TRINITY CHAMBERS

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Playing Catch Up With Big Tech In Antitrust Regulation

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1. *Introduction*

Post the Covid-19 pandemic, trade norms in India have been rewritten due to the advent of big data and internet commerce platforms. Start-ups with significant financial backing are willing to suffer short-term setbacks to capture India's demographic dividend. In addition, the establishment of a digital ecosystem has led to the introduction of disruptive marketing tactics and other innovations that frequently fall in a grey area under the current antitrust jurisprudence. This is especially true given the lack of empirical research on emerging markets. As a result, antitrust regulators worldwide are trying to adapt and build legal frameworks to tackle the competition law concerns associated with such upcoming business forms.

In India, the Competition Commission of India (**CCI**) has also moved its attention to competition policy challenges resulting from fast-evolving marketplaces driven by technology and disruption. Intangible assets, non-price aspects of competition, virtual commerce, and aggregator business models are just a few examples of the factors now being considered by the CCI in a bid to evolve alongside the booming digital economy. This article traces the jurisprudential trends of antitrust law in emerging Indian markets.

(i) Cab Aggregators Market

(a) The Meru v. Ola-Uber Case

One of the early rulings on the aggregator services business model was made in *Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd. and Ors.*[1] The informant (Meru) alleged that Ola and Uber used attractive incentives to lure cab drivers into signing contracts that would bind them into a single network. In addition to offering passengers steep discounts, the business model gave drivers unreasonably high incentives to increase market share. According to the informant, the above practices restricted entry into the market and foreclosed the competition.

Upon taking note of the facts, CCI observed that the drivers connected to various aggregators through apps could easily switch between aggregators depending on the incentive scheme by simply switching off or switching on their mobile handsets. Therefore, it was observed that the relevant market was in nascency, and the market dynamics were yet to effectuate fully. Furthermore, according to CCI, there was no evidence to support the

1 *Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd. & Ors.*, (Case Nos. 25-28 of 2017).

contention that there were supply restrictions on the market for drivers, such that the purported agreements may result in lock-ins and, as a result, create obstacles to entry in the market for radio taxi services.

(b) Samir Agrawal and Ola-Uber Case

In *Samir Agrawal (Cab Aggregators Case)*[2], the Supreme Court was dealing with an appeal against the decision of CCI, which also came to be upheld by the NCLAT. The informant in the case alleged that cab aggregators like Ola and Uber operated on algorithmic pricing. As per the informant, the algorithmic pricing used by Ola and Uber manipulated the demand and supply guaranteeing higher fares and higher commissions. As per the informant, the drivers cooperated with the algorithmic pricing to earn higher fares and hence were engaging in a concerted action under Section 3(3)(a) read with Section 3(1) of the Competition Act, 2002 (**Act**). The CCI in its order dismissed the contention of the informant and held that the algorithmic pricing was based on large data sets known as "*big data*" and a host of factors *e.g.*, time of day, traffic situation, special conditions/ events, festival, weekday/ weekend.

The CCI held that for the drivers to collude, there must be an agreement amongst the drivers to set prices through a particular platform for instance an association of drivers. However, Ola and Uber cannot be compared to associations of drivers, rather they acted as distinct entities enabling customers and drivers connect with each other. Accordingly, the CCI denied that there was any anti-competitive effect on the market on account of the algorithmic pricing model used by Ola and Uber. The decision of CCI came to be upheld by the NCLAT and later by the Supreme Court in *Samir Agrawal (supra)*.

(ii) Hotel Aggregators Market

(a) OYO Case[3]

In the hospitality sector, the Oravel Travels (OYO) case concerned a hotel aggregator who was brought before the CCI for allegations of abuse of dominance. As per the informant, OYO was a dominant business undertaking in the market offering inexpensive hotels to customers through online booking. It was argued that OYO used its strong position to impose unfair and biased terms on its partners.

The CCI held that OYO was not acting in violation of the Act. While arriving at its decision, CCI described the factors to assess dominance contained under Section 19(4) of the Act and observed, "*the Commission is of the view that though OYO may be a significant player in the relevant market, presently it cannot be unambiguously concluded that it holds a dominant position*". In the OYO case, CCI only emphasised on '*the market conditions in totality*'. Further, just like the Ola-Uber case, CCI appears to have exercised some restraint on account of the nascent phase of development that the relevant market was passing through.

2 *Samir Agrawal v. Competition Commission of India and Ors.*, (2021) 3 SCC 136.
3 *RKG Hospitalities Pvt. Ltd. v. Oravel Stays Pvt. Ltd.*, (Case No. 03 of 2019).

