



**REDEFINING THE CONTOURS OF  
THE DIGITAL MARKET: THE  
ARTIFICIAL INTELLIGENCE  
PERSPECTIVE OF COMPETITION  
LAW**

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**ABSTRACT**

The author circumscribes its research to the digital markets or web search-oriented markets. The author analyses the research subject with three approaches. Firstly, the interrogative approach whereby the research is objectified towards analysing the setbacks that could be faced by the Competition Commission of India in operating the digital markets as the competition markets. Secondly, the comparative approach wherein The United Nations Conference on Trade & Development key issues and reports in line with Competition Act 2002, European Union Competition Policy is being compared in order to extract the vulnerable points of the Competition Act 2002 in terms of digital markets & artificial intelligence. Lastly, the remedial approach to specify the recommendations to be adopted in the Indian Competition Policy in reference to artificial intelligence & digital markets.

Key words – Artificial Intelligence, Mergers, Multi Homing, Market Tipping, Lock-in-

Effects, Algorithm, Technical Assistance, United Nation Conference on Trade and Development, Data-Driven Network Operation and Competition Law

**1. INTRODUCTION**

Epochal events often drive transformation for entire industries in a short span of time. The Covid-19 pandemic has been proved to be one such influencer for e-commerce growth in India. The last quarter of 2020, the India's e-commerce grew by 36% and 30 % in terms of volume and gross merchandise value (GMV) respectively<sup>1</sup>, while the ordinary order value disintegrated by 5% in Q4 of 2020 as compared to Q3 of 2020 whereby the increasing rate of illicit practices was been executed to reach this threshold against consumers & other small traders. In this concern, it is crucial to be in consonance with regional & international cooperation guidelines for the effective enforcement of the competition laws wherein the subject matter is circumjacent to digital markets due to its global nature.

In reference to the antecedent mentioned, The United Nations Conference on Trade & Development (UNCTAD) Intergovernmental Group of Experts on Competition Law & Policy 19<sup>th</sup> session held from 07-07-21 to 09-07-21<sup>2</sup> wherein the key issues include:<sup>3</sup> 1. Competition Law, Policy & Regulation in the Digital Era 2. Review of capacity building on the technical assistance in competition law. The 19<sup>th</sup> session deduced that the competition

<sup>1</sup> *E-commerce Grows By 36% In Last Quarter in India: Report* Money control, <https://www.moneycontrol.com/news/business/e-commerce-grows-by-36-in-last-quarter-in-india-report-6484431.html> (Last Visited Nov 1, 2021)

<sup>2</sup> UNCTAD Intergovernmental Group of Experts on Competition Law & Policy 19th

Session, in Intergovernmental Group of Experts on Competition Law & Policy 19th, Single Page, <https://unctad.org/es/node/29990> (last visited Nov 1, 2021)

<sup>3</sup> Ibid



authorities in the developing countries encounter several challenges in enforcing competition laws against digital markets<sup>4</sup>.

Thus, the aim of this research paper is triple edged. Firstly, to understand the features that could distort the digital market competition. Secondly, to construct the setbacks that could be faced by the CCI and lastly, to adopt remedial measures in order to drive the digital market efficiently.

## 2. HYPOTHETICAL CONSTRUCTION

The UNCTAD survey published on 28-04-21 envisage some of the major setbacks for the competition authorities of the developing nations circumscribing to the relevant market, determination of dominance in digital markets & vertical service arrangements<sup>5</sup>. The concluding remarks of survey reports provide the dynamic structure of digital markets, zero-price services, network effects, market tipping, lock-in effects and multihoming are the elements that need compact observation while establishing the relevant markets and determining the market power.

