

# ABUSE OF DOMINANCE IN PLATFORM-BASED DIGITAL MARKETS: AN ANALYSIS OF THE INDIAN ANTI-TRUST LEGAL REGIME

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***A**bstract—Internet penetration in India has significantly increased in the past decade. Consequently, the number of users transacting online has gone up and many day-to-day transactions have shifted online. Thus, purchase of good and services has shifted online, communication is happening online, information, news, education, and entertainment is accessed online, payments are being made online. COVID-19 has further amplified the volume of online transactions. Digital markets have emerged as an important substitute for the conventional brick and mortar stores. Primarily, these digital markets function and operate through digital platforms. Most of these digital platforms provide their platforms to third party businesses and allow them to connect to the end users. Further, these digital platforms vary significantly from the traditional markets as they exhibit network effects, have access to big data, and may earn super normal profits on achieving economies of scale. Thus, achieving dominance in the relevant market ensures major incentives for the digital platforms. After all, digital markets are winner-take-all markets. Thus, digital platforms may be more inclined to use strategies such as predatory pricing, vertical integration, etc. compared to the traditional markets. In India, the antitrust legal regime provides for ex-post regulation of abuse of dominance for both traditional and digital markets and does not distinguish between them. Against this background, this article argues for ex-ante regulation of abuse of dominance by digital platforms*

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*owing to their unique characteristics. Evaluating some of the key pronouncements on abuse of dominance by digital platforms, the article also highlights the limitations of the current legal regime in dealing with the same.*

**Keywords:** Digital Platforms, Abuse of Dominance, Competition Act, 2002, Predatory Pricing, Network effects.

## I. NATURE AND CHARACTERISTICS OF DIGITAL PLATFORMS

Digital markets have disrupted the traditional model of doing commercial business. Primarily, the digital markets function and operate through digital platforms – a “business entity working as a marketplace connecting the business users to the end consumers.”<sup>1</sup> Major e-commerce companies such as Amazon, Flipkart use a digital platform and connect diverse businesses to the end-users. Similarly, companies such as Uber, Ola, etc. connect taxi service providers with the end users while app-based food delivery companies such as Zomato, Swiggy, etc. link restaurants with end users.<sup>2</sup> Social media companies such as Facebook, Twitter, LinkedIn, and instant messaging apps such as WhatsApp allow individuals to connect with one another and share information, pictures, etc.<sup>3</sup> Covid-19 and the consequent emphasis on physical distancing has further accentuated the utility of these digital platforms.<sup>4</sup> For instance, ed tech companies such as BYJU’S, Vedantu, Unacademy, etc., and communication tech companies such as Zoom saw a huge surge in their users during the pandemic.<sup>5</sup>

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<sup>1</sup> STANDING COMMITTEE ON FINANCE, MINISTRY OF CORPORATE AFFAIRS, ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES, 53rd REPORT, 2022-23, 27, [https://eparlib.nic.in/bitstream/123456789/1464505/1/17\\_Finance\\_53.pdf](https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf) (last visited on Mar. 25, 2023).

<sup>2</sup> Companies such as Make my Trip, Yatra, Netflix, Disney Hotstar, etc. also belong to this category.

<sup>3</sup> There are certain differences between the primary nature of functions performed by Facebook, Twitter (Now X) and LinkedIn. However, for the purposes of this article all these companies have been kept under the broad head of social media.

<sup>4</sup> Kathuria, Rajat, Kedia, Mansi, Bagchi, Kaushambi, *India’s Platform Economy and Emerging Regulatory Challenges*, Working Paper, No. 407, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS (ICRIER), New Delhi (2021).

<sup>5</sup> Krishna Veera Vanamali, *As Pandemic Boom Fades, can Ed-tech Startups Survive*, BUSINESS STANDARD (July 6, 2022), [https://www.business-standard.com/podcast/current-affairs/as-pandemic-boom-fades-can-ed-tech-startups-survive-122060600051\\_1.html](https://www.business-standard.com/podcast/current-affairs/as-pandemic-boom-fades-can-ed-tech-startups-survive-122060600051_1.html) (last visited on Mar. 27, 2023).

