



## RISING MONOPOLIES AND UNFAIR TRADE PRACTICES: DO COMPETITION LAWS NEED AN OVERHAUL?

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### ABSTRACT:

The aim of the Competition Act is to promote, sustain and maintain healthy competition in the market, while making it a safe space for the consumers. While this mechanism has been running for a long time, there comes a point where a little repair is necessary. In this article, we have highlighted how in this age of rampant competition, only a handful control the grounds and the rest have to follow suit. Even amidst a global pandemic, these few are soaring while the rest have dipped far below. The essence of the law which lies in preventing monopolies and ensuring fair trade is less than alive and we need to take cognizance of the same. We have discussed 'The Reliance Angle' of the new India as well as the raging, 'Google Dominance'. This article discusses a range of issues with the current Competition Laws, some prime monopolies around the world and the total dominance of Reliance Industries in the Indian market.

### KEYWORDS:

Monopolies, Abuse of dominance, Free-market economy, Competition Act

### INTRODUCTION:

*"Freedom requires the Government to keep the channels of competition and opportunity*

*open, prevent monopolies, economic abuse and domination"* - Herbert Hoover

The literal definition of monopoly can be understood as "a market situation where one company, or a cluster of companies acting in concurrence, controls the functions of the market, mainly, supply and demand of a service provided or any good". Evidently, the economic implication or the better term here could be the economic repercussions of this situation has been synonymous with prices touching sky high limits and the restriction of output creating a major imbalance. The intent and structure of regulation of the market around the globe has consequently attempted to mitigate or break up monopolies in an attempt to negate and curb this abusive pricing power.

Even though competition laws have been in play almost for 2,000 years, the framework and intellectual roots of the existing notion for competition policy and anti-monopoly regulation, referred to as anti-trust in the US, can be traced to justice Louis Brandeis of the US supreme court (1916-1939) who further argued that there should be a democratic distribution of power and opportunity in the political economy to keep up the balance and that "industrial liberty" must go hand-in-hand with political and religious liberty to achieve the desired output. The basis of his arguments was the Madisonian principles with significant inputs from the Chicago school, this "Brandeis philosophy" has morphed into one of consumer welfare, measured principally by the cost remunerated by consumers as the test of policy effectiveness.



## ENTERPRISES WITH MONOPOLISTIC CHARACTERISTICS:

The combined market capitalization of just four but major Multi-national companies - Facebook, Apple, Alphabet (Google) and Amazon—is greater than the gross domestic product (GDP) of India as a country alone. In the US and lately as in India, corporations which contribute a disproportionately large share of their consumer markets are rising as we speak. The current regulatory architecture is undulating inadequate to comprehend and determine whether this corporate focuses on aggregating towards the rise to monopoly power. The conditions in India are much similar to that of US and Europe, the rise in corporate epicenters has led to the realization about the gap and limitations in the existing laws.

The EU, and its rival tsarina, Margrethe Vestager, have used existing competition regulation framework to examine and analyze the “abuse of market concentration” with some ardent efforts. The most recent judgment on disrupting competition and the abuse of market power in the international arena have come about in the European Union. Some important landmark judgments were adjudged in 2004 against the “lack of interoperability” of the Microsoft operating system and in 2017 against Google’s Android operating system. In the US, it is still a debatable topic among a group of observers who are known as “the New- Brandeisians”.

<sup>1</sup> Narayan Ramachandran, 'Opinion | India's Competition Policy Must Keep up with Emerging Threats' (*mint*, 2020) <<https://www.livemint.com/opinion/columns/opinion-india-s-competition-policy-must-keep-up-with-emerging-threats-1565025039611.html>> accessed 26 October 2020.