In consonance with the preceding mentioned, there are specifically two scenarios subject to Indian Competition policy, on one hand the growth of Indian digital market is being acknowledged from Q4 of 2020, and on the other hand the Competition Commission of India in its order dated 09-11-20 against Google LLC (Google Pay) declared on the

basis of the information that the Google LLC is abusing its dominant position in the market of Appstore for android mobile operating systems whereby the CCI contended that Google is dominant in the worldwide market (excluding China) for app stores for the Android mobile operating system. Google's app store, the Play Store, accounts for more than 90% of apps downloaded on Android devices and Google's app store dominance is not constrained by Apple's App Store, which is only available on iOS devices<sup>6</sup>. Further, it was also observed by the CCI that Google is using certain kinds of algorithm to secure the top position in the Play Store search list for Google Pay<sup>7</sup>. This case replicates that Indian Competition Policy is efficient enough to construct the notion of relevant market and abuse of dominance through traditional competition theories, but at the same time lacks the gravity of conclusiveness in terms of other factorial attributes which are crucial to be considered by regulatory authorities.

### 2.1. PURPOSE OF RESEARCH

Incoherence with the antecedent mentioned, the purpose of the existing research is to gauge the operational aspect of the Artificial Intelligence which is core technology used in digital market. Further, it is also crucial to analyse the UNCTAD reports to constructively reinstate the factorial attributes in which Indian Competition Policy lacks. Moreover, comparison of the international competition policy and Indian competition

<sup>4</sup> United Nation, ensuring open, competitive & fair digital markets (United Nation Conference on Trade & development) (2021), <https://unctad.org/news/ensuring-open-competitive-and-fair-digital-markets> (last visited Nov 1, 2021)

<sup>5</sup> Competition Policy & regulation in digital era (United Nation Conference on Trade & Development)

(2021), [https://unctad.org/system/files/official-document/ciclpd57\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd57_en.pdf) (last visited Nov 1, 2021)

<sup>6</sup> Case No 07/2020 (Competition Commission of India)

(2021), <https://www.cci.gov.in/sites/default/files/07-of-2020.pdf> (last visited Nov 1, 2021)

<sup>7</sup> Ibid at Pg-38



policy is mandatory to assess the lacunas of the Indian competition policy in terms of digital markets.

## **2.2. RESEARCH QUESTIONS FORMULATED**

Construing the preceding mentioned, hereinafter mentioned questions should be addressed as soon as possible:

- A. What features AI have to offer through the digital markets which are inclined towards causing a considerable threat to market competition?
- B. What are the challenges faced by the Competition Authorities of the developed nations due to digital market distorting competition?
- C. Which is the juridical mechanism to be adopted in Indian Competition Policy to drive digital market competition with efficacy?

## **2.3. HYPOTHETICAL STATEMENT**

The research is examining the following hypothesis:

**“Indian Competition Policy is ample enough to drive the digital market competition with efficacy.”**

## **3. ARTIFICIAL INTELLEGEENCE FEATURES RENDERED BY DIGITAL MARKETS DISTORTING THE MARKET COMPETITION**

In order to counteract certain modalities of technological aspects of the digital markets, it is also important to decrypt artificial intelligence features that cumulatively distort

the market competition. The UNCTAD Intergovernmental Group of Experts on Competition Law & Policy in its 18<sup>th</sup> session held in Geneva during 10-07-19 to 12-07-19 considered hereinafter mentioned features integrating threat to the digital market competition<sup>8</sup>:

### A. Multi-sided Markets

This is a type of practice that includes behaviour encryption data gateway. According to European Commission, “an online platform is an undertaking operating at two or more-sided markets at the same time, which operate the internet to extract value for at least one group”. The platform imparts services & execute per se the activities such as marketplace, social networking, search engines & payment gateways distributively. The only way through this is to import the tools which cumulatively store the behaviour patterns of the customers.

### B. Research on behavioural tendencies of the consumers

Research on behavioural tendencies is being executed with the use of algorithms so as to extract corrective value behaviours in line with emerging trend analysis whereby the deductions are extracted from the bunch of data. This further reinforces dominant platform market power & dominance by switching platforms so as to provide new services in line with the trend analysis report & corrective value behaviours. Due to this dominance factor, the consumers have fewer alternatives & almost no control over the collection & use of their data.

### C. New business model & use of the algorithm

<sup>8</sup> Redirect Notice Google.com, <https://www.google.com/url?sa=t&source=web&rct=j&url=https://unctad.org/systems/files/official->

document/ciclpd54\_en.pdf&ved=2ahUKEwiXrbGw mLTyAhXt7HMBHZ2xAn (last visited Nov 05, 2021)



Digital platforms have new business models & functions with the algorithm which are designed to collect & process data with decisions based on that data. Such a platform requires high up-front investments & low marginal cost whereby storing data would be an exorbitant process but the marginal cost specified to operate on additional data is low whereby the same data is used to improve the algorithms so as to impart personalized services to the customers.