An important aspect about these digital platforms is that they are not product or service providers themselves rather they mostly provide the digital platform to the third-party businesses and allow them to connect to the end users.<sup>6</sup> To that end, they may be understood as intermediaries. Also, these digital platforms differ significantly from the conventional markets in the following aspects:

1. **Economies of Scale:** Economies of scale simply means that average cost per unit of output decreases with increase in the scale of output.<sup>7</sup> While economies of scale is visible even in the traditional markets, this phenomenon is far more extreme in case of digital platforms as in the case of digital platforms there is almost no variable cost incurred as new consumers join an already existing platform. This leads to a situation where already existing digital platforms in a given market can make profits without incurring any cost. This means that digital platforms offer significant rewards for expansion as compared to the traditional markets. This also ensures that already existing market players have a comparative advantage in price as compared to the new players entering the market. Further, to reap the rewards of economies of scale, digital platforms may also defer profits for a long time and continue to run at losses.<sup>8</sup>
2. **Access to exponential amounts of data:** Digital platforms have data advantage over their counterparts in the traditional markets as they can, with the aid of technology, collect and process big data from the users accessing their platforms.<sup>9</sup> Here also, already existing large platforms have significant advantage as they have more users accessing their platform and the algorithmic technologies work better on large datasets thereby giving them a competitive advantage.<sup>10</sup> Further, big tech companies such as Google, Facebook, Amazon, Apple, etc. enjoy scale of advantages in case of access to data owing to an already existing large user base. According to CCI,

“Most of the Big Tech companies possess vast amount of data along with the capability to process it with artificial intelligence and machine learning

<sup>6</sup> Exclusive online stores opened by specific companies in addition to physical, brick and mortar stores are different from these digital platforms.

<sup>7</sup> RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 42 (Oxford, 9th ed. 2009).

<sup>8</sup> RAJYA SABHA DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON COMMERCE, PROMOTION AND REGULATION OF E-COMMERCE IN INDIA, 172nd Report, (July 2022) [https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/13/159/172\\_2022\\_6\\_14.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/159/172_2022_6_14.pdf) (last visited on Mar. 27, 2023).

<sup>9</sup> As per OECD (Organization for Economic Cooperation and Development) big data is “information asset characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value”.

<sup>10</sup> Kathuria, Rajat, Kedia, Mansi, Bagchi, Kaushambi, *India's Platform Economy and Emerging Regulatory Challenges*, Working Paper, No. 407, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS (ICRIER), New Delhi (2021).

algorithms. Acquisition of other companies that possess any kind of data by these big technology companies may result in competitive advantage, especially compared to the new entrants in the market”.<sup>11</sup>

In fact, it has also been submitted that,

“the Big Tech impose unfair and discriminatory conditions/initiatives including prominent placement results in driving more downloads/traffic/transactions on their Payments App. It allows the Big Tech to generate more user data which in turn empower them to innovate and offer better features than their competitors. This creates a vicious cycle and gives the Big Tech companies insurmountable scale advantages, thereby (and at the same time) creating barriers to the entry and expansion of smaller and newer innovative companies”.<sup>12</sup>

- 3. Network Effects:** Digital platforms may be two sided or even multi-sided markets giving rising to direct or indirect network effects.<sup>13</sup> A direct network effects refers to the situation when the value of the network for a user increases with the increase in number of users accessing the platform. For instance, users of a search engine are benefitted as more users start using the search engine thereby ensuring more data for the search engine service provider eventually leading to better search results for the individual user. This benefit accrues to the existing users without incurring any additional costs and is also referred to as network externality. Also, in this case the online sellers and content sellers would increasingly try to ensure that the products and services are ranked higher by the search engine. This leads to more value to users as they would be easily able to access more relevant search results or products and services. This is characterised as the indirect network effect.<sup>14</sup> Network effects are visible in a two-sided or multi sided market platform, where two or more groups of consumers or users are catered for and due to the network effects, growth in the number of users on one side benefits the customers on the other.<sup>15</sup> The digital platforms with the higher user base would benefit more from network effects and would be able to expand faster.<sup>16</sup> This also provides a major incentive

<sup>11</sup> STANDING COMMITTEE ON FINANCE, MINISTRY OF CORPORATE AFFAIRS, ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES, 53rd Report 2022-23, 24, [https://eparlib.nic.in/bitstream/123456789/1464505/1/17\\_Finance\\_53.pdf](https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf) (lastvisited on March 25, 2023).