Reports suggest that the aforesaid group has created a situation where they are pushing lawmakers to discard short-term price effects as the sole determinant of abuse and amplify the scope of determining to curb the shortcomings. Lina Khan who is a leading competition attorney, in a Yale Law Journal article titled Amazon’s Antitrust Paradox, asserted that “it doesn’t matter if companies like Amazon are making things cheaper in dollars if they are acquiring by the means of predatory pricing strategies to dominate several industries and choke off competition and choice”.<sup>1</sup>

## OVERVIEW OF THE COMPETITION ACT AND ITS SHORTFALLING:

The competition market of India is administered under the Competition Act of 2002. This Act controls the activities that would affect the market forces that may have an “adverse effect on competition in India”. The Act is now insufficient to deal with the recent demands and changing business environment in telecommunications, and e – commerce sector, and an indirect role or an invisible hand of Government in eliminating such competition. The similar dearth plagues the rest of the globe - the dominance created in the market and a test of price “raises” bars the commission from challenging abuse.<sup>2</sup>

Section 4 of the Indian Competition Act 2002, as amended (the Act) talks about organizing and regulating the conduct of dominant enterprises by prohibiting the abuse of the power and position of a dominant in the

<sup>2</sup> Anand S Pathak, 'India - The Dominance and Monopolies Review - Edition 8 - TLR - The Law Reviews' (*TheLawreviews.co.uk*, 2020) <<https://thelawreviews.co.uk/edition/the-dominance-and-monopolies-review-edition-8/1228453/india>> accessed 27 October 2020.



market by an enterprise or cluster of companies. The flaw in the law is that it forbids the abuse of power in a dominant position but not the fundamentals i.e. the creation of dominance in the first place. The act has the power and authority to regulate the conduct of both the sectors – private and public which are state owned enterprises including government departments that are involved in non-sovereign functions and activities carried out across all sectors of the Indian economy.

Since there is lack of recent developments in formal policy statements in regards to application of Section 4 by the commission till date, the decision of the commission is treated as apex and continues to illuminate the way as the only source of guidance. The recent times i.e. the time period between 2019–20 have seen varied changes like the commission’s decision of adopting a highly domineering regulatory framework. And as per the guidelines, investigations were initiated into the gadgets market like e – commerce and others where a remarkable declination from the recent patterns in competition law enforcement was observed. The Competition Act holds a great importance for regulating the market as it functions to forbid an enterprise or corporation to enjoy any dominant position in the market from abusing its position of dominance. As per the interpretation of the act, “dominant position” can be understood as a position of authority or strength, enjoyed by the said corporation in the market of India which –

- (a) enables it to function independently of competitive forces existing in the relevant market or

- (b) To have an effect on its competitors or consumers or the relevant market in its favor. The shortcoming in the competition law is that it does not provide any single criteria for determining or classifying whether a corporation or cluster enjoys the dominant position in the relevant market but rather it provides a detailed reasoned list involving several non- exhaustive factors which the CCI may consider while determining such dominance as required by Section 19 of the Act regarding the context of non – exhaustive factors. Some of these factors can be - size of the market, share of the market, resources possessed by the corporation, size and importance of the competitors, vertical integration, entry barriers and dependence of consumers on the allegedly dominant enterprise and subsequently proportional purchasing power or capacity. The function and significance of each of these factors mentioned above, varies depending upon the facts and issues of each case and the alleged theory of harm, but while analyzing its decisions, the Commission will levy the dominance of the allegedly dominant enterprise as per each of the Section 19 factors. Usually, market share and its size and resources of the enterprise will be the chief prerequisite in the Commission's assessment of dominance.

The Competition Act, 2002 explicitly mentions about an extensively comprehensive list of practices and steps carried out which would result in institutionalization of dominant position which subsequently constitute abuse of dominance and any steps carried out by a dominant firm in the furtherance of the same which falls within the scope of such conduct is likely to be forbidden. These include:



- daunting unfair or discriminatory terms on sale or purchase of goods/services, including predatory pricing;
- putting limitations or restrictions;
- manufacture of goods or stipulation of services of a market; or
- technical or scientific advancement connecting to goods or services to the discrimination of consumers;
- indulging in practice or practices which are consequential in denial of market access, in any and all manner;
- drawing the conclusion of contracts subject to acceptance by other parties of auxiliary obligations, which already exists in nature according to commercial usage and have no correlation with the subject of such contracts; and
- Utilizing one's dominant position in one relevant market to penetrate into or guard another.