D. Improvising algorithms in order to manipulate the market.

One of the best features of the data-driven markets is that the algorithm automatically improvises itself in consonance with new emerging data & cumulatively provides personalized services. For instance, Google can use its search engine optimization tool to improve its search engine algorithms whereby novice corporations in the market do not have these pros prevailing in tech-oriented markets.

E. Data-driven network operation

The whole web search market relies on the network effect which refers to the effect that the user of one good or service has on the value of that product to other existing & potential users. Data-driven markets usually based on peer pressure & associated behaviour as a consequence of such an act. For instance, people around the globe wish to use Facebook for social networking simply because their friends do so. The value of a digital platform proportionally & mandatorily depends on the number of users. Cumulatively through the data of large segment of customers, they are able to collect much greater segment of the data & use those data in order to improvise their services. This uninterrupted loop makes it very difficult for

a novice entity to compete against any tech giant.

F. Dominant Digital Platform

Dominant platforms had expanded their business of operations by incorporating customer's behavioural tendencies to provide other business services. For instance, Google provides its Android operating system free of charge in order occupy place in more smart phones so as to collect more data. Google also provides other services like cloud storage, payment gateway, video sharing platforms & these have cumulatively increased the quality of its search engine services on one hand and increased the value of data sold to advertisers for better-targeted advertising.

G. Absence of Neo-classical approach towards business

The new business models initially sequence growth over profits, that is to include maximization of number of users rather than focusing on the economic valuation of the corporation. Dominant platforms can operate based on such a business strategy to incur losses by investors. For instance, Amazon was permitted by the investor to grow without being concerned about the profits in the initial years & later it revolutionized the industry.

Herein abovementioned, we had discussed the features which have potential to threat the digital market competition in consonance with this it is also crucial to construe the principles of the competition laws which are being dragged along with these features.

**4. THE NOTIONAL CONCEPTS OF THE COMPETITION LAWS WHICH ARE BEING INVOKED DUE TO**



## EXECUTION OF ANTI-COMPETITIVE BUSINESS PRACTICES IN DIGITAL MARKETS

The member states of the sixth United Nations Review Conference requested the UNCTAD secretariat to prepare the points for consideration on Model Laws on the Competition Policy, whereby in its 10th session held between 07-07-09 to 09-07-09<sup>9</sup>, UNCTAD expert committee prepared the same based on the proposal received by the member states. The report made by the UNCTAD in its 10<sup>th</sup> session being a grundnorm for the competition law & policy defined certain terms in line with the global digital market competition. Eventually the features of the digital platforms as mentioned preceding drag these notional concepts as a consequence:

- A. Relevant Market<sup>10</sup> {Chapter II Provision 1(d)}  
 “General conditions under which sellers and buyers exchange goods, and imply the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers, and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not-insignificant amount”

<sup>9</sup> UNCTAD: Model Law on Competition (United Nation Conference on Trade & Development) (2010), [https://unctad.org/system/files/official-document/tdrbpconf7d8\\_en.pdf](https://unctad.org/system/files/official-document/tdrbpconf7d8_en.pdf) (last visited Nov 06, 2021)

If we analyze this definition, it could be deducted that this definition is a classifier as it classifies the specific group of sellers & buyers dealing in a certain specific group of products or services. Further, it also includes all substitutable products & services which cumulatively also include the products & services offered by the digital markets which in consequence operate through Google SEO tool in order to provide their products & services and also operate as a separate digital platform.

- B. Dominant position of market power<sup>11</sup> {Chapter II Provision 1(b)}  
 “It refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services”.  
 From the abovementioned phraseology, it could be deducted that the definition does not only include joint dominance but also circumscribes itself to the future possibilities of collective dominance wherein more than two companies join in order to control the relevant market.
- C. Abuse of Dominance<sup>12</sup> {Chapter IV Provision 1}  
 “Acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:  
 Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service or groups of goods or services

<sup>10</sup> Ibid at page 3

<sup>11</sup> Ibid

<sup>12</sup> Ibid at page 4.



