

Combating abuse of dominance in digital markets: Study from the perspective of EU and India

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Abstract

Online transactions, networking, also online shopping of goods & services have exponentially increased. Digital markets have been preferred by consumers, businesses. Undertakings are competing to persuade customers. Well established business groups gain dominant position in the market and more possibility to avoid new entrants. Conversely, new entrants face huge competition, and they need to compete on par with gigantic business groups. Existing legal systems regulate markets, deal with abuse of dominance. However, dynamic digital markets necessitate separate competition law. The legal system around the world have begun to make laws, rules, think over fair digital competition. To provide safe online environment, in which the new entrants can safely land on the business platform, compete freely and in this connection, USA, EU have passed laws to regulate digital markets.

EU has Digital Markets Act and Digital services Act providing level playing field for businesses, ensuring protection of fundamental rights of users. Both laws are applicable throughout EU. Further, Digital Markets Act, which is an ex-ante in nature, identifies gatekeepers by setting criteria, makes them responsible for their behaviour in the market.

Similarly, Indian Competition Act 2002 along with Competition (Amendment) Act, 2023 regulate competition in the market. In the same line, there are ongoing discussions, standing committee reports which pressurize, for having a separate digital competition law regulating digital markets. This thesis covers legislations, discussions, judgements regarding abuse of dominance in digital markets.

Key words: EU, Digital Markets, India, Competition

Foreword

It is a wonderful journey to study at Lund University, Sweden. With this thesis, I am happily completing my master's education at Lund University.

I would like to express gratitude to my thesis supervisor Professor Kacper Szkalej, his guidance, insights are indeed motivating. Also, I express gratitude to all my Professors, Co-ordinator of master's programme for their support, teaching & all-time assistance.

Similarly, I express my gratitude to my parents, my husband & all my family members who supported me throughout my studies.

Last but not least, I thank my fellow students for their support, co-operation.

Thank you!

Abbreviations

CCI	Competition Commission of India
CJEU	Court of Justice of the European Union
DG	Director General
DMA	Digital Markets Act
DSA	Digital Services Act
EEA	European Economic Area
EU	European Union
GDPR	General Data Protection Regulation
MRTP	Monopolies Restrictive and Trade Practices Act
NCA	National Competition Authority
OECD	Organization for Economic co-operation and Development
OMC	Oil Marketing Company
TEU	Treaty of European Union
TFEU	Treaty on Functioning of European Union

1. Introduction

1.1 Background

Digitalization has made significant changes in our lives. Digital markets have been created which differed from traditional markets, facilitating trade by introduction of online platforms. Digital players compete each other to attract users to their products and services. In this regard, there is a possibility of dominance of economic positions, for example Google, Facebook potentially dominant in specific markets and there arises need for regulation, maintenance of fair competition.¹ New entrants need to have assurance that they can freely enter, market their products or services, also can compete with already existing dominant groups. In this connection, there are developments worldwide providing leeway to fair digital competitive markets.

In European Union (EU), the guiding principles of internal market, EU structure, values are enshrined in Treaty on Functioning of European Union (TFEU) & Treaty on European Union (TEU). Article 26 of TFEU relate to internal market, as an area in which free movement of goods, services, persons, capital is ensured without having any internal frontiers. It is single market of EU where no internal borders are present. In other words, it is considering EU as a single space, single market.

With regard to internal market, Article 101 of TFEU prohibit agreements between undertakings, concerted practices, decision which affect trade between member states and further, if by their object or effect are distorting competition within the internal market, shall be prohibited as incompatible with EU internal market.

Further Article 102 of TFEU relate to any abuse of dominant position by one or more undertakings which affect trade between member states shall be prohibited as

¹ Daniel Mandrescu, EU competition law and the digital economy: protecting free and fair competition in an age of technological (R) evolution, Vol 3, 2020, eleven international publishing, pp.1-3

incompatible or against the EU internal market. In this connection, Regulation 1/2003 relate with implementation of Article 101 & 102 and the Commission & National Competition Authorities need to co-ordinate, also pledged to implement competition rules.

Besides, by adopting single digital market strategy in 2015, EU ensures better access for online goods and services throughout Europe.²

In this regard, Digital Markets Act(DMA), ensure the proper functioning of the internal market by having ex-ante rules regarding contestability and fairness in this digital sector. DMA at the Union level, provide safeguards to eliminate the unfair practices of gatekeepers, also facilitates cross border transactions.³ The aim of Digital Markets Act in the words of Andreas Schwab (a leading MEP on digital markets Act) “The purpose of digital single market is that Europe gets the best companies and not the biggest”.⁴

Similarly, Digital Services Act(DSA) at the Union level, ensures safe online environment & user will be protected from illegal and harmful content and it also provides framework for the innovative digital services.⁵

To begin with Indian perspective on competition law, the first attempt to regulate competition in the market can be identified with MRTP (Monopolies and Restrictive Trade Practices) Act 1969. It is a significant legislation to protect interest of consumers, eliminating restrictive trade practices, preventing economic concentration, also regulating monopolies.⁶ India’s policy of Liberalization,

² What is the digital single market about <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192> Accessed on 23.05.2023

³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925> Accessed on 23.05.2023

⁴ EU Digital Markets Act and Digital Services Act explained, <https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained> Accessed on 23.05.2023

⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065> Accessed on 23.05.2023

⁶ Geeta Gouri & Kalyani Pandya (2020) The Indian competition law experience– its history and its (digital) future, Indian Law Review, 4:3, 276-300, DOI: [10.1080/24730580.2020.1843316](https://doi.org/10.1080/24730580.2020.1843316)

Privatization, Globalization adopted in 1991 facilitated industrial development, delicensing of sectors which remained exclusively to public sector enterprises.

This led to the need for market regulation to enhance competition. As a result MRTP Act came to be repealed by the Competition Act 2002.⁷ In this connection, Competition Commission of India, an authority established under Indian Competition Act, 2002 has wide powers to investigate, decide matters relating unfair practices in digital market.

However, increased digitalization of global, Indian markets with the advent of online platforms such as Facebook, LinkedIn, Google, eBay, WhatsApp etc has challenged the adequacy of the competition law.⁸ At present, Competition Act 2002 and Competition (amendment) Act 2023, form the legal framework regulating Indian digital markets.

To take note of recent developments on competition law in India, the Standing Committee on finance in its 53rd report specifically enumerates anti-competitive practices and also proposes to regulate anti-competitive practices by big-tech companies. Also, Annexure 1 of the said report has reference to the Digital Markets Act of EU, American innovation and choice online Act (AICO) USA, Open App Markets Act of USA, also 10th amendment to German competition Act. Further, the Committee also expressed need to have a digital competition law, similar to that of EU Digital Markets Act, Digital Services Act.⁹

On International Platform, the Organization for Economic Co-operation and Development (OECD) promotes sustainable economic growth, free markets. Additionally, OECD handbook on competition policy in the Digital age acts as a guiding source to policy makers, authorities, researchers, also to the interested.¹⁰

⁷ Geeta Gouri & Kalyani Pandya (2020) The Indian competition law experience– its history and its (digital) future, Indian Law Review, 4:3, 276-300, DOI: [10.1080/24730580.2020.1843316](https://doi.org/10.1080/24730580.2020.1843316) Accessed on 23.05.2023

⁸ Ibid

⁹ Geeta Gouri & Swarnim Shrivastava, Indian parliament pushes for Ex ante rules on digital competition, CPI columns south Asia, February 2023, p.3 <https://www.competitionpolicyinternational.com/wp-content/uploads/2023/02/South-Asia-Column-February-2023-Full.pdf> Accessed on 23.03.2023

¹⁰ Competition policy in the digital age, <https://www.oecd.org/daf/competition-policy-in-the-digital-age/> Accessed on 20.04.2023

1.2 Purpose and research questions

The purpose of this thesis topic is to evaluate the legal framework of EU and India in ensuring fair competition in digital markets by combating abuse of dominant position. In this regard, this thesis topic focuses particularly on abuse of dominant position in digital markets and discusses the efforts by EU and India in combating such abuse of dominant position in digital markets.

To fulfil the purpose of this thesis, the following research questions will be answered-

1. What are the fundamental elements of competition law relating to abuse of dominant position?
2. What is the EU legal framework in curbing abuse of dominant position in digital markets?
3. What are the developments in the Indian legal system in combating the issue of abuse of dominant position in digital markets?

1.3 Materials and method

To fulfil the purpose of this thesis and to answer research questions, the EU legal method has been applied. The legal method refers to the method of interpretation, application and development of law by the judiciary.¹¹ Certainly, the EU constitutes a new legal order of international law, to which states have agreed and limited their sovereign rights.¹²

In the legal dogmatic method, questions relate to 'what valid law is, what is the material referred, sources of law and can be read as per the expert legal culture'.¹³ The EU legal

¹¹ Nielsen, R., Roseberry, L., & Neergaard, U. B. *European Legal Method: Paradoxes and Revitalisation*. Djøf Forlag, (2001), p.76

¹² Chalmers D, Davies G, & Monti G, *European Union law*, (4 ed. Cambridge University Press, 2019), p.16

¹³ Nielsen, R., Roseberry, L., & Neergaard, U. B. *European Legal Method: Paradoxes and Revitalisation*. Djøf Forlag, (2001), p.105

method aligns with legal dogmatic method which accommodates recent developments such as court rulings, legislations within a legal system.¹⁴

In this connection, reference has been made to European legal sources which include primary and secondary sources of law. Particularly, thesis has reference to the primary sources of law namely TEU and TFEU which are having same legal value and provide foundation to competition law regime.¹⁵ TEU sets out EU's purpose, values of the EU, composition and functions of EU institutions, its external relations. TFEU relate to competences, institutional procedures. Article 101 & 102 of TFEU relate to maintaining fair competition in the market.

Furthermore, Article 288 of TFEU relate to secondary law, which mentions different types of secondary laws which include directive, decision, regulations, recommendations. Regulations are used when there is a need for uniformity and they have direct applicability, are binding.¹⁶ In other words, there is no need of transposition into national laws. Also, Article 114 of TFEU empowers EU parliament and Council to adopt measures in relation to functioning of internal market and in this connection DMA, DSA are enacted at Union level. Notably, DMA & DSA are regulations. Additionally, Regulation 1/2003 relate to implementation of Article 101 & 102 of TFEU.

In this regard, secondary sources of law such as DMA, Regulation 1/2003, also court rulings have been referred.

It is also important to note that, there are different types of interpretation namely literal, historical, systematic, teleological, which help to understand the law, treaty. EU Court of Justice is the highest court of law to interpret EU law and through preliminary rulings national courts can seek for clarification on EU law. EU courts' rulings have been referred to understand court's interpretation in relation to digital markets. In short, the concept of abuse of dominance in digital markets of EU, has

¹⁴ Smits, Jan M., What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (September 1, 2015). Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, New York [Cambridge University Press] 2017, pp. 207-228, Maastricht European Private Law Institute Working Paper No. 2015/06, Available at SSRN: <https://ssrn.com/abstract=2644088> or <http://dx.doi.org/10.2139/ssrn.2644088>

¹⁵ Article 1(2) of TFEU

¹⁶ Chalmers D, Davies G, & Monti G, *European Union law*, (4 ed. Cambridge University Press, 2019), p.114

been in most part explained by referring EU case laws, referring articles, official publications and DMA, TFEU.