<sup>12</sup> *Id.* at 23.

<sup>13</sup> RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 11 (Oxford, 9th ed. 2009)

<sup>14</sup> *Id.* at 12.

<sup>15</sup> For instance, an increase in the number of users on e-commerce website such as Amazon, Flipkart, etc. would benefit the sellers who list their products for sale on the website making it more valuable to them. Thus, more sellers would prefer these websites which would also have a positive effect on the number of users on these websites.

<sup>16</sup> Megha Rani Ahuja & Ganesh Kumar, *A Study of Technological Advent and its Impact on Competition in India*, 58 EPW ENGAGE, (Jan. 6, 2023).

for the digital platforms to establish the network effects by acquiring higher market share by engaging in practices such as predatory pricing, deep discounts, cash back, etc. even by sustaining losses in the short run.<sup>17</sup> However, only platforms with sufficient financial capital are able to achieve this.

Usually, because of these characteristics “digital markets often tip quickly to winner-take-all monopolistic outcomes resulting in limited fair competition and thus are prone to anti-competitive behaviour such as abuse of dominance”<sup>18</sup>. While, in principle, it is possible for a new enterprise to penetrate the market with a disruptive technology, its practices, it may be difficult due to significant entry barriers.

## II. LEGAL FRAMEWORK FOR ASSESSMENT OF ABUSE OF DOMINANCE IN INDIA’S ANTI-TRUST REGIME

Anti-trust regime in India witnessed significant change pursuant to the country’s policy makers deciding to “open up the economy, remove controls and resort to liberalization”.<sup>19</sup> Accordingly, the earlier existing legislation- Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 - was considered obsolete<sup>20</sup> and “limited in its sweep and hence not sufficient to fulfil the need of a competition law in the age of growing liberalization and globalization”.<sup>21</sup> The Government believed that in the light of international economic developments relating more particularly to competition laws there was a need to shift focus from curbing monopolies to promoting competition. Consequently, a High-level Committee on Competition Law and Policy headed by Mr SVS Raghav was constituted to “suggest/recommend a way forward including a legislative framework if any”.<sup>22</sup> The committee recommended that the “MRTP Act may be repealed, and a new law called the Indian

<sup>17</sup> See generally Lina M. Khan, *Amazon’s Anti-Trust Paradox* 126 Yale L. J. 710 (2017) [https://scholarship.law.columbia.edu/faculty\\_scholarship/2808](https://scholarship.law.columbia.edu/faculty_scholarship/2808) (last visited on Mar. 31, 2023).

<sup>18</sup> STANDING COMMITTEE ON FINANCE, MINISTRY OF CORPORATE AFFAIRS, ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES, 53rd Report 2022-23, 1, [https://eparlib.nic.in/bitstream/123456789/1464505/1/17\\_Finance\\_53.pdf](https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf) (last visited on Mar. 25, 2023).

<sup>19</sup> Statement of Object and Reasons, The Competition Act, 2002.

<sup>20</sup> The MRTP Act was enacted in 1969 pursuant to “government inquiry into private concentration in which it was found that over 85% of industrial areas had a high concentration of economic power. See Dorothy Shapiro Lund, *A Competition Act by India, for India: The First Three Years of Enforcement Under the New Competition Act*,” 5 INDIAN JOURNAL OF INTERNATIONAL ECONOMIC LAW 59 (2012).

<sup>21</sup> Raghavan Committee Report, 1.2.2, [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf) (last visited on Mar. 27, 2023)

<sup>22</sup> Pingali, V., Chaudhuri, M.K., Malik, P., Tamara, R., Kakkar, A., Chatterjee, C., Mondal, S., & Sokol, D.D. *Competition Law in India: Perspectives*, 41(2) VIKALPA, 168–193 (2016) <https://doi.org/10.1177/0256090916647222>.