The act however has certain exceptions while interpreting as it is not entirely forbidden at all the stages. The exclusion on implementing "unfair" or "discriminatory" pricing does not apply to dominant enterprises which take measures and the conduct is carried out to meet the competition in the market. This is a genuine concern and a precise observance which needs to be understood as both the aforementioned terms "unfair" or "discriminatory" have not been defined under the Competition Act. The major areas covered by the CCI in the instances of abuse of dominance are sports regulation, stock exchange, real estate etc. It must be noted that CCI remarkably determined the scope of "relevant markets" while investigating into potential abuse of dominance however the

CCI is prone to define relevant market in the most rigid and narrow way possible. This can be understood by the example of DLF decision, the CCI intended to move forth with rather a precisely narrow definition of relevant market while analyzing the alleged abuse of power by DLF, a real estate company. The fundamental issue in the allegations was whether "high-end" residential apartments in a small geographical region in the city of Gurgaon would constitute a relevant market. The decision of the analysis marked the difference between the markets for high-end and low-end apartments and thus can be further categorized as two different individual product markets. The reason behind this decision was the different demands and preferences of the consumers which was given the priority basis while deciding. A similar situation arose in the recent auto – parts decision where the CCI undertook the state practice while giving heed to the established precedent in the DLF case by considering each brand of cars to be posed as a separate relevant market for the supply of spare parts and after-sales services.<sup>3</sup>

The interpretation used in Section 4 (1) of the Competition Act directs that abuse of a dominant position is subject to a per se prohibition which literally means that the act is inherently illegal. Thus, CCI does not necessary requires to take steps for a market effect analysis for cases regarding abuse of dominance. Nevertheless, it can be easily inferred from the decision reviewal and behavioral pattern of the CCI that it is prone to analyze the market effects along with

<sup>3</sup> Samir Gandhi, Hemangini Dadwal and Indrajeet Sircar, 'Antitrust and Competition Laws In India' (*Global Compliance News*, 2020)

<<https://globalcompliancencnews.com/antitrust-and-competition/antitrust-and-competition-in-india/>> accessed 29 October 2020.





dealing with the cases of abuse of dominance together.

In the case of *AMMFI*, the Commission found that Grasim created dominance in the relevant market. Grasim was the sole producer of VSF in the entire country and from the period of 2011-2016 where it also enjoyed a market share of 87 per cent. The spinners of the tertiary sector did not find the outlook of importing VSF to be commercially viable or feasible on account of the anti-dumping duty imposed by the government on imported VSF during the period of its investigation. Grasim on the other hand was a flagship company of the Aditya Birla Group, one of the leading mega corporations of the country and had a controlling stake in many large and small companies. The group companies of Grasim had witnessed significant growth in recent years in terms of revenue and assets, and the revenues generated by Grasim from the sale of VSF had also seen a considerable boost. The Commission on investigation found that the manufacturing process of VSF was extremely capital intensive and involved a complex technological process that required the incurring of huge investments. Moreover, the industry was subject to rigorous environmental regulation and the production process required a large quantity of water, which acted as significant entry barriers for potential entrants.

In *Adani*, the Tribunal apprehended that since Adani was the sole enterprise providing natural gas to industrial consumers in the district of Faridabad and there was no alternative available to natural gas in the city

of Faridabad at the relevant time, Adani was thus dominant in the relevant market. The Tribunal also adjudged that the mere fact about the pipeline structure installed by Adani could be used by its competitors to distribute CNG did not have any impact or correlation on the finding that Adani was dominant.<sup>4</sup>

The Section of Abuse -

Section 4(2) of the Act seems to contain an exhaustive list of conduct that may constitute abuse of dominance, unlike Article 102 of the Treaty on the Functioning of the European Union (TFEU). The list of 'abuses' in Section 4(2) is adequately broad thus flexible enough that it could cover most exploitative and exclusionary conduct by corporations that could be characterized as an abuse of dominance.

Section 4(2)(c) particularly states prohibition by any conduct by a dominant enterprise which consequently results in 'denial of market access in any manner'. The said dominance is often used by complainants or informants to hide restricted dealing, denial to supply and other theories of anticompetitive harm that do not explicitly fall within any of the other categories in Section 4(2).

