

THE REGULATION OF E-COMMERCE UNDER INDIAN COMPETITION LAW

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ABSTRACT

This paper shall analyse the treatment of the burgeoning e-commerce market under the competition laws of India. The role of the Competition Commission of India (“CCI”) vide its various pronouncements in disputes involving e-commerce companies has been crucial in shaping the jurisprudence surrounding the digital market. It also raises several questions with respect to the terminology used in certain provisions of the Competition Act, 2002 (“the Act”).

Part I shall analyse how the CCI through various judgments, has dealt with the question of delineating the “relevant market” for digital companies. Part II shall delve into the question of exclusive arrangements, and whether such arrangements have been declared anti-competitive by the CCI. Part III will analyse “deep discounts” provided by online retail platforms in light of the law on predatory pricing. Part IV shall operate as the conclusion of the paper, delineating the various lacunae in the applicable laws, and estimating the way forward for e-commerce in India.

DELINEATING THE “RELEVANT MARKET” IN THE CONTEXT OF E-COMMERCE

The concept of “relevant market” is crucial in determining whether there has been an abuse of dominance by a particular firm that has satisfied the conditions of assessment of dominance under S.4 read with S.19(4) of the Act. The idea of relevant market under the Act comprises a relevant geographic market, as well as a relevant product market. The various criteria to be incorporated in an analysis of the same are enlisted under S.19(6) and (7) of the Act respectively. While these analyses are relatively simple when applied to brick and mortar enterprises, they become complicated in the context of the digital economy, more precisely, e-commerce. C

The decisions of the CCI on disputes involving alleged abuse of dominance by e-commerce enterprises have done very little to provide a sound jurisprudence on the subject. As e-commerce in India began to rise, in 2014, the CCI took a contradictory view on whether online and offline markets could be considered together as the relevant market for particular products. Firstly, in the case of *Ashish Ahuja v. Snapdeal.com*,ⁱ the informant, Ashish Ahuja alleged that Snapdeal.com and SanDisk Corporation had abused their respective dominant positions, as per S.4 of the Act. This is because the informant had an agreement with Snapdeal, an e-commerce operator for the sale of his products, i.e. pen drives, hard disks, laptops, etc., on its portal. Subsequently, the products sold by the informant were removed from the portal, and he was informed that only authorized partners of SanDisk India were permitted to sell SanDisk products on the Snapdeal portal. Furthermore, the informant was asked to obtain a ‘No Objection Certificate’ from SanDisk as a condition precedent to continue selling his products on Snapdeal. As the informant alleged that SanDisk had a dominant position in the electronics market, the CCI undertook an analysis of the relevant product market in order to determine whether SanDisk had abused its alleged dominant position. It concluded that the relevant product market was the market for portable consumer storage devices including USB pen drives, SD memory cards, etc. Importantly, it considered pen drives and memory cards to be substitutable products. Based on this, the CCI concluded that online and offline markets were different in terms of discounts and shopping experiences. Accordingly, buyers would weigh options available in both markets and decide. Therefore, the two markets were not different relevant markets. It was further observed that the role of Snapdeal.com was merely to manage

a web portal to enable buying and selling. The Commission went on to state that the e-commerce market in India (the relevant geographic market) had other competitors such as Amazon, eBay, Flipkart, etc. operating and the e-commerce market thrives on special discounts and deals. With these factors, Snapdeal.com could not be considered a dominant player in the relevant markets. It is crucial to note that in this case, the CCI took the view that e-commerce platforms are not different from brick and mortar selling platforms. This means that the relevant market in this analysis is significantly wider, with e-commerce platforms having a miniscule market share, and thus de facto cannot be considered as dominant players.ⁱⁱ

This approach was followed by the CCI in the case of *Mohit Manglani v. Flipkart India Private Limited and Ors.*,ⁱⁱⁱ wherein the informant alleged that certain e-commerce operators were abusing their dominant positions by entering into exclusive agreements with sellers of particular goods. In this case, the question of relevant product market was the market for books. The CCI concluded that irrespective of whether e-commerce markets are considered as separate relevant markets from offline markets, none of the sellers or the online retailers could be said to be individually dominant.