- ii. Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development”.

From grammatical interpretation of the preceding mentioned provision it could be extracted that to decide the dominance of any corporation, the competition authorities depend on several factors including barriers to entry, and actual and potential competitors, the durability of high market share, buyer power, economies of scale and scope, access to upstream markets, and vertical integration, market maturity/vitality, access to important inputs, and the financial resources of the firm and its competitors.

#### D. Arrangements<sup>13</sup>

“The agreements or arrangements which are between two market competitors in order to fix the price or other terms of sale including in international trade whereby it also includes collusive tendering, Market or customer allocation, restraints on production or sale inclusively by quota, concerted refusal to purchase or supply & collective denial of access to an arrangement or association which is crucial to competition”.

In a simple sense, the arrangements are those acts that are in a concerted manner objectified towards gaining a market monopoly.

Now as we know the notional concepts of competition law that are being in operative state in the digital markets it is important to equalize these notional concepts with the laws of India & other developed countries so as to have a concrete conclusion of the

judicial mechanism which we have to adopt in the Indian Competition policy & challenges faced by the CCI against digital markets.

### 5. COMPARATIVE ANALYSIS OF THE COMPETITION POLICY: INDIA & EUROPEAN UNION

To extract the setbacks & challenges that could be faced by the Competition Commission of India (CCI), it is important to parallelly analyse the Indian competition policy with the European Union (EU) Competition Policy, as the EU had adopted the concrete judicial mechanism against the corporations operating in digital markets. In this sense we are going to evaluate based on the abovementioned concepts and other allied instruments as follows:

#### A. European Union

To ascertain the challenges before CCI and remedial measures for Indian Competition Policy, we are going to analyse the EU Competition Policy in line with the conceptual notions put forth by the UNCTAD in its 10<sup>th</sup> session, that is herein after mentioned:

#### I. Relevant Market

There are specifically two sources for defining the term “relevant market” having validity under European Union law. Firstly, the 1997 Commission Notice on Market Definition; and the second is ratio decidendi of case law:

<sup>13</sup> UNCTAD: Model Law on Competition (United Nation Conference on Trade & Development) (2010), <https://unctad.org/system/files/official->

[document/tdrbpconf7d8\\_en.pdf](https://unctad.org/system/files/official-document/tdrbpconf7d8_en.pdf) (last visited Nov7, 2021)



i. 1997 EU Commission Notice on Market Definition<sup>14</sup>

This incorporates the American import called the ‘Small, but Significant, Non-transitory Increase in Price’ (SSNIP) which is a hypothetical monopolist test that construes the levels of demand transposition, which includes the criteria when consumers will transfer allegiance to another product as a result of price increases. If this eventuality is being executed where there is a price integration in terms of 5-10% it is reinstated that the product and the substitution are part of the same market. The analytical breakdown is largely limited to consideration of the product and the geographic dimensions of the market.

a. Relevant Product Market

“a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use”

The deduction of the court in the case analysis uses these features to construe the relevant product market:

- Demand Cross-elasticity/substitutability<sup>15</sup>

The case of United Brands Co v Commission dealt<sup>16</sup> with the concept of cross-elasticity of demand between fruits, which is the measurement of how likely a price increase is going to cause consumers to substitute with

another product. The argument is presented in the case that bananas:

“Compete with other fresh fruit in the same shops, on the same shelves, at prices which can be compare, satisfying the same needs: consumption as a desert or between meals”

This therefore would give rise to the possibility of high elasticity. The Commission focused on appearance, softness; and seedless properties thereby determining that they met the needs of children, the sick; and denture wearers and should be separated from the market of other fresh fruit.

This case, therefore demonstrate the complexity of the assessment of products in that a different analysis leads to designation into other markets. The ‘healthy eating’ group that desires fruit as a dietary choice would have no problem interchanging the specific species to find the most economic option but the presence of different market groups of consumers clearly creates situations of elasticity in some groups and static in others.