Competition Act may be enacted”.<sup>23</sup> Accordingly MRTP Act was replaced by the Competition Act, 2002 (notified in 2009) which was more “specific in its formulation”<sup>24</sup> and expressly included “certain offending trade practices including abuse of dominance”. The preamble of the new Act prioritizes promotion of competition, protection of consumer interest and freedom of trade as its main goals unlike the MRTP Act whose main purpose was to ensure that the “operation of the economic system does not result in the concentration of the economic system”.<sup>25</sup>

Also, unlike its predecessor, the new Competition Act is not concerned with the size of the enterprises or overall concentration of the economic power.<sup>26</sup> Rather, it focusses more on the conduct of the enterprises and is said to have adopted a rule of reason approach instead of a per se illegal approach.<sup>27</sup> Thus, more importance is given to “how the behaviour of the enterprises affects competition and consumer interest” rather than how the presence of an enterprise affects the market structure *per se*.<sup>28</sup> Here, it may be added that the new Indian anti-trust regime seems to have tilted towards the new Chicago School approach to antitrust which rejected economic structuralism based foundation of anti-trust legal regime in favour of “faith in the efficiency of markets”.<sup>29</sup> In as much as big is no longer consider bad in India’s new Anti-trust regime, it’s not dominance per se rather the abuse of dominance by enterprises is prohibited.<sup>30</sup> In fact if an entity is not dominant, the CCI does not even enter into an analysis of the conduct of the enterprise.<sup>31</sup>

An abuse of dominance investigation involves three major steps. The first step is the delineation of the relevant product market and relevant geographic market as the assessment of the dominant position is always with reference

<sup>23</sup> RAGHAVAN COMMITTEE REPORT, 7.4.2, [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svvs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svvs_raghavan_committee.pdf) (last visited on Mar. 27, 2023).

<sup>24</sup> Malik, P., Malhotra, N., Tamarappoo, R. et al., *Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach*, 54 REV IND ORGAN, 435–464 (2019) <https://doi.org/10.1007/s11151-018-9651-y> (last visited on Mar. 29, 2023).

<sup>25</sup> The MRTP Act drew its normative basis from arts. 38 and 39 of the Indian Constitution.

<sup>26</sup> Vijay Kumar Singh, *Competition Law and Policy in India: The Journey in a Decade*. 4 NUJS L. REV. 523 (2011), SSRN: <https://ssrn.com/abstract=2971805> or <http://dx.doi.org/10.2139/ssrn.2971805> (last visited on Mar. 30, 2023).

<sup>27</sup> Pingali, V., Chaudhuri, M.K., Malik, P., Tamara, R., Kakkar, A., Chatterjee, C., Mondal, S., & Sokol, D.D. *Competition Law in India: Perspectives*, 41(2) VIKALPA, 168, 193 (2016) <https://doi.org/10.1177/0256090916647222>.

<sup>28</sup> Geeta Gouri, *Lecture Delivered on “Making Markets Work Effectively in India: Experience of the Competition Commission*, (2013), <http://164.100.58.95/lecture-delivered-making-markets-work-effectively-india-experience-competition-commission> (last visited on Mar. 30, 2023).

<sup>29</sup> See generally Lina M. Khan, *Amazon’s Anti-Trust Paradox* 126 Yale L. J. 710 (2017) [https://scholarship.law.columbia.edu/faculty\\_scholarship/2808](https://scholarship.law.columbia.edu/faculty_scholarship/2808) (last visited on Mar. 31, 2023).

<sup>30</sup> The Competition Act, 2002, s. 4, 2002 (India).

<sup>31</sup> Lifestyle Equities CV v. Amazon Seller Services (P) Ltd., 2020 SCC OnLine CCI 33.

to the relevant market.<sup>32</sup> This step involves identifying “closely substitutable commodities and the geographical scope within which such commodities compete”.<sup>33</sup> Delineation of the relevant market is a crucial step in analysing abuse of dominance for if the relevant market is delineated too broadly, then it may understate the dominance of the enterprise under investigation thus leading to a false negative.<sup>34</sup> And if delineated too narrowly, it may overstate the market power of the enterprise which may lead to a false positive.<sup>35</sup>

Next step involves examining whether the enterprise under investigation is dominant in the relevant market.<sup>36</sup> This determination is of special significance for “if an enterprise does not enjoy dominant position in the relevant market, then its conduct is not scrutinised”. Further, “a dominant enterprise has special responsibility to ensure that its conduct does not lessen competition in the market”.<sup>37</sup> Dominant enterprise “is the one that has the power to disregard market forces, i.e., competitors, customers, and others and to take unilateral decisions that would benefit itself and in the process cause harm to the process of free competition, injuring the consumers by saddling them with higher prices, limited supplies, limited choice etc.”<sup>38</sup> This kind of conduct is possible if the enterprise enjoys market power and arises when the enterprise does not face any restraint from the competitors. Dominance is a question of fact and three issues are critical to its determination – the market position of the enterprise and its competitors, expansion and entry barriers, countervailing buying power.<sup>39</sup> Currently acquiring the relevant position is not prohibited, only the abuse of such position.<sup>40</sup>