In an almost contradictory opinion, the CCI in the case of *Fast Track Call Cab Private Limited v. ANI Technologies Pvt. Ltd.*,^{iv} held that the market for radio cab services was to be considered as a relevant market in itself as they were not comparable with other modes of transport. The analysis of factors, in this case, included convenience to consumers, and ease of choice, which the CCI used in the previous two cases to establish that e-commerce platforms are not different from brick and mortar platforms, and hence constitute the same relevant market.^v

These cases display an extremely myopic view taken by the CCI where allegations of abuse of dominance by e-commerce operators are concerned. By expanding the scope of the relevant market, the CCI has absolved dominant e-commerce operators of liabilities imposed under S.4 of the Act and neglected to consider the true market shares of such operators. In an attempt to demystify this concept, the CCI in *All India Online Vendor's Association v. Flipkart India*^{vi} defined the relevant market for e-commerce operators as the market for services provided by online portals for the selling of goods in India. Per this view, e-commerce markets cannot be considered in conjunction with offline markets as a basis for delineating the relevant market.^{vii}

In January 2020, merely days after the CCI released its market study on e-commerce in India, directions were passed by the CCI to carry out investigations concerning abuse of dominance

by Flipkart and Amazon, following an information filed by the Delhi Vyapar Mahasangh.^{viii} As of 2021, the case is ongoing, with the CCI conducting extensive investigations into the business practices of prominent e-commerce portals.^{ix} It is also important to note that the Department of Consumer Affairs released the Consumer Protection (E-Commerce) Rules in 2020, so it remains to be seen how the CCI will implement these.

ABUSE OF DOMINANCE BY E-COMMERCE OPERATORS: EXCLUSIVE AGREEMENTS AND PREFERENTIAL LISTING

It has been an extremely common practice for e-commerce operators to enter into exclusive supply agreements with certain sellers, whose products would then be preferentially listed on online portals in some cases. Exclusive agreements are to be scrutinized as per S. 3(1) and S. 3(4) read with S.19(3) of the Act, which lays down six criteria to determine whether a particular agreement causes appreciable adverse effect on competition (“AAEC”). In the case of *Ashish Ahuja v. Snapdeal.com.*,^x the CCI neglected to conduct this analysis and instead held that it was within the right of SanDisk to protect its distribution channels by insisting that only authorised dealers to be allowed to list their products on Snapdeal.com. This was a case of an exclusive supply agreement between Snapdeal.com, which demonstrated the same by reneging on its agreement with the informant and instead insisting that the informant obtain a NOC from SanDisk. The agreement between SanDisk and Snapdeal was an exclusive agreement that had the effect of driving existing competitors, in this case, the informant out of the market. This means that the agreement had the potential to create AAEC, a crucial possibility which the CCI did not explore.

Similarly, in the case of *Mohit Manglani v. Flipkart India Private Limited and Ors.*,^{xi} the informant alleged that various e-commerce websites had been indulging in anti-competitive practices by entering into exclusive supply agreements with sellers. He averred that these practices did not accrue any benefits on the consumers, and instead deprived them of choice. In this case, while the CCI did undertake an analysis of the factors laid down in S.19(3), it failed to substantiate its holding that prima facie there was no AAEC caused by exclusive supply and distribution agreements. It merely underscored the difference between S.3(3) and S.3(4), stating that an analysis under the former would begin with the presumption of AAEC

as it pertained to horizontal agreements, whereas the latter would require a joint reading of S.19(3) to establish whether AAEC is proved to conclude that the agreement is anti-competitive. This demarcation did not address the specificities of the case, instead, it led to the erroneous conclusion that the creation of new e-portals meant that competition was increasing, hence there could not be AAEC in this case.

Following these two cases, the Ministry of Commerce and Industry in its Foreign Direct Investment in e-commerce policy provided that e-commerce platforms would be barred from purchasing more than 25% of a particular product from one vendor.^{xii} Despite this policy, the CCI has not yet decided on a case that explicitly upholds this rule.^{xiii}