(b) MakeMyTrip, Goibibo and the OYO case[4]

In the second case, the CCI once again had a chance to look into the allegations of anti-competitive conduct on part of MakeMyTrip (MMT), Goibibo and OYO. The informant alleged that MMT and Goibibo imposed a price parity arrangement whereby partner hotels were not permitted to sell rooms to other Online Travel Agencies (OTAs) at a price lower than what was being offered by MMT and Goibibo. Additionally, it was claimed that FabHotels and Treebo were denied access to the market by MMT and Goibibo because the two companies refused to pay the hefty brokerage demanded by MMT and Goibibo. Lastly, it was alleged that another agreement was also entered into between MMT, Goibibo and OYO wherein MMT and Goibibo agreed to give preferential treatment to OYO. As per the informant, a net result of the above was that Treebo and FabHotels were denied access to the market.

The CCI upon going through the facts of the matter opined that relevant market in the matter was the "*market for online intermediation services for booking of hotels in India*". As regards the commercial arrangement between MMT, Goibibo with partner hotels, the CCI opined that the same fortified the position of MMT and Goibibo as a large number of hotels were drawn to the said platforms. Thus, the CCI held that MMT and Goibibo held a dominant position in the relevant market. As regards the agreement between MMT, Goibibo and OYO, the CCI was of the opinion that the same constituted a vertical agreement under Section 3(4) read with Section 3(1) of the Act. Upon taking into account the anti-competitive of the activities described above, CCI decided to impose a penalty of INR 223.38 crores on MMT and Goibibo, and a penalty of INR 168.88 crores on OYO.

(iii) Instant Messaging App Market

An intriguing series of antitrust proceedings have focused on the instant messaging app WhatsApp, which is owned by Meta. In 2016, CCI was first approached with the WhatsApp privacy update case[5] for the first time. In the privacy update case, data privacy was argued to be a crucial non-price factor influencing competition in the relevant market. However, CCI refused to act in the privacy update case for two reasons. Firstly, CCI stated that it did not have authority over matters relating to data and privacy under the Information Technology Act of 2000. Secondly, the CCI noted that the users had the option to reject the privacy update by opting out of the application.

Eventually, WhatsApp was again brought before the CCI in the *suo motu* matter[6] of 2021 for a revised privacy policy allegedly being implemented on a 'take it or leave it' basis. This time, CCI held that privacy was an essential non-price parameter of competition and formed a preliminary view that WhatsApp's privacy policy appeared to be an act of abuse of dominance. Accordingly, CCI passed an order directing the Director General to investigate further into the matter. Since then, the matter has passed through multiple litigation rounds. Ultimately, the Supreme Court of India in *Meta Platforms Inc. v. Competition Commission of*

4 *Federation of Hotel & Restaurant Associations of India (FHRAI) v. MakeMyTrip India Pvt. Ltd. (MMT) and Ors.* (Case Nos. 14 of 2019 and 01 of 2020).
5 *Vinod Kumar Gupta v. WhatsApp Inc.*, Case No. 99 of 2016.
6 *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Suo Moto Case No. 01 of 2021.

India[7] refused to interfere in a challenge against the order of CCI directing further investigation in the matter.

Yet another case involving WhatsApp is the WhatsApp Pay case[8]. The informant in this matter alleged that WhatsApp abused its dominance by bundling/ tying its messaging application with a payment option. As per the informant, this was intended to disrupt the UPI-enabled digital payments market. During the course of examining the anti-competitive effect of WhatsApp Pay, CCI defined the relevant markets to be *of over-the-top messaging services for smartphones in India*. While CCI was of the *prima facie* view that WhatsApp is dominant in the said market, it was observed that the UPI payments market was a separate product market independent in itself. Furthermore, the CCI noted that users were not constrained from using the instant messaging services of WhatsApp if they chose not to use WhatsApp Pay (the tied product). It was also noted that many stages were involved in making a WhatsApp Pay account, including the Know-Your-Customer requirements (KYC), which would disincentivise new users to shift automatically. Hence, CCI held that the matter did not pose any competition concerns.

(iv) E-Commerce Apps

Since 2015, Flipkart and Amazon in the e-commerce industry have been under the scrutiny of CCI. In the 2015 Flipkart-Amazon case[9], the informant alleged that the e-commerce companies were in contravention of Section 4 of the Act by entering in exclusive agreements to sell certain products while completely excluding the product's availability in the physical markets. The informant argued that such exclusivity allowed the e-commerce giants to determine, *inter alia*, the availability, sale price, terms of payment, and other sale parameters. It was also contended that exclusivity of sale also allowed the e-commerce entities to create artificial scarcity in supply.