Furthermore, thesis carries study on Indian Competition laws with regard to abuse of dominance in digital markets. The sources of Indian legal system are mainly constitutional law, parliamentary enactments, customary law, Judicial precedents. 'Constitution of India' is the supreme law of the country, which sets the powers of Union, States, fundamental rights and duties, powers and duties of constitutional authorities etc. Highest court of the country is 'Supreme court of India' situated at New Delhi, India. High courts of States are higher or last courts of appeal in states and appeals from High courts lie to Supreme courts on matters of law. Supreme court is known as the guardian of Indian constitution, also final interpreter questions of law which stands on same line with EU court of Justice. There were also instances of writ application to High Court in relation to Indian Competition Act.

Particularly, doctrinal legal research methodology has been opted to discuss Indian Law in competition area. There are two important research methodologies namely doctrinal and non-doctrinal. Non- Doctrinal legal research is a research process relating to the impact of legal process on people, their values, institutions and in what way, law and legal process achieve, welfare of people.¹⁷

Further, the term 'research' refers to "systematic investigation towards increasing sum of knowledge,"¹⁸ in other words, it is systematic fact finding i.e., what the law is on given subject, systematising the facts, predicting legal trends.¹⁹ In this regard, doctrinal legal researcher's task is to refer statutory provisions, case-laws, reference books, articles.²⁰ It is necessary to look into what others have said and to understand

¹⁷ Jain, S. N. "LEGAL RESEARCH AND METHODOLOGY." *Journal of the Indian Law Institute* 14, no. 4 (1972): . <http://www.jstor.org/stable/43950155> p.499, Accessed on 23.05.2023

¹⁸ Jain, S. N. "LEGAL RESEARCH AND METHODOLOGY." *Journal of the Indian Law Institute* 14, no. 4 (1972): 487-500. <http://www.jstor.org/stable/43950155>

Accessed on 09.05.2023

¹⁹ Ibid p.490

²⁰ Jain, S. N. "LEGAL RESEARCH AND METHODOLOGY." *Journal of the Indian Law Institute* 14, no. 4 (1972): 490-498. <http://www.jstor.org/stable/43950155>

Accessed on 09.05.2023

their perspective. To carry out that objective, reference to legal periodicals can be made.²¹

To note, thesis has reference to Indian Competition 2002 and also Competition (Amendment) Act 2023. Also reference has been made to ongoing discussions related to digital competition bill. Additionally, online sources such as E books, e articles, official publications have been referred. Reference has also been made to OECD publication on abuse of digital markets-contribution from India.

To understand international level goals, efforts in relation to competition law regime, reference has been made to OECD goals, handbook and OECD discussions on digital markets. Official e-publications have been referred to understand the subject matter with accuracy.

To avoid confusion (by clubbing Indian and EU law) separate sub-sections, separate chapters have been made on EU and Indian law.

1.4 Delimitations

Particularly, merger and acquisition, data and privacy related aspects are not discussed in the thesis because thesis purely focus on analysing abuse of dominance in digital markets.

1.5 Structure

Thesis has been divided into five chapters. Each chapter contains brief introduction of the chapter, discussion, conclusion.

Chapter 1- Introduction, Chapter 2- Competition law and abuse of dominance, Chapter 3- Abuse of dominance in digital markets- EU perspective

Chapter 4- Abuse of dominance in digital markets- Indian perspective ,

Chapter 5- Conclusion.

²¹ Jain, S. N. "LEGAL RESEARCH AND METHODOLOGY." *Journal of the Indian Law Institute* 14, no. 4 (1972): 490-498. <http://www.jstor.org/stable/43950155>
Accessed on 09.05.2023

2. Competition law and abuse of dominant position

2.1 Introduction

Abuse of dominance or monopolization of markets is one of the debatable areas of competition law. Detecting and resolving abuse of dominance has benefit to the competition as well as to the consumers.²² In this regard, countries across the world have formulated their own competition policies for combating abuse of dominance and for having fair competition in their markets.

This chapter discusses the fundamental aspects of competition law relating to abuse of dominance and has reference to the Indian law, EU law. It focuses on the meaning of abuse of dominance and mention acts amounting to abuse of dominant position. Reference has been made to exceptions to acts of abusiveness. Further, procedure by authorities in dealing with abusive acts has been briefly explained. In short, this chapter provides general understanding of competition law in relation to abuse of dominant position in markets.

2.2 Competition law & abuse of dominant position

2.2.1 Introduction

European competition law regime surrounds ‘undertakings’. Undertaking is an entity, engaged in an economic activity notwithstanding its legal status or how it is financed.²³

²² OECD (2022), Remedies and commitments in abuse cases, OECD Competition Policy Roundtable Background Note, <https://www.oecd.org/daf/competition/remedies-and-commitments-in-abuse-cases-2022.pdf> Accessed on 24.04.2023

²³ Chalmers D, Davies G, & Monti G, European Union law, (4 ed. Cambridge University Press, 2019), p.919

To understand it in simpler way, undertaking should be carrying an economic activity. In this connection, economic activity means, offering of goods or services on market by private undertaking with a purpose of making profits.²⁴ Such economic activity should be carried within the framework of Article 101, 102 of TFEU.

Article 102 specifically relate to abuse of dominance by enumerating situations in which an act amount to abuse. Article 101 relates to the anti-competitive behaviour of two or more undertakings. Whereas abuse of dominance mentioned in Article 102 of TFEU relates to unilateral conduct of undertakings either on their own or collectively affecting the market.²⁵ Further, Article 101(3) of TFEU acts as an exception to agreements falling under Article 101(1). In support of Articles 101, 102, in maintaining fair competition, Regulation 1/2003 sets out powers of the European Commission. Also obliges that, Commission and Competition authorities of Member States to work in close co-operation in applying community competition rules.²⁶

Parallely, Indian Competition Act 2002 and Competition (Amendment)2023 aim to maintain fair competition in the markets. Notably, Section 4 of the Competition Act 2002, relate to abuse of dominant position. Further, Competition Commission of India (CCI) an authority, aimed at eliminating anti-competitive practices affecting competition, protecting the interest of consumers, to promote and sustain competition.²⁷ Also, the Competition Appellate Tribunal has been established to hear appeals from decisions of CCI.

2.2.2 Competition law and abuse of dominance

Abuse is improper use or unfair use. Dominant position meaning superiority and in competition law it is economic superiority or independence. Abuse of dominance is excessive or unruly use of dominant position by an entity in the market, affecting

²⁴ Kellerbauer, M., Klamert, M. and Tomkin, J. eds., 2019. *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press p.1003-1005

²⁵ Ibid, p.1039

²⁶ Article 11 of Regulation 1/2003. Community competition rules are in fact Article 101, 102 of TFEU which aim to maintain undistorted competition in internal market.

²⁷ Article 18 of Indian Competition Act 2002

the competition in the market. However, dominance by itself is not bad to the market but the abuse of dominance is bad. Undertakings that dominate a market can validly hold its dominant position, however such undertaking should not affect the market by abusing its dominance. Specifically, dominant undertaking is under an obligation to act fairly in the market.

2.2.2.1 Indian perspective-

Indian competition Act 2002 defines, abuse of dominance as ‘an ability or superiority possessed by an enterprise which enables it to operate in a way affecting the competitors, consumers and relevant market’.²⁸ In other words, dominance of an undertaking is adversely affecting competitors, consumers, competition.

In order to assess such dominance of an enterprise, it is important to determine relevant market i.e., relevant product market, relevant geographic market.

In this connection, recently enacted Competition (Amendment) Act, 2023 defines relevant market²⁹ as ‘market involving all those products or services which are substitutable by consumer, because of their intended use, prices, characteristics’. Further it adds that, the production or supply are understood as substitutable by the supplier, if there is ease of switching production in relation to such products or services, in short term without additional cost or risks in response to small and also permanent variation in prices.

Admittedly, market should have alternatives, enabling consumers to substitute easily without incurring heavy prices. Similarly, suppliers should also have ease of switching products. This provision is aimed at protecting the interests of consumers as well as suppliers.

Particularly, it is necessary to understand relevant product and relevant geographic market which assist in determining the dominance.

²⁸ Explanation (a) of Section 4 of Competition Act, 2002

²⁹ Section 2 (f) of Competition (Amendment) Act, 2023

Relevant product market-

A market comprising all the products or services, enabling consumer to substitute, by reason of their characteristics, price, intended use. In this connection, Small but Significant Non-transitory Increase in Price (SSNIP) test becomes very relevant. The test relates to, customers' ability in switching to readily available products in the market (Demand side) or substitutability of products without incurring extra cost in response to small but long-term price changes (Supply side).³⁰

To illustrate, 'demand substitution' customers can easily substitute from tea to coffee. Similarly 'supply substitution', producer of formal shirts can easily shift to T-shirts. This test is basic for defining relevant market. Despite, there are other factors to be considered while defining relevant market, such as consumer preferences, price, end-use of goods, characteristics.³¹

Relevant geographical market-

The conditions of competition in relation to supply of products or services or for demand of products or services are homogenous, which can be easily distinguished from the existing conditions in neighbouring areas.³² As per Competition Act, factors to be considered in determining relevant market are, regulatory trade barriers,³³ availability of distribution facilities, consumer preferences, transport costs, after-sale services, regular supply.³⁴

After identifying relevant market, the next step is to understand factors or acts leading to abuse of dominance.

³⁰ Singh, Vijay Kumar, Competition Law Dominant Position and Its Abuse: Meaning of Dominant Position (September 2014). Module written for e-Pathshala, MHRD Project NME-ICT of Government of India (2014), Available at SSRN: <https://ssrn.com/abstract=2973770> or <http://dx.doi.org/10.2139/ssrn.2973770> Accessed on 09.05.2023

³¹ Ibid

³² Singh, Vijay Kumar, Competition Law Dominant Position and Its Abuse: Meaning of Dominant Position (September 2014). Module written for e-Pathshala, MHRD Project NME-ICT of Government of India (2014), Available at SSRN: <https://ssrn.com/abstract=2973770> or <http://dx.doi.org/10.2139/ssrn.2973770> Accessed on 09.05.2023

³³ Regulatory trade barriers imposed by Govt of India and trade barriers imposed by State in the public interest.