The concept of abuse is also regarded as an “objective concept relating to the behaviour of the dominant enterprise which is such as to influence the structure of the relevant market, where, as a result of the very presence of the enterprise, the degree of the competition is weakened and which, through recourse to methods different from those which condition normal competition in products and services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still

<sup>32</sup> The Competition Act, 2002, s. 2(r), 2002 (India).

<sup>33</sup> Geeta Gouri, *Lecture Delivered on Making Markets Work Effective in India: Experience of the Competition Commission*, (2013) <http://164.100.58.95/lecture-delivered-making-markets-work-effectively-india-experience-competition-commission> (last visited on Mar. 30, 2023).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> T. RAMAPPA, *COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS*142 (2nd ed.2009).

<sup>37</sup> GAUTAM SHAHI, SUDHANSU KUMAR, *INDIAN COMPETITION LAW*, 155 (Taxmann 2021).

<sup>38</sup> T. RAMAPPA, *COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS*142 (2nd ed. 2009).

<sup>39</sup> RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 11 (Oxford, 9th ed. 2009).

The Competition Act, 2002 provides several factors that may be considered while assessing dominance under s.19(4) of the Act.

<sup>40</sup> T. RAMAPPA, *COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS*143 (2nd ed.2009).

existing in the market or the growth of that competition”.<sup>41</sup> The Act provides an exhaustive list of acts which when committed by a dominant entity is considered abusive.<sup>42</sup> Both exploitative and exclusionary acts are included within the scope of abuse in the Act.<sup>43</sup> Importantly, the Act does not require the “demonstration of an adverse effect on competition in the evaluation of abuse”. Thus, if the conduct of the enterprise comes within the purview of the abuse as defined in the Act, it is not essential for the CCI to demonstrate that “the conduct in question is harming market-competitiveness”.<sup>44</sup>

### III. INSTANCES OF ABUSE OF DOMINANCE BY DIGITAL PLATFORMS IN INDIA: ANALYSING THE JURISPRUDENCE

In the last decade, India had limited jurisprudence on many contemporary issues pertaining to competition as India’s competition law was notified only in 2009.<sup>45</sup> However, gradually the competition law adjudicators in India have begun to address the complex anti-competitive issues affecting the Indian markets. One such issue is the abuse of dominance by digital platforms operating in India.

CCI was confronted with the issue of abuse of dominance by a platform-based market in one of the earliest cases decided by it. The case involved NSE, one of the leading stock exchange companies of India which was accused by the informant MCX of engaging in predatory pricing in the newly introduced CD (Currency Derivatives) of the stock exchange and thereby abusing its dominant position.<sup>46</sup> While MCX had license only to operate in the CD Segment, NSE was an already established market player in all the segments of the stock with a 92% combined market share in equity, WDM, F&O segments.<sup>47</sup> Separately, in the CD segment there were three players – NSE with

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<sup>41</sup> GAUTAM SHAHI, SUDHANSU KUMAR, *INDIAN COMPETITION LAW*, 169 (Taxmann 2021).

<sup>42</sup> The Competition Act, 2002, s. 4(2), 2002 (India).

<sup>43</sup> Exploitative abuses are those in which the dominant players seek to enhance their revenue by exploiting consumers and competitors such as imposition of unfair condition or price in purchase or sale of goods or services. Exclusionary abuses are those in which the dominant player tries to exclude other enterprises from the markets such as by denying them access to an essential technology.

<sup>44</sup> Dorothy Shapiro Lund, *A Competition Act by India, for India: The First Three Years of Enforcement under the New Competition Act*, 5 *INDIAN JOURNAL OF INTERNATIONAL ECONOMIC LAW* 59 (2012).