It is to be observed that, unlike Article 102 of the TFEU as interpreted by the EU courts, the Act does not provide an excuse for objective justifications as defenses to the anticompetitive conduct of dominant enterprises. Under the Act, the only defense acknowledged for abusive conduct of a dominant enterprise is the 'meeting

<sup>4</sup> Anand S Pathak, 'India - The Dominance And Monopolies Review - Edition 8 - TLR - The Law Reviews' (*TheLawreviews.co.uk*, 2020)

<<https://thelawreviews.co.uk/edition/the-dominance-and-monopolies-review-edition-8/1228453/india>> accessed 27 October 2020.



competition' defense which still prevails. Till date, the Commission has not yet provided any authorized guidance, including in its decisions, on the scope of this defense. As previously mentioned, the Draft Amendment Bill seeks to exempt the reasonable exercise of intellectual property rights from Section 4 for further lucidity.

### THE RELIANCE ANGLE:

The topic of Monopoly would definitely attract the example and strategies used by Reliance to emerge as a monopoly in telecom Industries and maintain it. With that Reliance is now trying to expand its reach in other sectors as well. Most of it was also because of its partnership with Google, Facebook and Microsoft and some other strategies, one of them being making its customers used to the benefits of Jio by giving them high data and then increasing prices. Along with that, Reliance also introduced its keypad phones with network. All these strategies combined made Reliance what it is today.<sup>5</sup>

Moreover, other businesses have given up and realized that they need to associate with Reliance in order for them to keep surviving and growing and further a considerable increase in its business. Also, Corona virus outbreak has further increased the net

consumption with everyone at home and everything from work to classes being online.<sup>6</sup>

However, Reliance didn't start its business with telecom industry but used its revenue from Petroleum Industry to finance and entered Telecom Industry. Soon it was at top of the Industry with Jio. Reliance already had reputation and thus raised capital by selling its shares and there were investments from top companies like Facebook, Google and Microsoft. Reliance's combined market capital is worth US \$189 billion which ranks in top 50 global lists and the 10th in Asia.<sup>7</sup>

Not only Reliance but Google and Facebook as well have been monopolistic in nature and are under investigation for allegedly engaged in monopolistic behavior in Indian Markets. Google has nearly total monopoly in Indian markets in terms of use of Smartphone platforms in India where its apps like Play Store and Android Operating system is used by nearly 95% of Indians who use smart phones.<sup>8</sup>

However, Indian Companies like Paytm, MakeMyTrip, PolicyBazaar and Sharechat have come together to find a possible solution to the Monopoly of Google in Indian Markets. It was after Paytm got kicked out of

<sup>5</sup> Rohan Venkataramkrishnan and Rohan Venkataramkrishnan, 'What Use Will India's Internet Revolution Be If It Ends Up With A Reliance Jio Monopoly?' (*Scroll.in*, 2020) <<https://scroll.in/article/968185/what-use-will-indias-internet-revolution-be-if-it-ends-up-with-a-reliance-jio-monopoly>> accessed 28 October 2020.

<sup>6</sup> From Atmanirbhar Bharat To Reliance India | NewsClick' (*NewsClick*, 2020) <<https://www.newsclick.in/Narendra-Modi-Govt-Mukesh-Ambani-Jio-5G-Atmanirbhar-Bharat-Reliance>> accessed 28 October 2020.

<sup>7</sup> 'Facebook Allegedly Manipulating Competitors With User Data' (*The Financial Express*, 2020) <<https://www.financialexpress.com/industry/technology/facebook-allegedly-manipulating-competitors-with-user-data/1757504/>> accessed 27 October 2020.

<sup>8</sup> Robert McMillan and others, 'How Google Interferes With Its Search Algorithms And Changes Your Results' (*WSJ*, 2020) <<https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753>> accessed 26 October 2020.



Play Store which is Google's app. Even though it was for a few hours the abuse of dominance by Google was quite evident. Further, Google has decided to strictly enforce the in-app purchase policy which tensed the businesses even more. They have formed an alliance to launch a new app to compete against Google and break its monopoly. Google's 30% commission policy also underscores its monopoly.<sup>9</sup> Such Monopolies lead to data manipulation.<sup>10</sup>

#### **DATA MANUPALATION, RIGGING OF SHARES AND PRICE FIXATION; HURDLES COMPETITION LAWS HAVE TO OVERCOME:**

In the era of digitalization one of the most sought out valuable for an enterprise is the data of the users which they can use to control or influence the market. Data can be easily used to manipulate and shape public opinion and can be used in the favor of the Manipulator if done purposefully or could go drastically wrong if it was because of a mistake. A recent investigation by Wall Street Journal has found that the Google

manipulates search results to favor big companies and hides sensitive issues. Google hides search results of sensitive issues like that of immigration and abortion. Even though Google has declined these allegations every time, many reports have claimed that Google uses such manipulation and this Algorithm starts even before one type into the Google Search.<sup>11</sup>

