamics.

In brief, the acknowledgment by the CCI of the distinct characteristics of online marketplace services and its meticulous delineation of the relevant market constitute pivotal measures in tackling antitrust issues within the digital economy. This particular case serves as a demonstration of the intricate nature of delineating relevant markets within the context of the digital era, highlighting the need for a subtle and sophisticated approach to antitrust inquiries within this swiftly changing environment. The identification of a relevant geographical market in the e-commerce sector relies on the presence of a certain service or product offered by brick-and-mortar merchants or suppliers. The World Wide Web, an extensive interconnected network consisting of several subordinate networks, presents a challenge to the concept of a tangible space defined by external limits. Hence, the scope of the regional market extends beyond the client base of a certain firm, including additional people who use the Internet and other channels via which ads might reach a wider audience. The identification of a relevant geographic market may be achieved by using the physical location of the merchant or customer as a practical tool for matching.⁴

³ All India Online Vendors Association vs Flipkart India Pvt. Ltd. & Ors, 2018 SCC ONLINE CCI 97

⁴ Aarchi and Soumee Roy, Abuse of Dominance by the E-Commerce Sector: An Overview, 4 Int'l J.L. Mgmt. & Human, 1037 (2021).

ANTITRUST ISSUES IN THE DIGITAL MARKETPLACE

The e-commerce sector utilizes a spectrum of inventive strategies and methodologies to cultivate a customer base and acquire a share of the market. These approaches encompass exclusive agreements, online promotions, and advertising campaigns. Nonetheless, the implementation of these techniques gives rise to competition-related apprehensions.

1. Exclusive Agreements

The matter pertaining to exclusive dealers and distributors, as well as the practice of refusing to interact with other participants in the market, has emerged as a significant area of dispute within the realm of competition law. Within the realm of electronic trade, this particular issue has materialized in several manifestations. In the contemporary economy, a selection of items from certain brands may only be obtained via online merchants. For example, mobile devices manufactured by manufacturers like MI are solely retailed via dedicated online platforms. Although this method has the potential to allow producers to efficiently target a larger consumer base, apprehensions over its potential anti-competitive consequences and its influence on other participants in the market remain prevalent.

The Competition Commission of India (CCI) encountered a similar issue in the case of *Mr. Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors*⁵ pertaining to the exclusive distribution of the literary work authored by Chetan Bhagat, which was only accessible via the platform of Flipkart. There were claims that these agreements had negative effects on other participants in the physical market and resulted in the establishment of monopolies specialized to certain products, enabling control over pricing, manufacturing, and supply. It has been contended that this might have adverse effects on consumer welfare and impede equitable competition within the market. However, the charges were dismissed by the CCI, which expressed the view that a discriminatory agreement between a manufacturer and an e-commerce platform did not give rise to barriers to entry, as items sold via online portals continued to be subject to competitive limitations. According to the perspective of the CCI, it was determined that products such as mobile phones, tablets, books, cameras, and others were not susceptible to monopolistic activities or domination. Moreover, a dearth of tangible data existed to substantiate the claim that the exclusive agreements had a detrimental impact on incumbent market participants. The CCI has posited that in the contemporary landscape of digital commerce, characterized by the emergence of many e-commerce platforms, there is evidence of heightened competition that serves to alleviate apprehensions over anti-competitive conduct. This particular case highlights the changing dynamics of electronic commerce and the regulatory obstacles that arise from exclusive distribution agreements.⁶

⁵ Mohit Manglani, In Re v. Flipkart India Private Limited, 2015 SCL CCI 131 18

⁶ Aditya Bhattacharjea, India's Competition Policy: An Assessment, 38 Economic and Political Weekly, 3561–74 (2003).