³⁴ Singh, Vijay Kumar, Competition Law Dominant Position and Its Abuse: Meaning of Dominant Position (September 2014). Module written for e-Pathshala, MHRD Project NME-ICT of Government of India (2014), Available at SSRN: <https://ssrn.com/abstract=2973770> or <http://dx.doi.org/10.2139/ssrn.2973770> Accessed on 09.05.2023

Pre-dominantly, Section 4 (1) of Indian competition Act 2002, relate to abuse of dominant position, which prohibits abuse of dominant position by an enterprise³⁵ or group.³⁶

Section 4 (2) enumerates acts which-

1. Directly or indirectly imposition of unfair, discriminatory conditions or price (which includes predatory price) in purchase or sale of goods or services. However, a discriminatory condition or price adopted to serve competition is permitted,
2. Acts which restrict production and cause adverse effects to technical or scientific development in relation to goods or services,
3. Practices, amounting to denial of market access,
4. Concluding a contract subject to acceptance of supplementary obligations which have no connection with subject matter of the contract,
5. Abusing its dominant position in one relevant market, for the purpose of entering another relevant market.

Thus, acts of causing harm to entry, restricting production or development, price discrimination, denial of market access, unfair conditions imposed in transactions amount to abuse of dominant position.

In *East India Petroleum pvt ltd (EIPL) v South Asia LPG company pvt ltd*³⁷ (SALPG), the Competition commission of India (CCI) ruled that, protection of commercial interest by dominant entity, at the cost of competition, is contrary to the object of the Act.

The brief facts of the case are that parties to the case were engaged in the business of terminalling services to the oil marketing companies (OMCs).

³⁵ Section 2 (h) Competition Act 2002

³⁶ The term 'Group' is mentioned in explanation (b) of Section 5 of Competition Act 2002 that, two or more enterprises directly or indirectly are in position to exercise 26% or more of voting rights in other enterprise or appoints more than 50 % of board of Directors or controls management & affairs of other enterprise.

³⁷ Case No.76/2011

Required business infrastructure was owned by SALPG. EIPL alleged that SALPG didn't allow it to use blender on standalone basis but insisted on the mandatory use of its cavern as well. It entailed payment of higher prices. As a result, OMCs were forced to avail services by SALPG. To resolve these issues, there were negotiations between the parties but all in vain. Finally, EAIL was constrained to approach CCI. CCI held that SALPG shall allow use of its infrastructure subject to safety and other requirements but shall not insist on mandatory use of cavern. Further, it imposed a penalty of INR 19,20,70,000/-.³⁸

Thus, unfair conditions in transactions, conditional acceptance of obligations are prohibited as abuse of dominance.

Enforcement under Indian Competition Act 2002

Competition Commission of India (CCI) has wide powers to regulate competition. Particularly, Section 19 of the Competition Act 2002 empowers Competition Commission of India, to conduct inquiry in assessing dominant position of an enterprise. While assessing dominant position, it is bound to consider several factors such as market share, size and resource of an enterprise, vertical integration, dependence of consumers, competitors, market structure, size of the market, entry barriers etc.

Apart from CCI, as per Section 16 of the Competition Act, Central government is empowered to appoint Director General (DG) to assist CCI in conducting inquiries into contravention of the Act.

Upon receiving information or reference from Central government or State government or Statutory authority or Suo moto, CCI believes that there exists a *prima facie* case, it is empowered to direct DG to conduct an investigation into the matter. In contrast, if CCI is of the opinion that there is no *prima facie* case, it can close the matter, pass order accordingly.³⁹

³⁸ India: CCI Imposes Penalty On South Asia LPG Company Ltd For Abuse Of Dominant Position- A Classic Case Of Denial Of Essential Facility, <https://www.mondaq.com/india/antitrust-eu-competition-/739328/cci-imposes-penalty-on-south-asia-lpg-company-ltd-for-abuse-of-dominant-position--a-classic-case-of-denial-of-essential-facility> Accessed on 11.05.2023

³⁹ Section 26 of the Indian Competition Act 2002

Additionally, Competition Appellate Tribunal(CCA) hears appeals from decisions or order passed by CCI.

2.2.2.2 EU Perspective- TFEU provisions

Article 102 of the TEFU relate to abuse of dominant position that, abuse of dominant position by one or more undertakings, affecting internal markets shall be prohibited. Such abuse may be in forms of-

- 1.imposing unfair purchase or selling prices or unfair trading conditions,
2. acts which limit the production, technical development, markets,
3. by applying dissimilar conditions placing a party to competitive disadvantage,
4. conclusion of contracts only on acceptance of supplementary conditions which have no connection with contract in hand.

It is clear that, the Article 102 of TFEU and Section 4 of Indian Competition Act 2002 have similar conditions for an act amounting to abusiveness of dominant position.

In Hoffman la Roche⁴⁰, the court defines dominant position as ‘economic strength or dominant position possessed by an undertaking, which allows it to act in a way to prevent fair competition in the market.’⁴¹

Thus in order to prove an infringement of Article 102, an undertaking should have economic strength which led to preventing fair competition. Further, when an undertaking, having its operations in and outside of EU abuses its dominant position and in determining its dominance, the whole conduct of an undertaking is to be taken into consideration.⁴²

⁴⁰ Case 85/76 Hoffman La Roche & Co. AG v Commission

⁴¹ Ibid, para 38

⁴² Case 413/14 Intel v Commission

In the same line, dominance established in relation to undertaking's suppliers and also in relation to its customers is covered under Article 102 of TFEU.⁴³ Especially, proof of anti-competitive intent is not necessary in establishing abusiveness.⁴⁴

As a general rule, it is necessary to determine relevant market before courts begin with assessing the dominance. To understand relevant market, the Commission defines relevant product market as, a market made of all products and consumer considers as substitute for each other because of their prices, use, characteristics.⁴⁵ Similarly, it also defines geographic markets as an area in which the conditions of competition in relation to a product are similar.⁴⁶ At this moment, we can gather that, Indian and EU way of describing relevant market is identical. EU also considers SSNIP test in determining relevant market.

Along with above description on relevant market, Commission suggests that higher the market share, for a longer period of time is a preliminary pointer towards its dominance.⁴⁷

2.2.3 Acts constituting abuse of dominant position

There are divergent opinions regarding approach of law towards abuse of dominance. To assess whether an act amount to abuse, the form-based approach relies on types of conduct that are prohibited, the focus is on legal and formalistic principles, whereas the effect-based approach focuses on examination of economic effects of such abusive conduct on the market.⁴⁸ EU is more focusing on effects of anti-competitive behaviour of a dominant undertaking.

⁴³ Kellerbauer, M., Klamert, M. and Tomkin, J. eds., 2019. *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press, p.1040

⁴⁴ Ibid p.1050

⁴⁵ Procedures in Article 102 Investigations,

https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en Accessed on 23.04.2023

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Raffaele Di Giovanni Bezzi, A Tale of Two Cities: Effects Analysis in Article 102 TFEU Between Competition Process and Market Outcome, *Journal of European Competition Law & Practice*, Volume 14, Issue 2, March 2023, Pages 83–94, <https://doi.org/10.1093/jeclap/lpad004> accessed on 16.05.2023

2.2.3.1 Exclusionary and exploitative abuse

Firstly, abuse which cause harm to the customer of a dominant undertaking is exploitative abuse, for example, by having excessive prices.⁴⁹

In the same lines, Court in *United brands*,⁵⁰ observed that charging excessive price which has no relation to the economic value of product is abuse of dominance.

Secondly, abuse which has negative effect on rivals, is exclusionary abuse.⁵¹

It is a situation where actual or potential competitors access to market is disturbed or eliminated because of the conduct of the dominant undertaking, enabling such dominant undertaking to act abusively in the market.

After all, Commission has not dealt much with exploitative abuses, because in any market when an undertaking having some market power exists, prices will remain above marginal cost and it would be impossible to assess or apply competition law to all the prices above marginal cost. It would be leading to scrutinizing too many undertakings.⁵² It is common understanding that, prices can't be strictly fixed as per competition law.

Apart from above, Communication from the Commission⁵³ adopted on 5 December 2008 relate to enforcement priorities regard to exclusionary abuse of dominance. It provides clarity, predictability in analysis of various forms of exclusionary

⁴⁹ Chalmers D, Davies G, & Monti G, European Union law, (4 ed. Cambridge University Press, 2019), p.955

⁵⁰ C-27/76 *United Brands v Commission*, para 250

⁵¹ Chalmers D, Davies G, & Monti G, European Union law, (4 ed. Cambridge University Press, 2019), p.955

⁵² Chalmers D, Davies G, & Monti G, European Union law, (4 ed. Cambridge University Press, 2019), p.955

⁵³ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29> accessed on 24.04.2023

abuses.⁵⁴ Since adoption of this guidance, EU Court of Justice (CJEU) has delivered 32 judgements on exclusionary abuses.⁵⁵

With market developments and EU case laws background, the commission has amended guidance on enforcement priorities by having amending communication and also in the process of adopting guidance on exclusionary abuses.⁵⁶

2.2.3.2 Predatory pricing

Predatory pricing is fixing the price below the cost of production to invite customers, to enter a market, also as a strategy to drive competitors out of the market and such abusive conduct is prohibited.⁵⁷

2.2.3.3 Rebates

Rebate is price reduction. Quantity rebates are not treated as abusive, since quantitative rebates are solely connected with purchases made from dominant undertaking if increase in supply of quantity result in lower costs for the supplier.⁵⁸

Similarly exclusive dealing and exclusive purchasing also amount to abusiveness of dominant position.⁵⁹

2.2.3.4 Refusal to supply

Freedom of choosing partners is one of the core principles of market economy. Dominant undertakings have a special responsibility not to hinder fair competition in the market. Outright refusal to supply is not abusive but cases in which unreasonable conditions have been put forth by dominant undertaking makes it

⁵⁴ Antitrust: Commission announces Guidelines on exclusionary abuses and amends Guidance on enforcement priorities, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1911, Accessed on 24.04.2023

⁵⁵ Ibid

⁵⁶ Application of Article 102 TFEU, https://competition-policy.ec.europa.eu/antitrust/legislation/application-article-102-tfeu_en Accessed on 26.04.2023

⁵⁷ Chalmers D, Davies G, & Monti G, European Union law, (4 ed. Cambridge University Press, 2019), p.958

⁵⁸ Kellerbauer, M., Klamert, M. and Tomkin, J. eds., 2019. *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press, p.1052

⁵⁹ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29> accessed on 24.04.2023

abusive.⁶⁰ Problems arise when dominant undertaking compete with downstream supplier to whom the supply is much needed and the dominant undertaking refuses to supply.⁶¹ In this connection, the essential facilities doctrine becomes more relevant.

Essential facilities doctrine takes prominence in cases of refusal to supply. This doctrine has been applied by the court in Magill's case⁶², in which RTE the operator, of television stations, had copyright. It had dominant position to opt the licensees of television schedules. It obtained protection of copyright law to prevent Magill from publishing the information. The court held that, the copyright protection can't be availed in violation of competition rules.⁶³ Protection of copyright can't be taken to enjoy dominant position, to behave anti-competitive manner.