- Supply substitutability<sup>17</sup>

This is the concept circumscribe to analyse the elasticity of manufacturers on the supply side is of equitably crucial to the demand end side for the rational that there is transposability of target purchasers given the correct marketing tactics and innovations. The supply end of commodity market was

<sup>14</sup> EUR-LEX, Definition of relevant market (EUR-Lex) (1997)

<sup>15</sup> Id.

<sup>16</sup> United Brands Company v. Commission of the European Communities: Window to Price Discrimination Law in the European Economic

Community

Scholarlycommons.law.northwestern.edu, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1055&context=njilb> (last visited Nov 08, 2021)

<sup>17</sup> Supra Note 15



analysed in *Europemballage Corp and Continental Can Co Inc v Commission*<sup>18</sup> where the decision of the court “had to be quashed as a result of failing to recognise the ‘simple adaptation ‘of ‘glass and plastic containers ‘that would create ‘serious counterweight ‘to the product market profile.”

#### b. Relevant Geographic Market

The other element of the relevant market evaluates its geographic dimension. This is crucial from the perception that the Commission is then equipped with the dynamic market tools to identify the potential competitors of an undertaking & construe whether there is dominance within a ‘significant part of the community.’ The borderline of the geographic area can be very straightforward. In *United Brands Co v Commission*<sup>19</sup> it was stated that for Article 82<sup>20</sup> of the EU Treaty to apply, it must:

“...presuppose the clear delimitation of the substantial part of the EC in which it may be able to engage in abuses which hinder effective competition and this is an area where the objective conditions of competition applying to the product in question must be the same for all traders.”

Therefore, in *United Brands*, it was established that attributes and conditions of markets will allocate them into units of localised market contrary to being Europe-wide. Price differences between the geographic locations are therefore not a key factor.

As with the relevant product market, the courts face equal controversy where the ascertainment of a relevant geographic market is complex whereby commission have to construe different market in different need serviced by each subsidiary as against the global market.

In Furtherance of the above mentioned if we construe the European Commission (EC) Case M.8788 *Apple/Shazam*<sup>21</sup> in which the EC considered for the assessment that OSs for PCs and OSs for smart mobile devices belong to separate product markets, given that both used different hardware and had different performance capacities. A similar approach was adopted in *Microsoft/Nokia*<sup>69</sup> and in *Microsoft/LinkedIn*. In *Google/Motorola Mobility* the Commission considered that OSs for smartphones and tablets were likely to belong to the same market as OSs for smart mobile devices, in view of their similar functionalities, but it left the market definition open. In this sense, the

<sup>18</sup> *Europemballage Corporation & Continental Can Company v Commission of European Communities*, ECR 1973

<sup>19</sup> *United Brands Company v. Commission of the European Communities: Window to Price Discrimination Law in the European Economic Community* Scholarlycommons.law.northwestern.edu, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1055&context=njilb> (last visited Nov 08, 2021)

<sup>20</sup> Communication from the commission -Guidance on the commission’s enforcement priorities in applying article 82 of EC treaty (Eur Lex) (2009), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224\(01\)#:~:text=1.%20Article%20of%20the%20Treaty%20establishing%20the,undertaking%20is%20entitled%20to%20compete%20on%20the%20merits](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224(01)#:~:text=1.%20Article%20of%20the%20Treaty%20establishing%20the,undertaking%20is%20entitled%20to%20compete%20on%20the%20merits) (last visited Nov 08, 2021)

<sup>21</sup> Case M-8788 *Apple/Shazam* Ec.europa.eu, [https://ec.europa.eu/competition/mergers/cases/decisions/m8788\\_1279\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf) (last visited Nov 08, 2021)



relevant market is being considered as web search-oriented Apps in App Store & OSs for the smart mobile devices.

- II. Dominant position of the Market Power Article 82 (former Article 86) of the European Union Treaty<sup>22</sup> states: “any abuse by one more undertaking of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States”.