In the most recent case, which originated with the information filed by the Delhi Vyapar Mahasangh in 2020,^{xiv} the CCI has acknowledged that e-commerce giants such as Amazon and Flipkart follow a marketplace model, with the primary role being that of an intermediary service to sellers and consumers. Therefore, these platforms operate at different levels of the vertical supply chain. In such a scenario, the CCI agreed that exclusive agreements and launches of products could have the dangerous effect of rendering certain offline markets redundant.^{xv} In particular, e-commerce operators and smartphone manufacturers such as 'OnePlus' use exclusive launches as a common business practice to create the image of exclusivity in the minds of consumers. This practice is being investigated by the CCI since 13 January 2020. It was found that Amazon and Flipkart had operated as exclusive sellers for 45 and 67 smartphone brands, respectively. It concluded that prima facie a case could be made out for AAEC as there was an exclusive launch along with preferential treatment to certain manufacturers, including discounting practices. It added that further investigation would be necessary to look into whether these agreements were being used as exclusionary tactics to foreclose competition, thus contravening S.3(1) and S.3(4).^{xvi}

On the question of preferential listing, it has been observed that various online selling portals manipulate search queries by listing the products of certain manufacturers at the beginning of search results. In some cases, the manufacturing companies pay a subscription fee to ensure that their products are listed above others' on the search engine results page ("SERP"). This has led to several complaints by small scale retailers and manufacturers who claim that consumers are deprived and deliberately prevented from exercising choice as the listing caters only to allegedly dominant manufacturers.^{xvii}

The CCI's market study on e-commerce released in January 2020 flags the lack of platform neutrality as the first potential anti-competitive issue. The Commission recognized that online platforms can control search parameters and results in a manner that grants an advantage to certain brands over others. For instance, one of Amazon's most prominent retailers, 'Cloudtail' is frequently featured at the top of search results on its websites. Such preferential treatment has the potential to constitute a breach of S.4 of the Act. The manipulation of search results would particularly fall under S.4(b)(i) and S.4(c). This approach was followed by the CCI in the case of *Matrimony.com v. Google*.^{xviii} In this case, the informant alleged that Google had adversely affected competition by manipulating its search algorithms in a manner that granted advantages to its own services, and those of its partners and affiliates. Because Google charges monetary compensation in exchange for placing advertisements on its platform, it is fair to assume that large scale firms could enter into advertising agreements with Google to the detriment of small scale firms. The Commission established, based on total revenue, market share, the volume of business, and other factors, that Google was a dominant player in India. It then concluded that Google had indeed abused its dominant position. While this order has clarified that the CCI's position on search bias is that it is to be considered anti-competitive, it did not provide any guiding criteria or statistics to substantiate its holding.^{xix} Hence, it is unclear whether this case could be used to decide future cases with the same issue.^{xx}

DEEP DISCOUNTS AND PREDATORY PRICING

To set themselves apart from offline markets, online selling platforms often indulge in flash sales and deep discounts. Deep discounts are a practice wherein a particular online selling platform offers a significant discount on a good which is sold in huge quantities. Such platforms can do so due to the immense funding that they receive, as well as because of lucrative deals with exclusive manufacturers which are unavailable to brick and mortar sellers.^{xxi} These discounts are typically offered for a certain number of days, for instance, Flipkart's Big Billion Day Sale which operates for three days. The Act has not accounted for either of these practices in its list of anti-competitive conducts, hence it is largely up to the CCI to lay down rules and precedents in this regard. In the cases of *Ashish Ahuja v. Snapdeal.com*,^{xxii} and *Mohit Mangalni v. Flipkart*,^{xxiii} the CCI noted that offering discounts is a part of the e-commerce business model, and hence cannot be termed as anti-competitive. The question of deep discounting is

inextricably linked with exclusive agreements, hence it can be investigated under S.3(1) read with S.3(4), as well as under S.4.^{xxiv}

Deep discounting can very easily amount to predatory pricing as defined under S.4 of the Act, as it refers to the practice of selling goods at a below-cost price with a view to reduce competition or eliminate competitors. However, it must first be established whether the particular enterprise holds a dominant position in the relevant market. As seen above, the CCI has firstly erroneously delineated the relevant market in a majority of the cases, and secondly, has rarely held e-commerce enterprises to be dominated. In such a scenario, it would not be possible to scrutinise these practices, unless the CCI lays down concrete rules regarding the same. The aforementioned FDI policy of 2019 has attempted to curb predatory behaviours of tech giant firms such as Amazon who use FDI to recover losses incurred from providing heavy discounts. It has done so by providing for the realignment of business structures of e-commerce operators according to certain guidelines and explicitly preventing certain exclusive agreements, such as the one between OnePlus and Amazon.