In other words, when a required component is an essentiality to create or produce a new product and non-supply of such essential item would adversely affect the competitor, in such cases essential facilities doctrine comes into play. The abusive conduct of a dominant undertaking in non-supplying, affects the production, which in turn is detrimental to consumers and is a prima facie case of abuse under Article 102.

2.2.3.5 Tying and Bundling

Tying refers to purchase of one product requires, purchasing of another product of dominant undertaking. Bundling refers to the way products are offered and priced. Tying and bundling are common practices in which customers are offered better products at cost effective ways.⁶⁴ Tying does not give customers a right to choose the product, but they are forced to buy tied product.

⁶⁰ Kellerbauer, M., Klamert, M. and Tomkin, J. eds., 2019. *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press, p.1054

⁶¹ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29> accessed on 24.04.2023

⁶² Joined Cases C-241 & C-242/91 P, *Radio Telefis Eireann v. Comm'n of the Eur. Cmty.*,

⁶³ Squitieri, Mauro (2012) "Refusals to License Under European Union Competition Law After Microsoft," *Journal of International Business and Law*: Vol. 11: Iss. 1, Article 4.

<http://scholarlycommons.law.hofstra.edu/jibl/vol11/iss1/4> Accessed on 24.04.2023

⁶⁴ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29> accessed on 24.04.2023

2.2.4 Objective Justification

Article 102 does not provide any exceptions wherein the dominant conduct of an undertaking is permitted. However, through court rulings, unwritten defences or exceptions to Article 102 i.e. Abuse of dominance, have been developed.⁶⁵

When the objective justification has been applied, the act does not fall within the purview of Article 102. It acts as a clearance. The said conduct of dominant undertaking is treated as justified. In the same way, Commission's guidance on enforcement priorities⁶⁶ mentions two types of justifications namely, objective necessity and efficiency.

First, in objective necessity, Commission will assess the dominant undertaking's conduct that the alleged conduct is indispensable for achieving the goal. It is the duty of the dominant undertaking to adduce evidence or demonstrate that the conduct is justified.⁶⁷

Second, in efficiency as a justification, the dominant undertaking has to demonstrate that the conduct can be outweighed by benefit or usefulness in terms of efficiency and by which consumers also can have benefit.⁶⁸

Likewise, Director General of DG competition, Philip Lowe in his speech (in 2013) mentions three types of justifications i.e., legitimate business behaviour, public interest considerations, efficiency, which provide wider interpretation of justifications.⁶⁹

The three justifications mentioned by Philip Lowe are,-

⁶⁵ Kellerbauer, M., Klamert, M. and Tomkin, J. eds., 2019. *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press, p.1056

⁶⁶ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29> Accessed on 25.04.2023

⁶⁷ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29> Accessed on 25.04.2023

⁶⁸ Kellerbauer, M., Klamert, M. and Tomkin, J. eds., 2019. *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press, p.1056

⁶⁹ Tjarda van der Vijver, 'Objective Justification and Article 102 TFEU', (2012), 35, *World Competition*, Issue 1, pp. 55-76, <https://kluwerlawonline.com/journalarticle/World+Competition/35.1/WOCO2012004>

Accessed on 25.04.2023

1. Legitimate business behaviour, a firm or undertaking competes on merits. Competition law should not interfere when a dominant firm outperform than its competitors, because of its higher level of innovation or industry.⁷⁰

2. Public Interest considerations, ECJ has never condoned abusive conduct on public interest however Article 3(3) of TEU sets goals of ‘sustainable development’, ‘social progress’, ‘high level of protection and improvement of environment’. These goals may have influence on application of Article 102. Public interest could be relevant to take account when a dominant firm expects its trading partners to follow the corporate social responsibility.⁷¹

3. Efficiency, primarily a dominant undertaking has to demonstrate that, abuse has not caused harm to consumers.⁷²

Notwithstanding, the above three justifications presented by Philip Lowe, the commission in a number of cases rejected plea of justification based on public interest, because they do not meet the test of necessity or proportionality.⁷³

However, justifications allowed by commission are efficiency and necessity. As more lenient view on allowing justifications would lead to validation of abusive conduct which is harmful to the internal market.

2.3 Enforcement

Regulation 1/2003 relate to implementation of Article 101 and 102. When Article 102 is infringed, the Commission or National Competition Authority (NCA) can proceed to investigate, upon receiving a complaint or ex-officio investigation.⁷⁴ Next step is to define relevant market to assess the dominance such relevant market. Further, Article 20 of the above-said regulation relate to Commission’s power of inspection.

⁷⁰ Tjarda van der Vijver, 'Objective Justification and Article 102 TFEU', (2012), 35, World Competition, Issue 1, pp. 55-76, <https://kluwerlawonline.com/journalarticle/World+Competition/35.1/WOCO2012004>
Accessed on 25.04.2023

⁷¹ Ibid pp.65-67

⁷² Ibid p.67

⁷³ Ibid p.66

⁷⁴ Procedure in Article 102 investigations, https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en Accessed on 25.04.2023

At the end of initial investigation, the Commission can decide whether to pursue the case on priority or close it.⁷⁵ If the commission proceeds, it will issue statement of objections against undertaking and proceeds with the case. In this regard, as per Article 8 of the said regulation, interim measures can be provided. Also, Commission may also impose commitment decisions under Article 9 of the regulation.⁷⁶

Finally, fine imposition is calculated by percentage of company's annual sale regarding the product involved in the infringement, multiplied by number of months of infringement. The cap of fine or maximum limit is marked as 10% of company's annual turnover.⁷⁷

Apart from above regulation remedies, recourse to civil law can be made, which is governed by national laws of member states. Likewise, victims of infringement of competition rules also entitled to bring an action for damages. Such action for damages lies before the national courts.⁷⁸

2.4 Summary and Conclusion

Abuse of dominance affect market by creating imbalance in the market. To curb such abuse, countries have formulated their own competition policies and with little diversions, the competition policies are almost similar to each other. To note, Indian and EU have set similar criteria to assess to determine relevant market, also abuse of dominance.

In EU, abuse of dominance is dealt under Article 102 of TFEU. Abuse of dominance means monopoly behaviour in the market. Further, Article 103, Regulation 1/2003 acts as supporting provisions to control abuse of dominance. Regulation 1/2003 has elaborative provisions on enforcement. Further, Commission set out guidelines which provide more clarification in applying competition rules. Additionally,

⁷⁵ Competition: Antitrust procedures in abuse of dominance, https://competition-policy.ec.europa.eu/system/files/2021-05/antitrust_procedures_102_en.pdf Accessed on 25.03.2023

⁷⁶ Article 9 of the regulation relate commitment decisions. Undertaking offer commitment to end infringement. However, it is in discretion of the commission to accept or not.

⁷⁷ Competition: Antitrust procedures in abuse of dominance, https://competition-policy.ec.europa.eu/system/files/2021-05/antitrust_procedures_102_en.pdf Accessed on 25.03.2023

⁷⁸ Ibid

Objective justifications which are exceptions to abusive conduct, are though not expressly provided in the TFEU but have been recognized, developed by EU courts as well as by the Commission.

In spite of the additional grounds of justification discussed by Philip Lowe which widen the scope of objective justification, but courts have followed strict approach in applying justification because courts have aimed at ensuring fair competition in market.

Indian Competition Act 2002 has also set similar set of acts amounting to abuse of dominance. In EU, Commission and NCAs are two competition authorities pledged towards enforcement, whereas in India, CCI and Competition Appellate Authority have powers to curb anti-competitive behaviour.

3. Abuse of Dominance in Digital Markets- EU perspective

3.1 Introduction

Most economies of the world have shown strong willingness to digitalization, to harvest advantages of digitalization. Legal systems are providing green signal to transition towards digital economy, due to the benefits of digital technologies, introduction of artificial intelligence etc.⁷⁹

In this regard, EU has adopted ‘digital single market strategy’ providing European single digital market.⁸⁰ A digital single market ensuring level playing field for all companies transacting in goods or services in EU and also ensuring free movement of goods, persons, capital and services.⁸¹ Individuals as well as businesses can access online activities within the framework of fair competition, also ensuring data protection of consumers, however irrespective of nationality and place of residence.⁸²

Further, EU Commission presented ‘European Digital Decade’ policy programme involving concrete targets for 2030 in areas of digital transformation of businesses, public services, secure and sustainable digital infrastructure.⁸³ In furtherance of these objectives, EU adopted Digital Markets Act and Digital Services Act to

⁷⁹ Schulze R, Staudenmayer D and Watson J, EU Digital Law: Article-by-article commentary (Hart /Beck/Nomos 2020) pp.1-4

⁸⁰ Communication from the commission- A digital single market strategy for Europe. It was adopted in 2015, aimed at ensuring better access to consumers, business online goods or services, establishing conditions for digital networks and services, increasing potential growth of European digital economy.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192> Accessed on 02.05.2023

⁸¹ Article 26 of TFEU

⁸² Communication from the commission- A digital single market strategy for Europe <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192> Accessed on 02.05.2023

⁸³ Shaping the digital transformation: EU strategy explained,

<https://www.europarl.europa.eu/news/en/headlines/society/20210414STO02010/shaping-the-digital-transformation-eu-strategy-explained> Accessed on 02.05.2023

encourage fair competition, innovation, ensuring online security. Particularly, Digital Markets Act is aimed at curbing abuse of dominance in digital markets by introducing ex-ante provisions.

This chapter focuses on the abuse of dominance in EU digital markets, in this regard discusses DMA, need for having DMA and its goals. Further identifies ‘gatekeeper’ and discuss their obligation as do’s and don’ts. Also, there is a brief discussion on the challenges posed by DMA and enforcement. The chapter ends with summary and conclusion.

3.2 Abuse of dominance in digital markets- EU Digital Markets Act

3.2.1 Introduction

Chapter 2 of this thesis has elaborative discussion on what constitutes abuse of dominance in markets. This chapter specifically deal with abuse of dominance in EU digital markets.

In EU, there are more than 10,000 online platforms, in which above 90% belong to small and medium size enterprises.⁸⁴ Existing antitrust legal system is ex-post in nature and experts have emphasized, procedures under Article 101, 102 of TFEU are cumbersome, lengthy, which may have irreversible effects on consumers as well as on competition.⁸⁵ Ex-post meaning action for infringement lies after the happening of infringing act.

In T-612/17 *Google and Alphabet v Commission*, (also known as Google shopping case), Google abused its dominant position by its own comparison-shopping service over competing comparison-shopping services. This has been done in 13 countries of European Economic Area. Commission as well as General court on appeal found

⁸⁴ EU digital markets Act and digital service Act explained,

<https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained> Accessed on 02.05.2023

⁸⁵ Briefing, Regulating digital gatekeepers, background on the future digital markets act, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI\(2020\)659397_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI(2020)659397_EN.pdf) Accessed on 02.05.2023

that, google has abused its dominant position. General court upheld the decision of Commission, imposing fine of 2.4 billion Euros.