Further, in the first Article 82 cases, Hoffmann-La Roche<sup>23</sup>, the European Court of Justice aligned the existing legal criteria of market dominance, which is elucidated as: “a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers. III. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking, which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment”

In furtherance of the preceding contentions & decision given by EC in CASE M- 8878 Apple/Shazam<sup>24</sup> upheld that “the Apple while acquiring the Shazam influence in the Music Streaming Apps which is to be construed by the “results of the market reconstruction indicates that Shazam is the leading provider of music recognition apps in the EEA as well as worldwide, with a market share well in excess of 30% in the potential market for dedicated music recognition apps for smart mobile devices (in other words, excluding data for the Google Search app from the dataset), and in excess of 30% even in a broader market for apps for smart mobile devices including a music recognition functionality as part of a larger offering”. Thus, to construct on the factor of dominance it is important to reconstruct the position of the subjective corporation & its market nexus in order to have specific analysis. From this it would be easier to construct legally on the criteria of the abuse of dominance.

#### Abuse of Dominance

Under EU Competition Law, abuse of dominance should be constructed under two heads, namely:

Abuse of Dominance<sup>25</sup> {Article 82 of EU Treaty}

<sup>22</sup> EUR-Lex - 52009XC0224(01) - EN - EUR-Lex Eur-lex.europa.eu, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224\(01\)#:text=1.%20Article%2082%20of%20the%20Treaty%20establishing%20the,undertaking%20is%20entitled%20to%20compete%20on%20the%20merits.](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009XC0224(01)#:text=1.%20Article%2082%20of%20the%20Treaty%20establishing%20the,undertaking%20is%20entitled%20to%20compete%20on%20the%20merits.) (Last visited Nov 08, 2021)

<sup>23</sup> Hoffman La Roche & Co. Ag v Commission of the European committee, ECLI:EU:C:1979:36

<sup>24</sup> Case M-8788 Apple/Shazam Ec.europa.eu, [https://ec.europa.eu/competition/mergers/cases/decisions/m8788\\_1279\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf) (last visited Nov 08, 2021)

<sup>25</sup> EU/Competition/Article 82 of the EC Treaty (ex Article 86) Ec.europa.eu, [https://ec.europa.eu/competition/legislation/treaties/ec/art82\\_en.html#:~:text=EU%2FCompetition%2FArticle%2082%20of%20the%20EC%20Treaty%20%28ex%20Article,as%20it%20may%20affect%20trade%](https://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html#:~:text=EU%2FCompetition%2FArticle%2082%20of%20the%20EC%20Treaty%20%28ex%20Article,as%20it%20may%20affect%20trade%20)



“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between the Member States”

From the analysis of the above mentioned it could be analysed that the term “one or more undertaking” makes this provision specifically to demonstrate the single enterprise dominance or collective dominance. Herein the term single dominance is used to denote “has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers whereby the commission considers these factors as determinative “the market position of the allegedly dominant undertaking, the market position of competitors, barriers to expansion and entry, and the market position of buyers<sup>26</sup>”. Further the term Collective Dominance includes “For collective dominance to exist under Article 82, two or more undertakings must from an economic perception present themselves or act together on a particular market as a collective entity<sup>27</sup>”. In order to establish the existence of such a collective entity on the market, it is necessary to examine the factors that give rise to a connection between the undertakings concerned. Such factors may flow from the nature and integration of an agreement between the undertakings in question or from the way in which it is implemented, provided that the agreement leads the undertakings in

question to present themselves or act together as a collective entity.

Abuse of Dominance within internal market<sup>28</sup>  
{ Article 102 TEFU }

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between the Member States

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) concluding contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.

In consonance with the antecedent mentioned the EC in the CASE M. 8878 Apple/Shazam<sup>29</sup> ordered that “moreover, based on the Application Program Interfaces

20between%20Member%20States. (last visited Nov 08, 2021)

<sup>26</sup> Ibid at 47

<sup>27</sup> Ibid at 15 & 16

<sup>28</sup> EUR-Lex - 12008E102 - EN - EUR-Lex Eur-lex.europa.eu, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E102> (last visited Nov 08, 2021)

<sup>29</sup> See Supra Note 25



("APIs") published by Spotify, the Shazam app allows those of its users who are also users of Spotify to connect their Shazam account (anonymous or registered) to their Spotify account (freemium or premium). If a Shazam user has connected its Shazam account to a Spotify account, Shazam is able to gain access to some additional chunks of information on Spotify users, in particular Spotify premium users, in addition to information on the mere presence of the Spotify app on the device, for example it can gain access to playlist names. In this reference, Apple would cumulatively have market dominance over its competitors like Spotify". So specifically, the abuse of dominance is considered in here the Music streaming market. In this sense it is also important to understand the specific arrangements & agreements so as to quantify the merger & acquisitions in terms of their associated concepts.