<sup>45</sup> The CCI was established in 2003 but became functional only in 2009. The section pertaining to abuse of dominance was also notified in May, 2009. GAUTAM SHAHI, SUDHANSU KUMAR, *INDIAN COMPETITION LAW*, 169 (Taxmann 2021).

<sup>46</sup> *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*, 2011 SCC OnLine CCI 54.

<sup>47</sup> *National Stock Exchange of India Ltd. v. CCI*, 2014 SCC OnLine Comp AT 37: 2014 Comp LR 304 (Comp AT).



a markets share of 34%, MCX with a market share of 30% and USE with a market share of 36%.<sup>48</sup> While NSE argued that the relevant market would be the narrower CD segment and the CCI agreed, COMPAT held that the relevant market was the “services provided by the security exchanges”.<sup>49</sup>

Stock exchanges are digital platforms characterized by the network effects and “value to users on both sides of the platform increase as the number of players i.e. exchanges get deeper”.<sup>50</sup> Relying on this the CCI (Minority Order) observed that in a “when network externalities are present, a profit maximizing firm might initially price a product below cost in order to establish a large installed base of users, and thereby increase demand for its product.”<sup>51</sup> However, allowing established market players with the economic strength to adopt zero pricing policy in the name of availing advantages of network effect, economies of scale, may be instrumental in providing an enabling environment to drive out competition and achieve dominance. The dissenting order was also premised on two new players i.e. – MCX, USE entering the market thereby proving that there were no entry barriers and in a “networked industry a newcomer could have easily overcome the competitive advantage of the incumbent by offering innovative product with value added services”. Importantly however, both the CCI (majority Order) and COMPAT pointed that NSE could sustain zero pricing policy in the CD segment because of its profits, reserves, etc. in other segments which endowed it with the capacity to defer profits for a long time”.<sup>52</sup>

However, in *Bharti Airtel v. Reliance Industries Ltd & Reliance Jio Infocomm*, the CCI did not agree with the informant Bharti Airtel that the financial position of Reliance Jio Infocomm Ltd (RJIL) and its ability to “make huge investments in the telecom market” was because of the “financial strength of Reliance Industries Ltd (RIL) in other markets”.<sup>53</sup> RJIL commenced business in the telecom sector in 2016 and from 5th September 2016 to 31st March, 2017 offered “unlimited data and voice, video and messaging service along with a full bouquet of Jio applications”<sup>54</sup> absolutely free to the

<sup>48</sup> *Id.* at 23.

<sup>49</sup> *Id.* at 20.

<sup>50</sup> Geeta Gouri, *Lecture Delivered on Making Markets Work Effectively in India: Experience of the Competition Commission*, (2013) <http://164.100.58.95/lecture-delivered-making-markets-work-effectively-india-experience-competition-commission> (last visited on Mar. 30, 2023).

<sup>51</sup> *Ibid.*

<sup>52</sup> National Stock Exchange of India Ltd. v. CCI, 2014 SCC OnLine Comp AT 37: 2014 Comp LR 304 (Comp AT).

<sup>53</sup> *Bharti Airtel Ltd. v. Reliance Industries Ltd.*, 2017 SCC OnLine CCI 25. Reliance Industries Limited was the parent company of Reliance Jio Infocomm Ltd. with 99.44% shareholding in the same.

<sup>54</sup> CCI, MARKET STUDY ON THE TELECOM SECTOR IN INDIA: KEY FINDINGS AND OBSERVATIONS, 2021 <https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf> (last visited on Mar. 30, 2023).