In the *Delhi Vyapar Mahasangh case*,^{xxv} the CCI took a contradictory approach to the one laid down in the *Mohit Manglani case*,^{xxvi} holding that deep discounting has the potential to be an anti-competitive practice, and therefore needs to be scrutinized under S.3(4) of the Act. However, the CCI failed to rectify or differentiate its previous rulings from its current stance, even though the facts of the cases are largely similar.^{xxvii}

On the question of predatory pricing, it is worth noting that a landmark judgment by the Supreme Court in 2020 has clarified that predatory pricing can operate as an abuse of dominance, as well as proof of dominance.^{xxviii} In this case, the informant, Meru Travel Solutions Private Limited, a radio taxi service filed an information against Uber, another radio taxi service before the CCI alleging that Uber had abused its dominance. The case was dismissed by the CCI which held that Uber was not prima facie dominant in the relevant market. The matter was then brought before the Competition Appellate Tribunal (“COMPAT”) which reversed the judgment of the CCI. The CCI had relied upon market research reports by 6Wresearch, whereas the COMPAT relied on findings provided by TechSci Research Private Limited. The Supreme Court upheld the COMPAT judgment ordering the directorate general (“DG”) to investigate the matter. The reason for the apex Court’s interference was the fact that there was prima facie evidence of predatory pricing on the part

of Uber as it had offered sizeable discounts to consumers and incentives to drivers, resulting in an average loss of INR 204 to Uber per trip. The Supreme Court's order has therefore led to the conclusion that predatory pricing could constitute proof of dominance, as it has an effect on consumers.^{xxix}

CONCLUSION

As noted above, the jurisprudence on e-commerce platforms is extremely erratic and riddled with contradictions. However, some part of this is attributable to the Act itself, as it does not contemplate several potentially anti-competitive behaviours that can and do arise in the digital age. For instance, the Act makes no mention of deep discounting or flash sales, both of which are frequently used practices, particularly in India. It, therefore, becomes difficult to scrutinise such conducts in the absence of statutory underpinnings. Furthermore, the Act does not recognize collective dominance, an issue which has been flagged in the recent case against tech giants, Flipkart and Amazon. The CCI in this case ordered the DG to conduct an investigation with respect to the contravention of S.3(1) read with S.3(4), and S.4 since no investigation on collective dominance was possible due to the limitations imposed by the statute. The CCI's order was upheld by the Karnataka High Court, before which two separate writ petitions were filed by Amazon and Flipkart, challenging the validity of the order passed by the CCI and seeking for it to be quashed. The Karnataka High Court importantly recognized and upheld the CCI's jurisdiction in this case, even though Amazon and Flipkart were facing pending inquiries before the Enforcement Directorate and under the Foreign Exchange Management Act, 1933.^{xxx} Therefore, the CCI possesses the locus to carry out investigations into the conduct of tech giant e-commerce platforms. This investigation will be crucial in deciding the future of e-commerce in India, and in eradicating the confusion caused by the jurisprudence thus far.