IV. Arrangements<sup>30</sup> {Article 101 TEFU ex Article 81 EU Treaty}

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Further establishment of the EU Parliamentary Internal Market & Consumer Protection (IMCO) Committee is a milestone in this sense as it includes identifying and removing potential obstacles to the functioning of the EU single market and **promoting and protecting** the economic interests of consumers in the internal market.

V. Digital Markets Act<sup>31</sup>

On 15-12-20, the Commission adopted a proposal for a Digital Markets Act ("Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector"). Along with the antecedent mentioned proposal the proposal for a Digital Services Act was also adopted & seeks to address the negative consequences

<sup>30</sup> EUR-Lex – Art 101-TEFU-12008E101 - EN - EUR-Lex Eur-lex.europa.eu, [https://eur-lex.europa.eu/eli/treaty/tfeu\\_2008/art\\_101/oj](https://eur-lex.europa.eu/eli/treaty/tfeu_2008/art_101/oj) (last visited Nov 08, 2021)

<sup>31</sup> European Commission - Competition Ec.europa.eu, [https://ec.europa.eu/competition/sectors/ICT/digital\\_markets\\_act.html](https://ec.europa.eu/competition/sectors/ICT/digital_markets_act.html) (last visited Nov 08, 2021)



arising from platforms acting as digital “gatekeepers” to the internal market. These are platforms that have the power to act as private government and that can function as gridlock between businesses and consumers.

In digital markets, a few online platforms – often embedded in their own ecosystems – have emerged as key structuring elements of today’s digital economy, possessing a large segment of transactions between consumers and businesses. These gatekeeper platforms have a irreparable impact as they control access to and have achieved an long established market position in digital markets. This emergence of gatekeeper platforms has been accompanied by three main problems: (i) weak contestability of and competition in platform markets; (ii) unfair business practices vis-à-vis business users; and (iii) fragmented regulation and oversight of market players operating in these markets.

In furtherance of the antecedent mentioned the solutions cited by European Competition Commission (ECC) includes<sup>32</sup>:

Four solution driven points had been provided by ECC based on key factors including the scope design, the set of obligations related to unfair trading practices, the speed and flexibility of the architecture and the enforcement framework & includes:

- “Option 1 is a non-dynamic instrument of self-executing obligations addressing clearly defined unfair practices by gatekeepers in specific core platform services. This option is presented with two sub-options for the scope on the basis of solely quantitative thresholds.

Sub-option 1 is based on a high threshold, while sub-option 1.B is based on a lower threshold.

- Option 2 is a semi-flexible instrument, combining a set of self-executing obligations and obligations with regulatory dialogue, a mechanism for updating the practices, and a mechanism for identifying emerging gatekeeper companies. This option is presented with two sub-options for the scope on the basis of quantitative thresholds and qualitative designation. Sub-option 2.A is based on a high threshold, while sub-option 2.B is based on a lower threshold, both in combination with qualitative designation.
- Option 3 is a fully flexible instrument providing for a dynamic updating mechanism allowing for inclusion of additional core platform services and additional obligations when such an inclusion is considered appropriate and justified following a market investigation. The scope of this option is based solely on qualitative thresholds”.

The preferred policy option is Option 2<sup>33</sup> as it will increase the contestability of digital markets and help businesses overcome the barriers stemming from market failures or from gatekeepers’ unfair business practices. It will add a tailored regulatory solution where a gap currently exists. This will foster the emergence of alternative platforms, which could deliver quality innovative products and services at affordable prices. The associated benefit of the preferred option would be a change in consumer surplus estimated at EUR 13 billion per year. A

<sup>32</sup> EUROPEAN COMMISSION, Executive summary of the impact assessment report on digital market act (European Commission) (2020), <https://ec.europa.eu/info/sites/default/files/im>

fact-assessment-dma\_en.pdf (last visited Nov 09, 2021)

<sup>33</sup> Id.



substantial decrease in internal market fragmentation is also expected, thus freeing the growth potential of the Digital Single Market

Now as we analysed European Competition Policy it would be easier to extract lacuna of the Indian Competition Policy so as to assess the challenges before CCI & concrete measures against the anti-competitive business practices in digital markets.