subscribers. Bharti Airtel, one of the top mobile service providers in India and globally, argued before the CCI that RJIL was indulging in predatory pricing. However, the CCI determined the relevant market broadly i.e., “provision of wireless telecommunication services to end users in each of the 22 telecommunication circles in India” thereby not distinguishing between 2G, 3G, and 4G telecommunication services.<sup>55</sup> RJIL was providing 4G LTE telecommunications services primarily and had 6.4% market share in the relevant market leading the CCI to conclude that RJIL was not dominant and accordingly its zero pricing policy did not merit scrutiny.<sup>56</sup> Despite RJIL gaining a subscriber base of around 72 millions in just 4 months owing to its zero pricing policy, the CCI opined that “it is not anti-competitive for an entrant to incentivise customers towards its own services by giving attractive offers and schemes. Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature and as such cannot be a subject matter of investigation under the Act”.<sup>57</sup> The CCI also disregarded the immense financial strength of RJIL owing to the huge shareholding by RIL, a multinational conglomerate with market presence in diverse sectors of the Indian economy including energy, petrochemicals, natural gas, retail, etc and thereby capable of sustaining losses in the new sector till it found its feet. Importantly, the CCI noted that the telecom market was characterized by presence of many market players implying sufficient choice to consumer to switch from one service provider to another thereby negating any possibility of exercise of dominance by a new player such as RJIL. However, pursuant to the entry of RJIL, there has been “continuous shakeout in the industry” and the number of private telecom players has “effectively reduced to three” and one amongst them is already on the verge of bankruptcy.<sup>58</sup> Even CCI has noted in a recent report on the telecom sector that “any exit would mean a virtual duopoly”.<sup>59</sup> Considering the current predicament facing India’s telecom sector, it may safely be said that CCI’s decision of absolving RJIL’s zero pricing policy as necessary penetrative pricing by a new market player, at best, remains debatable.

Later, in another order CCI went on to conclude that e-commerce companies Flipkart and Amazon could not be said to be dominant in the online marketplace platforms as “there are several new players which have entered or

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<sup>55</sup> Bharti Airtel Ltd. v. Reliance Industries Ltd., 2017 SCC OnLine CCI 25.

<sup>56</sup> *Id.* at 19.

<sup>57</sup> *Id.* at 22.

<sup>58</sup> C.P. Chandrasekhar & Jayati Ghosh, *The Rising Spectre of Telecom Monopoly*, THE HINDU BUSINESSLINE, (Aug. 23, 2021) <https://www.thehindubusinessline.com/opinion/columns/c-p-chandrasekhar/the-rising-spectre-of-a-telecom-monopoly/article36063279.ece> (last visited on Mar. 30, 2023).

<sup>59</sup> CCI, MARKET STUDY ON THE TELECOM SECTOR IN INDIA: KEY FINDINGS AND OBSERVATIONS, 2021 <https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf> (last visited on Mar. 30, 2023).

propose to enter the e-commerce segment”.<sup>60</sup> Not only the CCI disregarded the network effects and the financial resources of Flipkart and Amazon but also observed that:

“marketplace based e-commerce model is still a relatively nascent and evolving model of retail distribution in India and Commission is cognizant of the technology-driven nature of this model. Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation”.<sup>61</sup> (Emphasis Supplied)

CCI has also ruled that Amazon and Flipkart are not dominant in the “market for services provided by online platforms for selling fashion merchandise in India”.<sup>62</sup> Here again, the CCI noted that there are a number of vertical, fashion only platforms in the market besides the horizontal, multi-product marketplace platforms like Amazon and Flipkart.<sup>63</sup> However, as the example of telecom market illustrates the market realities may very easily be altered by the practices of a market player with deep pockets and network effects.

Importantly, the CCI recognizes this in its last year assessment of abuse of dominance by Google in the licensable smart phone operating system market wherein Google had made the licensing of GMS (Google Mobile Services) conditional on the smart phone manufacturers having a valid and effective Anti-Fragmentation Agreement (AFA)/Android Compatibility Commitment (ACC) with Google.<sup>64</sup> AFA/ACC mandated Original Equipment Manufacturers (OEMs) to ensure that there was no fragmentation of Android and disallowed them from manufacturing smart phone devices based on Android forks i.e. modified version of Android.<sup>65</sup> This ensures that no operating system is able to compete with Android. And if smart phone manufacturers try to use another operating system based on android forks, they do not get license to must have Apps of Google such as Google Play Store, YouTube. Also, if OEMs require access to the must have apps of Google for which there are no meaningful alternatives/competitors, they must preinstall all other google apps including Google Search, Google Maps, etc. for which there are alternatives.<sup>66</sup> CCI recognized the

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<sup>60</sup> All India Online Vendors Assn.v. Flipkart India (P) Ltd., 2018 SCC OnLine CCI 97.

The information was against Flipkart, but CCI had also invited Amazon in the preliminary conference.

<sup>61</sup> *Id.* at 6.

<sup>62</sup> Lifestyle Equities CV v. Amazon Seller Services (P) Ltd., 2020 SCC OnLine CCI 33.

<sup>63</sup> *Id.* at 7.