Admittedly, there is a need to identify dominant undertakings and supervise their conduct, control their abusive conduct beforehand. This can be achieved by adopting ex-ante regulatory system, by controlling large online platforms, the issue of abuse of dominance can be eliminated in advance.⁸⁶ In this connection, the newly enacted Digital Market Act, identifies the gatekeepers who are dominant in the market. Further, ensures that dominant undertaking or gatekeepers are not abusing their dominant position by laying down obligations and prohibitions on them.

3.2.2 Trend towards digital markets

Online platforms cover various activities and most of them are globally well-known. These online platforms strive to maintain their position in market by being innovative.⁸⁷ Normally, traditional markets use offline campaigns and price can be a prominent factor, whereas in digital markets there is online advertising, online marketing and most of these services are free, for example- Facebook.

Furthermore, digital platforms such as Google, Amazon, Facebook, Netflix, Apple, Microsoft are known as big techs. These big techs have gained preference by consumers, due to their innovative services, their ability to meet consumers requirements and also, they influence market by holding major share of market.⁸⁸

Admittedly, these big techs are dominant and tend to abuse their market power to expel competitors, in their greed to continue with dominant position, cause harm to fair competition in markets. As a result, controlling big techs becomes need. Having said that, it is a challenge to identify or determine precisely, the dominance on

⁸⁶ Briefing, Regulating digital gatekeepers, background on the future digital markets act, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI\(2020\)659397_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI(2020)659397_EN.pdf)

⁸⁷ Daria Kostecka-Jurczyk, *Abuse of Dominant Position on Digital Market: Is the European Commission Going back to the Old Paradigm?* (2021), European Research Studies Journal Volume XXIV Special Issue 1, 120-132 <https://ersj.eu/journal/2033>

⁸⁸ Manganelli A and Nicita A, *Regulating Digital Markets: The European Approach* (Springer 2022)

dynamic digital platforms since the competition is majorly based on innovation rather than price.⁸⁹

To control abuse of dominance in digital sector and also to regulate the online platforms, EU has introduced Digital Markets Act and Digital Services Act. DMA⁹⁰ provides level playing field for online platforms, addressing concerns regarding two important aspects i.e., contestability and fairness.

3.2.3 Contestability and fair competition in digital markets

DMA relate to online platforms which are dynamic. “Online platform is a digital service which facilitates interaction between two or more separate but interdependent set of users, interacting via internet”.⁹¹

Similarly, digital Market is “a virtual marketplace or confluence of supply and demand, the basis of which is digital information, communication technologies”.⁹² Companies develop and apply new technologies to businesses and using digital capabilities new services are created.⁹³ Digital markets are multi-sided, have their network effects, economies of scale controls data and their effect on competition or consumers, are to be considered by competition authorities while defining relevant market.⁹⁴ In this connection, multi sided platforms are, where multiple suppliers and customers interact and they minimize transaction costs also, for example Airbnb, Google, Uber, eBay are multi sided platforms.⁹⁵

⁸⁹ Daria Kostecka-Jurczyk, *Abuse of Dominant Position on Digital Market: Is the European Commission Going back to the Old Paradigm?* (2021), European Research Studies Journal Volume XXIV Special Issue 1, 120-132

⁹⁰ It entered into force on 1 Nov 2022, however its application is from after six months i.e., 2 May 2023. Adopted under Article 114 of TFEU to promote internal market.

⁹¹ OECD (2019), "What is an “online platform”?", in *An Introduction to Online Platforms and Their Role in the Digital Transformation*, OECD Publishing, Paris, <https://doi.org/10.1787/19e6a0f0-en>. p.23, Accessed on 24.05.2023

⁹² Definition of digital market, <https://joernlengsfeld.com/en/definition/digital-market/> Accessed on 02.05.2023

⁹³ The CMA’s digital market strategy, July 2019,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf Accessed on 02.05.2023

⁹⁴ United Nations, Competition issues in the digital economy, https://unctad.org/system/files/official-document/ciclpd54_en.pdf p.6

⁹⁵ Abdelkafi, N., Raasch, C., Roth, A. *et al.* Multi-sided platforms. *Electron Markets* **29**, 553–559 (2019). <https://doi.org/10.1007/s12525-019-00385-4> Accessed on 17.05.2023

They should attract users to increase their value and concentrate on achieving network effects.⁹⁶ Ultimately, the value or significance of using online digital platform depend upon the number of users.⁹⁷

Undoubtedly, network effect plays an important role in the digital market. Network effect refer “to the effect that one user of a good or service has on the value of that product to other existing or potential users”⁹⁸ which means people use the social network platform such as Facebook, LinkedIn simply that their friends use it.

Indeed, companies use the data of users to improve their services, improve advertisement to monetize their services, also to attract more users.⁹⁹ Big and well established companies have this advantage over new entrants. The new entrants face huge competition and ultimately it may lead to acquisition.¹⁰⁰

In this connection, DMA identifies such gatekeepers i.e., dominant undertakings, by setting criteria. It is worth taking note of purpose and scope of DMA which relate to having harmonized rules for the proper functioning of the internal market. Correspondingly, member states shall not impose additional obligations on gatekeepers for ensuring ‘contestability and fair competition’. In other words, regarding contestability and fair competition, DMA act as a leading light.

To put it clearly, contestability is the ability of an undertaking to overcome entry barriers, in relation to expansion and also challenging gatekeeper on merits.¹⁰¹ In this regard, entry barriers can be strategic or structural.¹⁰² Structural entry barriers are sometimes quantifiable, for example- cost of building a plant. However, strategic entry barriers are intentionally created to deter entry, such as arrangements

⁹⁶ Abdelkafi, N., Raasch, C., Roth, A. *et al.* Multi-sided platforms. *Electron Markets* **29**, 553–559 (2019). <https://doi.org/10.1007/s12525-019-00385-4> Accessed on 17.05.2023

⁹⁷Ibid pp.4-6

⁹⁸ United Nations, Competition issues in the digital economy, https://unctad.org/system/files/official-document/ciclpd54_en.pdf p.6

⁹⁹ Ibid pp.4-6

¹⁰⁰ United Nations, Competition issues in the digital economy, https://unctad.org/system/files/official-document/ciclpd54_en.pdf pp.4-6

¹⁰¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925> Accessed on 05.05.2023

¹⁰² Competition and barriers to entry, <https://www.oecd.org/competition/mergers/37921908.pdf> Accessed on 05.05.2023

of exclusive dealing could create difficulties for new entrants.¹⁰³

Based on the observation of competition agencies, strategic entry barriers help incumbent firms in maintaining their dominant position in the market by preventing competition or competitors.¹⁰⁴

In a nutshell, DMA aim to control or regulate gatekeepers in its objective to maintain contestability and fair competition. Fair competition is in which all the players have equal opportunity to compete.

3.2.4 Gatekeepers

The trend supporting ex-ante rules acts as a complimentary to the existing ex-post rules which is a quintessential pendulum shift and also there is a growing consensus that the existing ex-post rules does not alone suffice in digital markets.¹⁰⁵

Correspondingly, Articles 5, 6 and 7 of DMA enumerates obligations and prohibitions of gatekeepers. Most of these obligations originate from court rulings. Certainly, gatekeepers have impact on internal market because they provide gateways for business users in reaching end users. Obviously, business users as well as end users need protection against unfair practices of gatekeepers.¹⁰⁶

In this connection, an undertaking providing one of the core platform services are treated as a gatekeeper, if they meet additional requirements mentioned in Article 3 of DMA.

Core platform services are enumerated in Article 2 of DMA, which includes- ‘online intermediation services (Example-app stores), online search engines, operating

¹⁰³ Competition and barriers to entry, <https://www.oecd.org/competition/mergers/37921908.pdf> Accessed on 05.05.2023

¹⁰⁴ Ibid

¹⁰⁵ Oles Andriychuk, Do DMA obligations for gatekeepers create entitlements for business users? *Journal of Antitrust Enforcement*, Volume 11, Issue 1, March 2023, Pages 123–132, <https://doi.org/10.1093/jaenfo/jnac034> pp.124-125, Accessed on 24.03.2023

¹⁰⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925> Accessed on 05.05.2023

systems, web browsers, certain messaging services, operating systems, cloud computing services, online marketplaces, virtual assistants, advertising services’.

Further, Article 3 of DMA relate to additional requirements of an undertaking to be considered as a gatekeeper that, if an undertaking,-

- a). ‘Has impact on internal market- If it reaches certain annual turnover and provides core platform services in at least three EU member states’,¹⁰⁷
- b). ‘When a company provides core platform services to more than 45 million monthly active end users located in EU or more than 10,000 annual active business users established in EU’,¹⁰⁸
- c). Entrenched and durable position – company has met above criteria (mentioned in b) in the last three years.¹⁰⁹

Presumption as to ‘annual turnover(mentioned in a)’ refer to, ‘equal or above EUR 7.5 billion in each of three financial years, or average market capitalization or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides core platform services in at least three member states.’¹¹⁰ When thresholds are met, within two months such undertaking must notify it to the Commission.¹¹¹ Besides, Commission also has power to designate an undertaking as a gatekeeper by conducting an investigation under Article 17 of DMA. Further, as per Article 4, Commission can review the decision of ‘designation as a gatekeeper’.