Not only Google but Facebook also comes in the list of manipulation. Facebook uses user data as a tool to bargain and manipulate the competitors as is claimed by a leaked civil suit. It says that Facebook rewards its partners by using personal data and deprives its competitors from the same information.<sup>12</sup> Reliance Industries was also found to be manipulating share prices and was barred by regulators (SEBI) after being found guilty<sup>13</sup>. Regulatory Authorities like SEBI need to take big steps in tracking down this manipulation as fast as they can. In January the Chairman of SEBI said that social media posts have helped in identifying Data Manipulation and that they would keep an

<sup>9</sup> GRADY MCGREGOR, 'Tech Firms In India Coalesce Around A Common Foe: Google'S 'Monopoly'' (*Fortune*, 2020) <<https://fortune.com/2020/10/06/google-india-monopoly-paytm-ceo-play-store-fee-commission/#:~:text=Sharma%20called%20Google's%2030%25%20commission,that%20underscores%20its%20E2%80%9Cmonopoly.%E2%80%9D&text=Google%20has%20near%20total%20control,95%25%20of%20India's%20smartphone%20users>> accessed 27 October 2020.

<sup>10</sup> Saket Sundria, Siddharth Philip and Bhuma Shrivastava, 'Reliance Industries Falls After Manipulation Charge, Trading Ban' (*BloombergQuint*, 2020) <<https://www.bloombergquint.com/markets/reliance-industries-falls-after-manipulation-charge-trading-ban>> accessed 27 October 2020.

<sup>11</sup> Karandeep Singh, 'Indian Startups Are Looking To Break Google's Monopoly With A Localized Play

Store Alternative' (*Android Police*, 2020) <<https://www.androidpolice.com/2020/10/01/indian-startups-are-looking-to-break-googles-monopoly-with-a-localized-play-store-alternative/>> accessed 30 October 2020.

<sup>12</sup> Ben Gilbert, 'Google Reportedly Manipulates Search Results To Hide Controversial Subjects And Favor Big Business' (*Business Insider*, 2020) <<https://www.businessinsider.in/tech/news/google-reportedly-manipulates-search-results-to-hide-controversial-subjects-and-favor-big-business/articleshow/72076450.cms#:~:text=Google%20is%20reportedly%20manipulating%20Google,su bjects%20E2%80%94%20including%20abortion%20and%20immigration>> accessed 29 October 2020.

<sup>13</sup> PRABIR PURKAYASTHA, 'Reliance Tech Arm Expands Monopoly Muscle In India' (*Asia Times*, 2020) <<https://asiatimes.com/2020/08/reliance-tech-arm-expands-monopoly-muscle-in-india/>> accessed 25 October 2020.



eye on Social Media posts to track down further manipulations.

The disclosure rules are used by companies to manipulate and misinform and the same goes unnoticed because neither SEBI nor market watchdogs investigate the quality of disclosures.

Due to their complete domination in the economy of the country, the government of America is planning on dividing the biggest giants in the tech market like Amazon, Google, Facebook in small entities, both sides of the political aisle are coming together for this decision as per their knowledge their biggest concern is that these companies have too much power over their country's economy, society and democracy. President Trump has said that "something is going on in regards of monopoly," and that it's "a bad situation."<sup>14</sup>

This decision has also come strong as the people are in support of it. They are worried about the volume of personal data the tech giants possess and the sway these companies have over their lives. Facebook has 2.4 billion active monthly users. Amazon accounts for almost 40 percent of all e-commerce expenses in America. Google gets more than 92 percent of global search engine inquiries.