ENDNOTES

- ⁱ MANU/CO/0056/2014.
- ⁱⁱ Srinandini Kar, 'Ashish Ahuja Vs SnapDeal' (7 May 2020) *Law Column* <<https://www.lawcolumn.in/ashish-ahuja-vs-snapdeal/>> accessed 1 November 2021.
- ⁱⁱⁱ [2015]131 SCL18 (CCI).
- ^{iv} MANU/CO/0072/2015.
- ^v Ayush Verma, 'Relevant market definition in e-commerce' (21 August 2020), <<https://blog.ipleaders.in/relevant-market-definition-e-commerce/>> accessed 1 November 2021.
- ^{vi} 2018CompLR1122(CCI).
- ^{vii} Simrandeep Kaur, 'Ahuja v. Snapdeal: Decoding the E-Commerce Anomaly' (7 April 2021) *All India Legal Forum* <<https://allindialegalforum.in/2021/04/07/ahuja-v-snapdeal-decoding-the-e-commerce-anomaly/>> accessed 1 November 2021.
- ^{viii} In Re: Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Another (CCI) <<https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>> accessed 2 November 2021.
- ^{ix} Prasad Hegde, 'CCI's E-Commerce Investigation: A New Era in Indian E-Commerce Landscape' (2 May 2020) *CBCL* <<https://cbcl.nliu.ac.in/uncategorized/ccis-e-commerce-investigation-a-new-era-in-indian-e-commerce-landscape/>> accessed 1 November 2021.
- ^x MANU/CO/0056/2014.
- ^{xi} [2015]131 SCL18 (CCI).
- ^{xii} Barkha Dwivedi and others, 'How CCI failed to distinguish Abusive Discount from legitimate price competition: New FDI policy on e-commerce to the rescue' (29 July 2019) *Kluwer Competition Law Blog*, <<http://competitionlawblog.kluwercompetitionlaw.com/2019/07/29/how-cci-failed-to-distinguish-abusive-discount-from-legitimate-price-competition-new-fdi-policy-on-e-commerce-to-the-rescue/>> accessed 2 November 2021.
- ^{xiii} Prasad Hegde (n 8).
- ^{xiv} In Re: Delhi Vyapar Mahasangh (n 8).
- ^{xv} Rohit, 'E-commerce and anti-competitive agreements' (5 August 2021) <<https://blog.ipleaders.in/e-commerce-anti-competitive-agreements/>> accessed 2 November 2021.
- ^{xvi} R. Sudhinder and Prerana Amitabh, 'CCI Issues Directions Under Section 26(1) Against Amazon and Flipkart' (15 January 2020) <<https://www.argus-p.com/updates/updates/cci-issues-directions-under-section-261-against-amazon-and-flipkart/>> accessed 2 November 2021.
- ^{xvii} Rohit (n 15).
- ^{xviii} Matrimony.com Limited v. Google <<https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>> accessed 2 November 2021.
- ^{xix} Sahithya Muralidharan, 'India-Matrimony.com v. Google: A Cat on the Wall Approach to Intervening in the Expanding Digital Space' (20 March 2018) *Kluwer Competition Law Blog* <<http://competitionlawblog.kluwercompetitionlaw.com/2018/03/20/india-matrimony-com-v-google-cat-wall-approach-intervening-expanding-digital-space/>> accessed 2 November 2021.
- ^{xx} Swati Sharma, 'The Odyssey of Google Search bias under the Indian Competition Law', (18 November 2019) *The SCC Online Blog* <https://www.sconline.com/blog/post/2019/11/18/the-odyssey-of-google-search-bias-under-the-indian-competition-law/#_ftn4> accessed 2 November 2021.
- ^{xxi} Sahaj Mathur, 'Deciphering Deep discounting under Indian Competition Law: Resolving the dilemma' *SITC* <<https://nujssitc.wordpress.com/2020/12/24/deciphering-deep-discounting-under-indian-competition-law-resolving-the-dilemma/>> accessed 2 November 2021.
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- ^{xxiii} [2015]131 SCL18 (CCI).
- ^{xxiv} Akanshha Agrawal, 'Competition Law and the Deep Discounting Conundrum' (22 March 2020) *IndiCorp Law* <<https://indiacorplaw.in/2020/03/competition-law-and-the-deep-discounting-conundrum.html>> accessed 2 November 2021.
- ^{xxv} In Re: Delhi Vyapar Mahasangh (n 8).
- ^{xxvi} [2015]131 SCL18 (CCI).
- ^{xxvii} Sahaj Mathur (n 21).
- ^{xxviii} (2020) PL (Comp.L) February 79.

^{xxix} Dhruv Rajain and others, 'Predatory Pricing- Not only abuse but also proof of dominance' (7 February 2020) *The SCC Online Blog* < <https://www.sconline.com/blog/post/2020/02/07/predatory-pricing-not-only-abuse-but-also-proof-of-dominance/>> accessed 2 November 2021.

^{xxx} Ishu Gupta, 'Amazon & Flipkart v. CCI: Validity of CCI's order under S.26(1) of the Competition Act, 2002 (17 August 2021) *The CBCL Blog* < <https://cbcl.nliu.ac.in/competition-law/amazon-flipkart-v-cci-validity-of-ccis-order-under-section-261-of-the-competition-act-2002/>> accessed 2 November 2021.