It is worth to note that, the application of DMA has a binary mode meaning, if gatekeepers meet designation criteria, the entire set of obligations becomes applicable or if not designated, obligations are not applicable at all. Furthermore, the competence of the Commission in designating an undertaking as gatekeeper is

¹⁰⁷ Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423 Accessed on 04.05.2023

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ The Digital Markets Act (DMA), <https://www.eu-digital-markets-act.com/> Accessed on 04.05.2023

¹¹¹ Article 3 of DMA

acceptable but competence not to designate, is not likely to having a judicial review.¹¹²

3.2.5 Prohibitions and obligations

Gatekeepers are to abide by obligations and prohibitions set out in DMA. Prohibitions are as follows-

- a) Without the consent of end user, processing end user data collected from third party, for providing online advertising services,¹¹³
- b) Reusing the data collected during gatekeepers services, to other services without prior consent, and also treating own products or services more favourably,¹¹⁴
- c) Preventing business users in offering products or services at different prices on their own online channels or third-party platforms and prescribing unreasonable termination conditions, also using non-public data of business users (generated while using core platform services of gatekeepers) to against such business user,¹¹⁵
- d) Preventing users from complaining to authorities, restricting end users from switching apps or services and also forcing them to use or subscribe other core platform services as a pre-condition.¹¹⁶

Additionally, DMA obliges gatekeepers in relation to business users and end users. At this juncture, it is worth to understand business user and end user. Article 2 (21) of DMA defines business user as ‘any natural or legal person in commercial capacity, using core platform service for the purpose of providing services or goods

¹¹² Oles Andriychuk, Do DMA obligations for gatekeepers create entitlements for business users? *Journal of Antitrust Enforcement*, Volume 11, Issue 1, March 2023, Pages 123–132, <https://doi.org/10.1093/jaenfo/jnac034> p.127, Accessed on 24.03.2023

¹¹³ Felix Makarowski, Amanda Bos Ekman, The Digital Markets Act- new rules for providers of digital services, <https://www.delphi.se/uploads/2022/11/the-digital-markets-act-new-rules-for-providers-of-digital-services-2.pdf> Accessed on 04.05.2023

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Felix Makarowski, Amanda Bos Ekman, The Digital Markets Act- new rules for providers of digital services, <https://www.delphi.se/uploads/2022/11/the-digital-markets-act-new-rules-for-providers-of-digital-services-2.pdf> Accessed on 04.05.2023

to end users'. End user is defined as 'a natural or legal person using core platform service but does not include a business user'.¹¹⁷

Obligations in relation to business users- To allow business users to use platform to promote, conclude contracts with end users.¹¹⁸ Ensure interoperability of software and hardware operating systems and apply fair, reasonable and non-discriminatory conditions of access for business users.¹¹⁹ Having transparency on prices of their advertising services and provide access to advertising performance data.¹²⁰

Obligations in relation to end users- Allowing them to use business user's software applications through gatekeeper's platform.¹²¹ Allowing to uninstall pre-installed software and allowing third party software on the device, which use gatekeeper's operating systems.¹²²

Admittedly, Commission may after assessment, suspend any of the obligations mentioned above, on the grounds of public health and public security.¹²³ Additionally, gatekeeper may demonstrate that compliance with such obligation would endanger its economic survival or viability of its operation in EU and which is beyond its control.¹²⁴

Additionally, Ducci F, in his article writes that, it was expected that ex-ante obligations would provide timely intervention which would avoid lengthy abuse of dominance cases, also avoid inability to intervene proactively to end harm.¹²⁵ Through ex-ante obligations, there is a possibility of effective intervention in relation to concerns regarding access to bottlenecks and exercise of market power

¹¹⁷ Article 2(20) of DMA

¹¹⁸ Felix Makarowski, Amanda Bos Ekman, The Digital Markets Act- new rules for providers of digital services, <https://www.delphi.se/uploads/2022/11/the-digital-markets-act-new-rules-for-providers-of-digital-services-2.pdf> Accessed on 04.05.2023

¹¹⁹ Felix Makarowski, Amanda Bos Ekman, The Digital Markets Act- new rules for providers of digital services, <https://www.delphi.se/uploads/2022/11/the-digital-markets-act-new-rules-for-providers-of-digital-services-2.pdf> Accessed on 04.05.2023

¹²⁰ Ibid

¹²¹ Ibid

¹²² Ibid

¹²³ Article 10 of DMA

¹²⁴ Article 9 of DMA

¹²⁵ Ducci F, Gatekeepers and platform regulation Is the EU moving in right direction?, <https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf> pp.10-14, Accessed on 24.03.2023

by firms in low contestability markets would necessitate ex-ante approach. However, benefits of ex-ante obligations in relation to timely intervention are less in which there are significant market changes, in which there is a need to depend on market investigations.¹²⁶ Moreover, hybrid system of intervention covering ex-ante and ex-post would be opted, that DMA to be available where competition law enforcement is insufficient.¹²⁷

With regard to hybrid system, it is important to take note that DMA relate to digital markets, particularly intend to have contestability & fair competition. Till today, Article 102 of TFEU, regulation 1/2003 holds good to control abuse of dominance in markets. It is a hybrid system.

3.2.6 Challenges posed by DMA

DMA intend to have a contestable and fair competition in the market. However there are few challenges and also discussions are on the way to resolve such challenges.

3.2.6.1 Interoperability

Article 2(29) of DMA defines interoperability as, “ability to exchange information and mutually use the information which has been exchanged through interfaces or other solutions, so that all elements of hardware or software work with other hardware and software and with users in all the ways in which they are intended to function.”

It is unclear, to what extent DMA’s requirement of interoperability would affect user privacy and security. People trust end to end encryption to protect their data. Interoperability has become debatable issue that some claim it is not possible to make end to end encryption services interoperable without affecting data and others

¹²⁶ Ducci F, Gatekeepers and platform regulation Is the EU moving in right direction?, <https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf> pp.10-14, Accessed on 24.03.2023

¹²⁷ Ducci F, Gatekeepers and platform regulation Is the EU moving in right direction?, <https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf> pp-14-16

claim that it is possible, but it is complex, cost-incurring, can involve security risks.¹²⁸

Also, Commission opined to have stakeholders' inputs and a workshop on interoperability was held at Brussels on 27 February 2023 to discuss issues relating end to end encryption, security, ensuring effective compliance with DMA.¹²⁹ Yet, there exists conflict of opinions, whether to compromise people's security and allow interoperability.

3.2.6.2 Concerns regarding data, transparency

Several concerns were raised regarding General Data Protection Regulation (GDPR) and DMA provisions. Designated gatekeepers are required to provide continuous access to data which might require gatekeepers to have technical solutions whereas as per GDPR data controllers are not required to transfer data when it is not technically possible to do.¹³⁰

Moreover, EU Commission planned to have discussion on 5 May 2023 with all stakeholders regarding 'privacy complaint data portability, cross – use of personal data, online advertising services, also use of non-publicly available data of business users'.¹³¹ In this connection Articles 5(2), 6(2), 6(9), 6 (10) will form important aspects of discussion.¹³²

3.2.7 Enforcement

As per DMA, Commission has wide powers to regulate abuse of dominance in digital markets. Under Article 30 (1) of DMA Commission can impose fine, not exceeding 10% of total worldwide turnover preceding the financial year, if gatekeeper intentionally or negligently fail to comply any of obligations mentioned

¹²⁸ The EU digital market Act: Is Interoperability the way forward? , Jacqueline Rowe, <https://www.gp-digital.org/the-eu-digital-markets-act-is-interoperability-the-way-forward/> Accessed on 05.05.2023

¹²⁹ DMA workshop- The DMA & interoperability between messaging, https://competition-policy.ec.europa.eu/dma/dma-workshops/interoperability-workshop_en Accessed on 05.05.2023

¹³⁰ Unpacking Digital Data Laws Across Europe: Addressing the Digital Markets Act, <https://datamatters.sidley.com/2023/01/24/unpacking-digital-data-laws-across-europe-addressing-the-digital-markets-act/> Accessed on 06.05.2023

¹³¹ Competition policy, DMA Workshop – The DMA & data related obligations, https://competition-policy.ec.europa.eu/dma/dma-workshops/dma-workshop-dma-and-data-related-obligations_en Accessed on 06.05.2023

¹³² Ibid

in Articles 5,6,7 of DMA, or measures,¹³³ remedies,¹³⁴ interim measures,¹³⁵ commitments.¹³⁶ Additionally, in case of repeated infringements a fine up to 20% of total worldwide turnover can be imposed.¹³⁷

Commission under Article 24 of DMA is empowered to take interim measures on the basis of prima facie infringement of Articles 5, 6, and 7.

Article 37 of DMA relate to, Commission and member states shall work in close co-operation¹³⁸ towards enforcement actions. Apart from this, whistle-blowers can alert competition authorities by providing information, which would help to tackle infringement of DMA provisions.¹³⁹

In this connection, EU regulators and Amazon are moving to having settlement of three-year antitrust probe, in which Amazon is using non- public data in competition with business users. Such non-public data was inaccessible to business users, such practice by Amazon provide an advantage to its products over others. Amazon has finally agreed to have a settlement, agreeing to comply with DMA by sharing data and by changing its business behaviour.¹⁴⁰

3.3 Summary and Conclusion

Abuse of dominance in EU digital markets can be curbed by identifying gatekeepers and imposing ex-ante obligations on them. DMA intend to attain contestability and fair competition by regulating abusive conduct of gatekeepers. Gatekeepers are dominant undertakings in digital markets, are closely observed and made responsible under Articles 5,6,7 of DMA. In support of this, Commission has wide

¹³³ Measures specified by commission as per Article 8(2) of DMA

¹³⁴ Remedied imposed as per Article 18 (1) of DMA

¹³⁵ Pursuant to Article 24 of DMA

¹³⁶ Pursuant to Article 25 of DMA

¹³⁷ Article 30 (2) of DMA

¹³⁸ Sincere co-operation is also a core principle mentioned in Article 4 of TEU.

¹³⁹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925> Accessed on 05.05.2023

¹⁴⁰ Amazon seeks an antitrust settlement with EU Commission by complying with Digital Markets Act, <https://dig.watch/updates/amazon-seeks-an-antitrust-settlement-with-eu-commission-by-complying-with-digital-markets-act> Accessed on 17.05.2023

powers of monitoring, designating an undertaking as a gatekeeper, also to enforce DMA provisions. Along with the Commission, national courts also contribute to enforcement.

Obligations of gatekeepers relate to use of data, self-preferencing, switching, interoperability, apps and app stores, advertising. These obligations are mostly result of judgments passed by EU courts. DMA provide protection to freedom of business user, end user. However, as observed by experts, DMA has some lacuna, or some review is needed in some aspects of DMA such as interoperability, data, online advertising services. It is a good sign that Commission has already took note of it, working towards it by initiating discussions.

Regarding DMA, beautiful remarks made by executive vice president Vestager that ‘there were three google cases, three Apple cases, Amazon cases and list goes on. By punishing illegal behaviour, correction can be made in specific cases. But if there is repetition by use of systematic misbehaviour, regulation should come in. For gatekeepers, DMA will be setting the rules of game’.¹⁴¹

¹⁴¹ Remarks by Executive Vice-President Vestager for the political agreement on the Digital Markets Act, https://ec.europa.eu/commission/presscorner/detail/en/speech_22_2042 Accessed on 06.05.2023

4. Abuse of Dominance in digital markets- Indian perspective

4.1 Introduction

Technological developments have made life easier. We can negotiate business transactions, shop, order food, book travel tickets etc via online platforms. In this connection, to strengthen digitalization, govt of India has launched 'Digital India'¹⁴² program in the year 2015, with a broad vision to transform India into digitally empowered society. This programme as well as the recent covid crisis paved way to increase in online platforms. On one hand, these all aspects have ignited rise in the online platforms and digital transactions. On other hand, competition authorities facing challenges to regulate or meet the pace of growing digital markets.

Indian Competition law regime begin with, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP). MRTP ensured that economic power is not concentrated in few dominant hands. However, new economic reforms made the said Act redundant, hence Competition Act 2002 was enacted with the purpose of preventing anti-competitive practices in the markets, to promote fair competition ensuring freedom of trade and to protect interests of consumers. On 11 April 2023, President of India has given assent to new amending enactment i.e., Competition Act, 2023 which amends several provisions of Competition Act 2002.¹⁴³

Recently, there were issues concerning anti-competitive practices by online platforms (Amazon and Flipkart), food delivery apps (Swiggy), online travel agents (Make my trip), WhatsApp, etc.¹⁴⁴ It is a need of an hour to control such anti-

¹⁴² Digital India, <https://csc.gov.in/digitalIndia> Accessed on 11.05.2023

¹⁴³ The amended provisions relate to new limits of merger control, changes in penalty, Changes in composition of CCI etc.