The government is also improving their scrutiny on these tech giants, which is facing antitrust investigations by the US department of Justice. One of the main rationales behind antitrust laws is to protect competition and the market. According to Kabrina Chang, a clinical associate professor of markets, public policy, and law, the first step in determining whether a company has a monopoly is defining its market—something that might not be so effortless to get along with modern tech giants.<sup>15</sup>

The biggest pause before breaking up these companies is how much we rely on them. It is due to the amount of power we have given to them, over us, our data, and our democracy. Also, the biggest problem in taking these companies down is the American approach tends to be too much one of free markets and allowing firms to do as they please and while that creates worth, it also creates grave perversion as to who gets to keep that worth.

"We need novel and enhanced economics and legislation to get this accurate—and to understand the fact that the nature of creating worth has altered drastically."<sup>16</sup>

Mukesh Ambani has taken over the telecom sector of the company. The country's richest man has outgrown smaller rivals and other competitors. When his Reliance Jio business

<sup>14</sup> Jake Kanter, 'Trump Drops The Biggest Hint Yet That He's Coming After The Big Tech 'Monopoly' With Potential Billion-Dollar Fines' (*Business Insider*, June 2019)

<<https://www.businessinsider.in/tech/trump-drops-the-biggest-hint-yet-that-hes-coming-after-the-big-tech-monopoly-with-potential-billion-dollar-fines/articleshow/69729645.cms>>

<sup>15</sup> Russell Russell Brandom, 'How To Break Up Facebook, Google, And Other Tech Giants' (*The*

*Verge*, 2020)  
<<https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook>> accessed 7 November 2020.

<sup>16</sup> Lokesh Kaushik, 'My Opinion: Manipulating & Suppressing Of Data Is Decaying The Foundation Of India's Economy' (*Thelogicalindian.com*, 2020)  
<<https://theologicalindian.com/opinion/raghuram-rajans-data-manipulation/>> accessed 27 October 2020.





was first introduced into the market, there were only two other national players in the private sector: Bharti Airtel and Vodafone Idea. Both are struggling. Vodafone might not survive in the country. Several years ago, India had one of the world's most competitive telecom markets, with numerous contenders for business. Now, there is a serious risk of monopoly.

Due to its generosity through relying on its parent company 'Reliance Industries', Jio has introduced super low-cost access to a state-of-the-art network. Due to these tens of thousands have lost jobs not only in the telecom sectors but also outside. Normally, the job of the competition authority is to ensure this sort of thing doesn't happen. There are only two explanations for this crisis that India now faces: Either regulators have failed drearily in their jobs over a sustained period, or they have colluded in Ambani's land grab. That is because all the country's regulatory moves in the last few years have favored Jio.<sup>17</sup>

Since Jio's arrival, India's competition authorities have swayed through a succession of takeovers and mergers that would have set off alarms in just about any other democratic country. Which led to merging of Airtel, MTS, Reliance Communications, Telenor and Tikona? Vodafone India and Idea Cellular, two former titans. No doubt India was ripe for such a change. India desperately needs to retract; it is starting to rescue telecom companies and could offer relief to companies that owe licensing fees. But it will have to go far to convince international communities that it upholds fair play.

#### CONCLUSION: -

Since its establishment the Competition Act has resolved various problems related to monopoly and abuse of dominance by big corporates. It has even halted combinations which were deemed anti-competitive. However, in today's market there are enterprises that have seemingly prevented healthy competition by monopolizing the sector. Any person with decent amount of knowledge of Competition laws will know for a fact that the Competition Act 2002 does have its flaws. Further the Competition Act is becoming more and more impotent with the developments in the technological fields and the digital era and its scope is getting narrower. Enterprises are exploiting the loopholes and the conservative laws of the Act without any consequences. It is utmost necessary for the Competition Act to keep up with these changes specially after the Covid-19 pandemic wherein, except for a handful, most of the companies incurred huge losses and are fighting for their survival. Their protection from predatory enterprises is needed for a free market economy to thrive. The issues mentioned in the article and emerging threats to the competition in the market point out the incompetency of the global competition laws and why revamping the laws could be the best solution.

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<sup>17</sup> Morris Lore, 'India Needs U-Turn To Prevent Jio Monopoly | Light Reading' (*Light Reading*, 2020) <<https://www.lightreading.com/asia/india-needs-u->

[turn-to-prevent-jio-monopoly/a/d-id/758142](https://www.lightreading.com/asia/india-needs-u-turn-to-prevent-jio-monopoly/a/d-id/758142)> accessed 30 October 2020.