2. Minimum Re-Sale Price

The maintenance of a minimum selling price is a subject of contention within the e-commerce industry. The issue of ensuring parity between online and offline merchants has been presented before the CCI in a few specific cases, but it remains a crucial area for future research. In the legal case of *ESYS v. Intel Corporation & Ors.*, the respondent was accused of participating in the practice of determining the retail pricing of its products. However, the Commission concluded that a company's ability to monitor pricing in its downstream market does not constitute anti-competitive behavior. The Competition Commission of India has provided clarification in a specific instance that the practice of offering varying discounts to different customers, such as lower discounts to retail purchasers and higher discounts to bulk purchasers, cannot be deemed a violation of Section 3(4) of the Act.

3. Advertising Dynamics in E-Commerce: The Google Case

E-commerce companies primarily function within the digital realm, making visibility, brand recognition, and promotional activities crucial for their growth. Competition law serves as the essential tool to establish their presence in the marketplace. In this regard, it's worth mentioning that several e-commerce entities, including Microsoft, Facebook, Yahoo, etc., were summoned by the Director General (DG) to offer their insights regarding the investigation into allegations of Google's abuse of dominance.⁷

On October 20, 2022, the CCI issued a significant order against Google, instructing the tech giant to discontinue its engagement in anti-competitive practices found to be in violation of the Competition Act. Google contested the ruling, alleging that the decision by CCI was influenced by confirmation bias. The company argued that its agreements with equipment manufacturers did not impose restrictions on them, preventing the pre-installation of rival applications with similar functionalities. Google emphasized its widespread use, highlighting that having a dominant market position does not automatically imply the abuse of that control.

In contrast, CCI pointed out that Google held a substantial market share, estimated at around 98%, in the Indian smartphone app industry. The commission found that Google engaged in anti-competitive practices to maintain its market dominance. Significantly, the Competition Commission of India (CCI) observed that Google, utilizing its dominant position in the Internet search industry, engaged in practices that restricted the accessibility of other search engines. Additionally, the CCI highlighted that Google's obligatory pre-installation of its proprietary applications on Android phones had substantially diminished the incentive and ability of device manufacturers to produce and distribute devices operating on alternative versions of the Android operating system. This directive seeks to foster fair competition in the Indian smartphone app industry and address apprehensions regarding market dominance and anti-competitive behavior.

⁷ Google LLC and Another v. Competition Commission of India Through its Secretary and Others, 2023 SCC OnLine NCLAT 147.

4. Online Promotions and Discounts

Online retail marketplaces often adopt a growth-focused strategy, prioritizing expansion over immediate profit by using low-price tactics to attract consumers and enlarge their customer base. Consequently, consumers are drawn to online shopping due to the competitive nature of these lower prices. Such anticompetitive practices are regulated by Section 4(2)(a)(i) of the Act, as the imposition of unjust or discriminatory pricing on the sale or purchase of goods or services is considered a direct or indirect abuse of a dominant market position. Section 4(b) of the Act further defines "predatory pricing" as pricing that falls below the cost of selling products or providing services, or the cost of producing those goods or services, with the intent of eliminating competitors or reducing competition.⁸

Conversely, the Act applies specifically to companies that hold a dominant market position in a relevant sector within India and prohibits the use of "predatory pricing" or "below-cost pricing." Predatory pricing is only prohibited under the law when a company holds a dominant position. As long as a corporation does not have a dominant market position, it is not subject to these legal restrictions. Several cases have been documented before the CCI whereby several online businesses, including Snapdeal, Amazon, and Myntra, have been accused of engaging in anti-competitive actions, namely predatory pricing. The matter of *M/s Fast Track Call Cab Private Limited v. ANI Technologies*⁹ involved accusations against Ola, a transportation service provider, regarding its involvement in providing incentives, loyalty programs, rebates, and exploitative discounts. The Commission noted that Ola's strategy of providing significant rebates to customers and bonuses to staff, despite incurring losses, appeared to be a deliberate scheme aimed at eliminating competition from other participants in the relevant market. This case illustrates a change in the Competition Commission of India's position regarding the protection of traditional taxi service businesses.