¹⁴⁴ OECD, Abuse of dominance in digital markets- contribution from India, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)8/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)8/en/pdf) Accessed on 08.05.2023

competitive practices in digital area. In furtherance of this goal, Ministry of Corporate affairs has appointed a Committee on digital competition law to examine the need for having a separate law regulating competition in digital markets.¹⁴⁵

A ray of hope in Indian digital competition law regime has emerged, to regulate anti-competitive behaviour of dominant enterprises in digital markets and also to maintain fair competition.

This chapter spells light on Indian Competition law regime relating to abuse of dominance in Indian digital markets. Subsections of this chapter relate to abuse of dominance in Indian digital markets, discusses prima facie case, relevant market, also has reference to cases, market study on e-commerce by CCI. Further, involves elaborative discussion on WhatsApp and Facebook saga-case law, brief discussion on emerging digital competition bill under the subsection 'Road to digital competition bill'. At last, this chapter ends with brief summary and conclusion.

4.2 Abuse of dominance in Indian digital markets

Subsection 2.2.2.1 of Chapter 2 of this thesis covers discussion on Indian Competition law regime on abuse of dominant position. However, this chapter focuses on Indian Competition law on abuse of dominance in digital markets.

To begin with, Indian legal system does not have separate digital competition law. But there are ongoing discussions for having separate competition law governing digital markets. This being the background, CCI is dealing with digital competition cases by applying Indian Competition Act 2002 and also referring to EU and US, other competition law regimes.¹⁴⁶ CCI has availed wide discretion, however, it lacked consistency and certainty in interpretation and application of law.¹⁴⁷

In *Matrimony v Google*¹⁴⁸, the Matrimony, provides online platform for prospective marriage alliance. It alleged against Google that, Google is creating uneven level

¹⁴⁵ As per order made on 06.11.2022

¹⁴⁶ Bhattacharya, Shilpi and Khandelwal, Pankhudi, Indian Competition Law in the Digital Markets: An Overview of National Case Law (July 29, 2021). Available at SSRN: <https://ssrn.com/abstract=3897291> or <http://dx.doi.org/10.2139/ssrn.3897291> Accessed on 11.05.2023

¹⁴⁷ Ibid

¹⁴⁸ C.Nos 7 & 30 of 2012, <https://www.cci.gov.in/antitrust/orders/details/746/0> Accessed on 12.05.2023

playing field by favouring its own services and partners, which is in contravention of Section 4 of Competition Act. It has been noted that, along with Google's search services, it also provides vertical services such as YouTube, Google news, Google maps. Google started to mix the vertical services along with its search results. For example- When a user search for a song on Googles, he receives links to video of that song on YouTube.

Also, it was alleged that, Google's own sites mainly appear on search results and additionally, acquisition of software products by Google, to assist in its vertical integration shows its tendency to avoid competition.

The Commission observed that, although the Act does not point towards a market share threshold, beyond which dominance can be presumed.¹⁴⁹ However, Google's markets share which is more than its nearest competitor, in the relevant market clearly evidences its dominance.

Yet, Commission differed on the point of 'denial of market access'. There was no evidence to show that, two distribution agreements amounted to denial of market access and further, the distribution deals with Mozilla's Firefox, Apple's safari are not having exclusiveness since they only mention that default search service on their browser shall be Google.¹⁵⁰

It is important to note, the Commission's observation made in paragraph 203 of the order that, Commission is aware of the fact that any intervention related to technology markets should be carried out with caution because it may lead to denial of benefits of innovation to consumers. It may also affect the economic welfare and economic growth of the country.

Ultimately, Commission held, Google has dominant position and contravened provision of Section 4 of Competition Act 2002, by unfair imposition of search services on users and also by prohibiting publishers 'under negotiated search intermediation agreements' from using search services offered by competing search

¹⁴⁹ Para 114 of the order in Matrimony v Google, <https://www.cci.gov.in/antitrust/orders/details/746/0> Accessed on 12.05.2023

¹⁵⁰ Arora, Himanshu, Bharat Matrimony v. Google India and others (March 30, 2019). Available at SSRN: <https://ssrn.com/abstract=3362831> or <http://dx.doi.org/10.2139/ssrn.3362831> Accessed on 12.05.2023
(Mentioned in paragraph 363 of the order by Commission)

engines. It imposed fine amounting to 5 % of average turnover generated from operations in India for the financial years of 2013, 2014, 2015.¹⁵¹

In the above-mentioned case (*Matrimony v Google*), at Paragraph 33 of the ‘Dissent Note’¹⁵² by two members of the Commission discuss that we are witnessing increase in online platforms and dominance by itself, not of antitrust concern. They further add that, “Competition agency should intervene, when evidence shows that the dominant firms exploit its market power causing detriment to consumers”¹⁵³ and however, in the present case, there is no evidence to have complete understanding of the conduct. Dissenting members opined that Google was not contravening Article 4 of the Competition Act because the investigation has not brought evidence or analysis showing complete understanding of market as well as the conduct concerned.

We gather from above discussion that, although Google was subjected to penalty, the above discussion leads to CCI’s preference in providing a leeway to innovation, technology. Dissenting members also mention that, unless there is evidence of exploitation of dominant power, consumers should be left to enjoy the benefits of innovation.

Conversely, CCI in a recent order in *Federation of Hotels & Restaurant Association of India & Ors. V Make my trip India Pvt Ltd.*,¹⁵⁴ provided primacy to level playing field, giving all players equal opportunity to participate in digital markets and compete on merits.¹⁵⁵

In the absence of a separate legislation or specified legal framework governing digital markets, CCI is attempting to have its own jurisprudence on digital markets.

¹⁵¹ Para 438 of the order in *Matrimony v Google*

¹⁵² Dissent Note by Mr. Sudhir Mittal and Justice. G.P.Mittal, <https://www.cci.gov.in/antitrust/orders/details/746/0> pp.167-190, Accessed on 12.05.2023

¹⁵³ *Ibid* p.189

¹⁵⁴ *Federation of Hotels & Restaurant Association of India & Ors. v. Make My Trip India Pvt. Ltd.* CCI case No.14 of 2019 & 1 of 2020

¹⁵⁵ Bhattacharya, Shilpi and Khandelwal, Pankhudi, *Indian Competition Law in the Digital Markets: An Overview of National Case Law* (July 29, 2021). Available at SSRN: <https://ssrn.com/abstract=3897291> or <http://dx.doi.org/10.2139/ssrn.3897291> Accessed on 12.05.2023

4.2.1 Prima facie case

As per Section 26 of the Competition Act, CCI directs investigation to be carried out by Director General(DG) only if the prima facie case is made out by having reference to material produced before it.

Number of cases have been closed at preliminary review because CCI didn't intend to interfere with innovative markets.¹⁵⁶

In *Vinod Kumar Gupta v WhatsApp*¹⁵⁷, CCI found that the entity is a dominant entity, but dropped the case, by observing that there is no abuse of dominant position. It failed to take account of the network effects enjoyed by the dominant entity WhatsApp, making hard for the user to switch towards other platforms. Network effects also act as a barrier to entry since the rivals or new entrants have to entice great mass to switch from existing platform.¹⁵⁸

4.2.2 Relevant Market

(Detailed discussion on relevant market can be found at subsection 2.2.2.1 of Chapter 2 of this thesis)

CCI was of opinion that, online and offline markets are different channels of distribution of same products, but they differ in relation to discounts, shopping experience and they are not two relevant markets.¹⁵⁹

CCI was reluctant to accept that online platforms constitute a separate relevant market. Further, e-commerce was treated as an extended store but not as an online market.¹⁶⁰

¹⁵⁶ Bhattacharya, Shilpi and Khandelwal, Pankhudi, Indian Competition Law in the Digital Markets: An Overview of National Case Law (July 29, 2021). Available at SSRN: <https://ssrn.com/abstract=3897291> or <http://dx.doi.org/10.2139/ssrn.3897291> Accessed on 12.05.2023

¹⁵⁷ CCI case No.99 of 2016, <https://cci.gov.in/antitrust/orders/details/338/0> Accessed on 12.05.2023 WhatsApp was sharing user information to Facebook.

¹⁵⁸ Sinha, V. and Srinivasan, S., 2021. An integrated approach to competition regulation and data protection in India. *CSI Transactions on ICT*, 9(3), pp.151-158. <https://doi.org/10.1007/s40012-021-00334-7> Accessed on 12.05.2023

¹⁵⁹ Ashish Ahuja v Snapdeal Case No. 17 of 2014

¹⁶⁰ Anshuman Sakle; Nandini Pahari, "The Interaction between Competition Law & Digital and E-Commerce Markets in India," *Indian Journal of Law and Technology* 16, no. 2 (2020): 18-37 <https://heinonline.org/HOL/Page?handle=hein.journals/indiajoula16&id=192&collection=journals&index=> Accessed on 13.05.2023

However this trend has been changed by CCI in recent judgements. It considered online and offline market as distinct.¹⁶¹

Digital markets are multi-sided, and authorities need to consider multiple factors to define relevant market. Determination of relevant market is essential to decide abuse of dominance.

4.2.3 Market study on e-commerce by CCI

To thoroughly understand functioning of e-commerce and its consequences on competition, CCI has launched a study in April 2019. The study has been useful to understand relevant market, assessment of market power, rationale behind conduct etc. It has identified following issues-

1. Platform neutrality- platforms have private label products and such products are directly in competition with different brands in same product categories. They perform the task of marketplace as well as competitor. Further, some of platforms have 'preferred sellers' who enjoy preferential treatment from platforms. These have adverse impact on competition.¹⁶²

2. Unfair contract terms- platforms determine, revise the contract terms unilaterally, which is harmful to the business users. For example-online food ordering listing on platform is coupled with mandatory bundling of delivery services. Restaurant who wishes to register on platform, have to register for the delivery service of platform. This incurs extra cost to the restaurant, they have little access to the orders via platform.¹⁶³

3. Price parity clauses- restricting the seller from setting lower price on other platforms.¹⁶⁴

¹⁶¹ All India Online Vendors Association v Flipkart India pvt limited & others, CCI case No.20 of 2018

¹⁶² Market study on e-commerce in India-key findings & observations, <https://www.cci.gov.in/economics-research/market-studies/details/18/6> Accessed on 14.05.2023

¹⁶³ Market study on e-commerce in India-key findings & observations, <https://www.cci.gov.in/economics-research/market-studies/details/18/6> Accessed on 14.05.2023

¹⁶⁴ Ibid

4. Exclusive agreements- Exclusive agreements takes place, in which a product is launched only on single platform and platform list only one brand in a product category.¹⁶⁵

5. Discounts- platform provide discounts on price set by seller, to attract customers. Seller is not having control over the price offered to the customer and also there is no criteria for setting discounts.¹⁶⁶

On the basis of the above study, enforcement priorities on CCI, are to ensure competition on merits, increased transparency, fostering coherent business relationship between stakeholders.¹⁶⁷

Previously, CCI with an intention to encourage digital markets, did not interfere in cases relating to unfair terms and treated them as objectively justified. Nonetheless, CCI has in few cases changed its approach, by holding discounts, arbitrary Commissions on businesses as prima facie cases of unfairness.¹⁶⁸

4.2.3.1 WhatsApp and Facebook Saga

After the market study on e-commerce, experts understand that CCI is more zealous to conduct investigations.¹⁶⁹ CCI has taken up Suo moto investigation¹⁷⁰ against WhatsApp in which media reports demonstrated that it updated its privacy policy and terms of service. New terms are making it mandatory for the user, to accept terms allowing to share user information with Facebook and its subsidiaries.