In the 2015 decision, CCI rejected the contentions of the informant and explained the benefits of e-commerce platforms. CCI noted that e-commerce platforms allowed consumers to evaluate aspects such as quality and price of all the products in the same segment. Furthermore, e-commerce increased business efficiency as it eliminated intermediaries. Hence, CCI held that exclusive agreements between e-commerce platforms and sellers/distributors of goods and services did not cause appreciable adverse effect on competition. However, things completely turned in 2019, when a similar case was brought against Flipkart and Amazon.[10] This time, the informant alleged that there were several vertical agreements in violation of Section 3 of the Act between Flipkart and Amazon and their respective preferred sellers. It was also alleged that the preferred sellers were controlled by the e-commerce giants directly or indirectly and that the preferred sellers indulged in deep discounting. Hence, the informant alleged that the preferred sellers had a heavy influence on the prices. The CCI opined that a *prima facie* case of anti-competitive agreements under Section 3 was made out against the e-commerce giants which required

7 *Meta Platforms Inc. v Competition Commission of India & Anr.*, Special Leave to Appeal (C) No. 17121/2022.
8 *Harshita Chawla v WhatsApp Inc. & Anr.*, Case No. 15 of 2020.
9 *Re: Mohit Manglani v. M/s Flipkart India Private Limited and Others*, Case No. 80 of 2014.
10 *In Re: Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Ors.*, Case No. 40 of 2019.

further investigation. Accordingly, an investigation was ordered under the provisions of Section 26 of the Act by CCI in the matter. The matter passed through multiple appeals before reaching the Supreme Court which refused to interfere with CCI's order for investigation.

(v) Google and the Android Ecosystem

The search engine giant Google has also been involved in its fair share of antitrust matters in India. In October 2022, the Competition Commission of India (CCI), in two orders rendered over the span of a week, penalised Google for a sum totalling to INR 2,274.2 crores for conducting anti-competitive activities.

(a) Android and MADA Case[11]

In the first matter, the CCI dealt with the licensing requirements for Google's Android mobile operating system and various other proprietary mobile applications, including the Play Store, Google Chrome and YouTube.

The CCI observed that in order to permit mobile manufacturers to use the Android operating system and other allied applications, Google required the original equipment manufacturers (OEMs) to enter into multiple agreements, including the Mobile Application Distribution Agreement (MADA). As per the CCI, the MADA ensured that certain Google applications were pre-installed on Android devices, which gave a significant market lead to Google. In addition to the MADA, the CCI observed that OEMs were also required to enter into Revenue Sharing Agreement (RSA) which aided Google in maintaining the exclusivity for its services and helped in eliminating competition. Hence, the CCI, in its investigation, found Google to be dominant across several 'relevant markets' in India, including the market for the licensable operating system, application store for smart mobiles, general web search, and online video hosting platforms in India.

The network efforts, coupled with the status quo bias, as per CCI, created a significant entry barrier and constituted the denial of market access to competing applications in contravention of Section 4(2)(c) of the Act. Thus, in the first case, the CCI imposed a penalty of INR 1337.76 crores and drew a list of measures in a cease and desist order that Google was required to comply with.

(b) Google Play's Billing System Case[12]

In the second matter, the CCI was concerned with the mandatory terms of usage in Google Play's Billing System (GBPS) for the payments to be made during purchase of applications or during in-app purchases. The CCI observed that Google Play was the primary distribution channel for mobile applications, allowing Android users to install various applications from the market. The selling of applications along with in-app services constituted a major source of income for developers to monetise their applications. However, as per the CCI, to distribute in-app services and engage in the related transactions, the developers were

11 *In Re: Umar Javeed v. Google LLC and Anr.*, Case No. 39 of 2018
12 *In Re: XYZ (Confidential) v. Alphabet Inc. and Ors.*, Case No. 07 of 2020.

mandatorily required to configure the application in a manner that all purchases were routed through GBPS. If the developers did not comply with terms of usage of GBPS, they were not permitted to list the applications on Google Play and thus stood at the risk of losing the majority of the market share in form of Android users.

The CCI observed that the mandatory imposition of GBPS disturbed the incentives for innovation and limited technical development in the market for in-app payment processing services. Accordingly, Google was held to be in contravention of, amongst others, Section 4(2)(b)(ii) of the Act. In the second case, the CCI imposed a penalty of INR 936.44 crores on Google while also rendering a slew of measures under a cease and desist order that Google was directed to comply with.

(vi) Conclusion

A quick conspectus of the above cases highlights how CCI is cognizant of the prevalence of disruptive innovation in the markets. CCI has shifted from a price and commodity centric approach to deal with broader antitrust issues that emerge in cases involving non-tangibles and non-price factors.

One such factor appears to be the use of consumer data. The approach adopted by CCI appears to be to allow the nascent markets to develop under close supervision. When the digital market and jurisprudence around it is evolving, interventions by the CCI can potentially stifle innovation, which is essential for the growth of technology and sustenance of the pace of economy in times of pandemic.

In many decisions, CCI has acknowledged as to how disruptive innovation removes inefficiencies of the traditional markets and may even cause knee-jerk reactions in conventional markets. While deciding on the anti-competitive effects, the antitrust watchdog places heavy reliance on the segregation of relevant markets. However, as market boundaries get diffused further with development of a digital ecosystem, it becomes important to rethink the regulatory approach to deal with the emerging challenges in the competition law ecosystem. The regulatory enforcement for emerging forms of business must strike a fine balance between preventing anti-competitive effects and allowing businesses to flourish for long-term efficiency that arises from innovation.

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