5. Preferential Listing

Preferential listing refers to the practice whereby a company exhibits a biased attitude by favoring some entities over others. In the legal matter of *Re Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited*¹⁰, the complainants alleged that Flipkart employs the label "Assured Seller" to signify products sold by its preferred vendors, suggesting a preference for these merchants over others. Additionally, it was claimed that Amazon uses the term "fulfilled" to designate products from recommended vendors, introducing search bias by strategically placing favored sellers at the forefront of the first page of results. The Competition Commission of India (CCI) noted that the prevalence of larger discounts and preferred listings might tilt competition on these platforms in favor of exclusive brands and merchants. As a result, these allegations were intertwined, necessitating a comprehensive examination of how vertical agreements function. The CCI determined that both platforms followed similar practices regarding exclusive tie-ups and

⁸ B.S. Chauhan, Indian Competition Law: Global Context, 3 Journal of the Indian Law Institute, 315–23 (2012).

⁹ M/s Fast Track Call Cab Private Limited v. ANI Technologies, 2015 SCL CCI 131 240

¹⁰ Re Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited, 2020 SCC ONLINE CCI 3

favorable terms with brands and sellers. Consequently, it appeared that competition between the platforms was not effectively mitigating the potential adverse impact on platform competition.¹¹

CONCLUSION AND SUGGESTIONS

There are several reasons for enforcing competition legislation in the online retail sector. The idea is to level the playing field between brick-and-mortar stores and online marketplaces. Nevertheless, when assessing the extent of dominance and potential abuse, the CCI should consider the distinctive features of the e-commerce industry, including rapid technological advancements, increasing consumer returns, network effects, and the collection of user data. To ensure the compatibility of a dominant player with other market operators, the CCI should also incorporate the necessary facilities concept. Some experts suggest that it is imperative to reassess and adapt the competition regime to accommodate the dynamics of the new economy. Consequently, it can be argued that despite the widespread challenges in competition policy, Indian competition law has effectively paved the way for innovative and pioneering entities to enter the market, offering consumers and organizations a broader array of options. Simultaneously, as e-commerce enterprises are safeguarded against potential harm, the competition regime also protects traditional brick-and-mortar businesses. Furthermore, the e-commerce sector has instituted a check and balance mechanism to deter unfair pricing practices.

Suggestions:

1. Equalizing the Playing Field - Enforced competition legislation in online retail should seek to establish fairness between brick-and-mortar stores and e-commerce platforms.
2. Consideration of E-commerce and its Unique Features - During evaluations of dominance and abuse, the Competition Commission of India should engage in actively acknowledging the distinct characteristics of the e-commerce sector, including rapid technological advancements, increasing consumer returns, network effects, and extensive user data collection.
3. Necessary Facilities Concept – It is an impediment for the CCI to incorporate the "necessary facilities" concept to ascertain if a dominant player was accommodating to other market participants.
4. Adaptation of Competition Regime - Suggestions have been made to adapt the competition regime to accommodate the evolving digital economy. This adaptation needs to reflect the dynamic nature of e-commerce.
5. Promoting Market Diversity - Indian competition law ought to play a vital role in clearing the path for innovative entities to enter the market, offering consumers and organizations a broader range of choices.
6. Protecting Both E-commerce and Brick-and-Mortar Businesses - The competition regime should function simultaneously to safeguard e-commerce companies against potential harm while also providing protection for traditional brick-and-mortar businesses.

¹¹ Sethi, Rajat, and Simran Dhir, Anti-Competitive Agreements Under the Competition Act, 2002, 24 National Law School of India Review, 32–49 (2013).

There is an urgent requirement to comprehensively examine and revise the competition regime to adeptly respond to the swift changes taking place within the emerging economy. Specifically, within the domain of electronic commerce, it is crucial to institute a framework of checks and balances to mitigate the potential risks associated with organizations engaging in unethical economic practices within the electronic marketplace.