Relevant market determination- CCI observes that, on one hand, WhatsApp is basically an over the top (OTT) messaging app, having links to smartphone device

¹⁶⁵ Market study on e-commerce in India-key findings & observations, <https://www.cci.gov.in/economics-research/market-studies/details/18/6> Accessed on 14.05.2023

¹⁶⁶ Ibid

¹⁶⁷ Anshuman Sakle; Nandini Pahari, "The Interaction between Competition Law & Digital and E-Commerce Markets in India," Indian Journal of Law and Technology 16, no. 2 (2020): 18-37 <https://heinonline.org/HOL/Page?handle=hein.journals/indiajoula16&id=192&collection=journals&index=> Accessed on 14.05.2023

¹⁶⁸ Bhattacharya, Shilpi and Khandelwal, Pankhudi, Indian Competition Law in the Digital Markets: An Overview of National Case Law (July 29, 2021). Available at SSRN: <https://ssrn.com/abstract=3897291> or <http://dx.doi.org/10.2139/ssrn.3897291> Accessed on 14.05.2023

¹⁶⁹ Sinha, V. and Srinivasan, S., 2021. An integrated approach to competition regulation and data protection in India. *CSI Transactions on ICT*, 9(3), pp.151-158. <https://doi.org/10.1007/s40012-021-00334-7> Accessed on 14.05.2023

¹⁷⁰ CCI Suo moto case No.1 of 2021, <https://www.cci.gov.in/images/antitrustorder/en/0120211652258503.pdf>

and mobile number, allows to communicate one to one or to group. It uses mobile internet for text messages, sharing video, photo or location. On the other hand, Facebook is networking app connecting many users, who can text, share video, photos and allowing them to join groups, receive notifications etc. In SSNIP test price is prominent factor, it would be difficult to apply substitutability (from the perspective of SSNIP test) for OTT Communication apps because they don't charge fee on user.¹⁷¹

As regards relevant geographic market, the functioning of the OTT communication apps over smartphone doesn't change basing on region, however the competitive conditions, players, regulatory framework might change in different countries. As the conditions of competition are homogenous in India, for the purpose of assessment, India is considered as relevant geographic market.¹⁷² Commission concluded that, WhatsApp is dominant in India.

Further, CCI was having *prima facie* opinion that new terms and conditions, necessitates investigation in view of market power, to ascertain the extent, scope, impact of data sharing. It directs DG to conduct investigation.¹⁷³

To the surprise, this order came to be challenged by WhatsApp and Facebook, through writ petitions before the Delhi High Court (Single bench) which rejected the contentions of WhatsApp and Facebook. Against this order, again an appeal was filed before the division bench which came to be dismissed. Finally, this was taken up before the Supreme court through Special leave to appeal. However, this was also turned to be futile effort by WhatsApp and Facebook. Supreme court held that, CCI is an independent authority, Investigation by DG is valid.¹⁷⁴

¹⁷¹ CCI Suo moto case No.1 of 2021, <https://www.cci.gov.in/images/antitrustorder/en/0120211652258503.pdf>

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ META /WHATSAPP FACE ANTITRUST PROBE ON ITS NEW DATA PRIVACY POLICY IN INDIA – SUPREME COURT DISMISSES THE SLP AGAINST CCI PRIMA FACIE ORDER OF INVESTIGATION, <https://www.competitionlawyer.in/meta-whatsapp-face-antitrust-probe-on-its-new-data-privacy-policy-in-india-supreme-court-dismisses-the-slp-against-cci-prima-facie-order-of-investigation/>
Accessed on 14.05.2023

It demonstrates that CCI is actively working towards regulation of digital markets. In this regard, Supreme court validation to Suo moto investigation strengthens the CCI.

4.2.4 Road to digital competition Bill

Many legal systems across the globe are introducing ex-ante regulations to regulate gatekeepers in digital markets. To maintain effective competition in digital markets, Parliamentary Standing Committee on Finance through its 53rd report, recommended for having ex-ante regulation.

The report mentions that Indian digital ecosystem is growing, and its digital economy is expected to reach USD 1 trillion by 2030. Also, Anti-competitive practices have been identified and global regulations i.e. DMA of EU, American Innovation and Choice Online Act, USA, Open APP Market Act, USA, 10th Amendment of German Competition Act, The Ending Platform Monopolies Bill, USA, have been discussed in the report.¹⁷⁵

Recently Committee on digital competition law has been formed to understand need for ex-ante regulation and also to study international best practices in the field of digital markets. The Committee is under an obligation to submit a report, also draft Digital Competition Act within three months.¹⁷⁶

4.3 Summary and Conclusion

Indian legal system on combating abuse of dominance in digital markets is still evolving. Indian digital sector has been developed, there are rampant anti-competitive practices by big tech or dominant entities. Without well-defined legal framework on digital market, CCI is trying at its best possibility, to handle anti-competitive behaviours of the dominant groups. Notably, CCI has decided a number of cases relating to digital markets such as WhatsApp, Facebook, Google cases.

¹⁷⁵ Fifty third report, https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf Accessed on 14.05.2023

¹⁷⁶ Order (Comp 06/11/2022-Comp-MCA) made on 06.02.2023, <https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf>

Further, market study on e-commerce has positively boosted CCI's approach. CCI with proactive Suo moto approach has changed its attitude towards digital sector anti-competitive cases. CCI is efficiently handling and maintaining a balance in market.

Notwithstanding, recent developments, CCI orders, Market study, the Indian legal system is in immediate need of a digital competition bill. There is a hope to succeed on this aspect, since the Ministry of Corporate Affairs along with Committee on digital competition law are working together to have a digital competition law, regulating dominant undertakings, controlling their abuse of dominance to ensure fair competition in digital markets. There is an expectation that, soon India will have its own Digital Competition Act.

5. Conclusion

Abuse of dominance in digital markets is gaining attention in every economy. Consumers, business groups have preferred or in transition from traditional markets to digital markets. Alternatively, it provides a leeway to dominant undertakings to act ruthlessly in the market. Although, existing competition law regimes regulate abuse of dominance but lack its rules with regard to dynamic digital markets.

Competition law & abuse of dominance-

Almost every legal system has competition law, regulating abuse of dominant position. Abuse of dominance is, exploitation of dominant position by an undertaking in the market affecting competitors and consumers, market. Before assessing dominance of an undertaking, it is necessary to determine relevant market. In this regard, SSNIP test becomes important. Refusal to supply, tying and bundling, excessive prices, predatory prices are the examples of abuse of dominance position.

With regard to EU, Article 102 of TFEU relate to abuse of dominant position, enlisting several acts amounting abuse of dominance. Also, Article 101 of TFEU prohibit unfair trade practices affecting fair competition. Additionally, Regulation 1/2003 relate to implementation of Article 101 and 102 of TFEU and Commission has wide powers regarding enforcement. Although objective justifications to Article 102 have not been expressly provided by law, EU courts have developed efficiency and necessity as two exceptions to Article 102.

Similarly, Indian legal system is also having Indian Competition Act 2002, Competition (Amendment) Act, 2023 to maintain balance or fair competition in the market. CCI is an authority which is associated with enforcement of Competition law.

It can be grasped that, EU and India are having similar set of criteria in identifying relevant market as both legal systems refer to SSNIP test. Also the conditions determining dominant position under Article 102 of TFEU and Section 4 of Indian

Competition Act 2002 are very similar. Both legal systems are having separate authorities i.e., CCI and Commission respectively, to enforce Competition law.

EU legal framework in curbing abuse of dominance in digital markets-

EU legal framework on digital markets can be identified with DMA and DSA. DMA intend to maintain contestability and fair competition. In this regard, it identifies large providers of certain platform services as gatekeepers, also obliges them to comply with 22 do's and don'ts.¹⁷⁷ In other words, gatekeepers are big tech companies or dominant groups who meet prescribed threshold of turnover and number of users. DMA imposed certain prohibitions and obligations on them. To note, DMA has introduced ex ante provisions which protect market against a failure, before it actually happens.¹⁷⁸ DMA has some concerns regarding interoperability, transparency for which EU already acting to resolve.

In short, DMA is intended to serve the goals set by Articles 101, 102 of TFEU. By imposing prohibitions and obligations, abusive conduct of gatekeepers can be regulated, which in turn results in contestability and fair competition.

Recent developments in India regarding abuse of dominant position in digital markets-

Indian competition law regime is identified with repealed MRTP Act. Currently, Indian Competition Act, 2002 and Competition (Amendment) Act, 2023 regulate markets, maintain fair competition. In this connection, CCI is an authority, empowered to deal with enforcement. Although, Indian legal system is not having a separate digital competition law governing digital markets, but the Competition Act 2002 is made applicable to digital market as well.

Initially, CCI was hesitant to interfere with digital markets cases. The market study on e-commerce strengthened CCI by providing insights about digital markets. CCI being *ex-officio*, is dealing with cases relating to digital markets or regulating digital

¹⁷⁷ Petterson, D. (2022). Sector-Specific Ex Ante Regulation in Digital Markets-A Complement or Substitute to Antitrust Enforcement? *Europarättslig tidskrift*, 4. p.1

¹⁷⁸ Ibid p.3

markets. However, it is similar to *ad hoc* arrangements. India being a digital hub, digital market issues are increasing.

In this connection, Indian government has identified need for having a separate digital competition law and has begun to its work towards it, by forming a committee to discuss on digital competition bill.

Recommendations-

1. Gatekeepers mentioned in DMA should begin preparations to align their business, actions with DMA. It is the best available solution to gatekeeper. By making gatekeeper as a responsible through obligation and prohibitions, abuse of dominance in digital sector can successfully be controlled.
2. India is working towards digital competition bill. Having regard to the concerns raised towards DMA such as interoperability, transparency, India should take note of those concerns and proceed its efforts, discussions on digital competition bill.

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