<sup>64</sup> Umar Javeed v. Google LLC, 2022 SCC OnLine CCI 61.

<sup>65</sup> *Id.* at 6.

<sup>66</sup> *Id.* at 5.

“smart mobile device market exhibits network effects. On one hand, the OS which can run maximum number of applications would be the most popular among the users and thus would attract the greatest number of users. On the other, the app developers would prefer to develop apps for the OS which has the maximum number of users because access to the large user base would result in substantial economies of scale”.<sup>67</sup>

For a new player attempting to enter the market it is “not the OS alone that would be sufficient to constrain Google but a whole gamut of functionalities”.<sup>68</sup> Not only would the new market player need to invest in creating a new OS but would also be required to offer apps that could compete with apps of license for Google does not license to OS based on forked version of Android. Thus, a new player would encounter both technological barriers to enter and application barriers to enter in “developing an ecosystem that would make the OS commercially viable alternative to Google”.<sup>69</sup> This reinforces Google’s dominant position in the licensable smart mobile device OS market.

#### IV. CONCLUSION & SUGGESTIONS

Digital platforms form the backbone of the internet economy. However, it is important to recognize that these are winner-take-all markets because of the direct and indirect network effects, economies of scale, access to huge amounts of data and the capacity to process that data to establish dominance. In many cases, popularity of a digital platform magnifies exponentially and is reinforcing, and accordingly platform-based markets often tip towards oligopoly or monopoly. Since scale and network effects are vital for market players in the digital platforms, “predatory pricing and integration across related business lines are emerging as key paths to establishing dominance”.<sup>70</sup> Accordingly, it’s important to regulate predatory pricing and vertical integration strictly in order to ensure that dominant digital platforms do not emerge. If these practices are allowed at the early stages, then digital platforms lock in users/ consumers making it extremely difficult for alternative technologies to emerge as seen in the case of Google’s operating system Android.

Further, in many instances CCI refrains from intervening in the digital platforms on the ground that these platforms face the “constant threat of creative destruction and of being outdated”.<sup>71</sup> They are said to lack market power as any new entrant with better technology and innovation can displace them. However, this may be possible only in the case of market players with deep

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<sup>67</sup> *Id.* at 18.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.* at 22.

<sup>70</sup> Lina M. Khan, *Amazon’s Anti-Trust Paradox*, 126 Yale L. J. 710 (2017) [https://scholarship.law.columbia.edu/faculty\\_scholarship/2808](https://scholarship.law.columbia.edu/faculty_scholarship/2808) (last visited on Mar. 31, 2023).

<sup>71</sup> Bharat Budholia, *Digital disruptions: A Competition Law Perspective*, (2018) 3 ICLR 1.

pockets and access to technology as was visible when RJIL could make a dent in the telecom market. Also, while innovation is useful, too much focus on innovation as a metric of consumer welfare may lead to concentrated markets and loss of choice to consumers. In any case, intellectual property protection is also available for protecting innovation. Therefore, it is important for the anti-trust authority to give sufficient weightage to different metrics of consumers welfare such as price, quality, choice, diversity, etc while scrutinising digital platforms.

Finally, the Indian legislative scheme on assessing abuse of dominance provides for an ex-post regulation of the abuse. There are three important implications of this. First, if the enterprise is not dominant, there is no need to evaluate its practices. Second, dominance, in itself, is not a problem if it's not being abused in a manner prohibited by the Act. Finally, only when the abuse by a dominant entity in the relevant market is established, the prohibition by the Act is triggered and the CCI intervenes. Thus, the practices adopted by the enterprise to achieve dominance are not scrutinized under the Act. However, once the dominance is achieved, ex post regulation “may be too delayed to prevent irreparable harm to the market and as a result, ex post monetary penalties are unlikely to be fully effective in dealing with the issue”.<sup>72</sup> Therefore, ex-ante regulation of abuse of dominance by digital platforms may be more effective and ensure that market players do not achieve dominance by adopting abusive practices.

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<sup>72</sup> Standing Committee on Finance, Ministry of Corporate Affairs, ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES, 53rd Report 2022-23, 27, [https://eparlib.nic.in/bitstream/123456789/1464505/1/17\\_Finance\\_53.pdf](https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf) (last visited on Mar. 25, 2023).