## B. India

As we know in India the Competition Act 2002 is the grundnorm concerning competition policy in this sense we are going to analyse the conceptual notions of the same whereby we are going to equalize these provisions with orders of CCI & the findings of the high court cases in order to extract the possible scenarios of setbacks faced by CCI.

### I. Relevant Market<sup>34</sup> {Section 2(r)}

The term relevant market means “the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both markets”. In this sense relevant market includes two notions:

Whereby the term relevant product markets include market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Further relevant geographical market includes market comprising the area in which

the conditions of competition for the supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

Further if we construe the judicial rational of the contentions put forth in order dated 09-11-20 by the CCI in the investigation against Google LLC & Google India Private Limited (Google Pay) whereby the contention is being narrated as “in order to construct on the notion of abuse of dominant position it is important to delineate the relevant market, market for licensable smart mobile device operating systems in India<sup>35</sup>”-

- i. Operating system (OS) designed for mobile device are different in terms of use and characteristics from computer OS.
- ii. From the Original Equipment Manufacturers (OEMs)' perspective, only such operating systems are accessible to them which are licensed by the developers. Thus, the non-licensable operating systems such as iOS do not appear to be part of the same market since they are not available for license by third-party OEMs.
- iii. Relevant geographic market will be considered as the whole of India as conditions of competition are homogeneous”.

To corroborate the above mentioned ascertaining the juridical dictum behind the case of Amazon Seller Services Private Ltd & Flipkart Internet Private Ltd vs Competition Commission of India in which the Hon'ble Karnataka High Court dismissed the writ petitions filed by the Amazon on the

<sup>34</sup> Section 2(r), Competition Act 2002

<sup>35</sup> CASE 07/2020 [www.cci.gov.in](http://www.cci.gov.in), <https://www.cci.gov.in/sites/default/files/07-of-2020.pdf> (last visited Nov 09, 2021)



ground that all the necessary requirements for the investigation had been complied with & no interference of the court is required thereunder<sup>36</sup>. Whereby construing the Sec 3(1)<sup>37</sup> of the Competition Act 2002 it was concluded that it was a clear case of joint/collective dominance & arrangements which cumulatively deduce that in order to prove dominance it is prima facie important to consider the market in which the corporation operates which is here an online web search-oriented market place (Market for Operating System had been considered hereunder).

If we equalize the abovementioned three contentions it could be ascertained that in the Indian Competition Policy, we have the comprehensive definition & inclusive approach towards the relevant market as to include an online market place or web search-oriented market places. Further from Section 2(r) of the Competition Act 2002 it could be concluded that there are existing online market places that provides services which should be deciphered as relevant service market in Section 2(r) of the Competition Act 2002 whereby only substantial or the physical thing for sale is being considered u/s 2(r) in the light of relevant product market further it would also be easier to allocate the technical services being adopted in future scenarios.

From the elucidatory approach towards the relevant market, it is now easier for interpretation of the Dominant market power & abuse of the dominance under the Competition Act 2002.

## II. Dominant position of Market Power<sup>38</sup> {Sec 4(a)}

The definition of this phrase is inclusive of conditional approach whereby the terminology includes “an enterprise as its position of strength in the relevant market in India which makes it possible to:

- i. operate independently of its competitors in the relevant market, or
- ii. affect its competitors or consumers or the relevant market in its favour.

Further Section 19(4)<sup>39</sup> provides for the factors which contributively constitutes the element of dominant position in the market & includes:

- a. “Market share of the enterprise;
- b. size and resources of the enterprise;
- c. size and importance of the competitors;
- d. economic power of the enterprise including commercial advantages over competitors;
- e. vertical integration of the enterprises or sale or service network of such enterprises;
- f. dependence of consumers on the enterprise;
- g. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;
- h. entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- i. countervailing buying power;
- j. market structure and size of market;
- k. social obligations and social costs;
- l. relative advantage, by way of the contribution to the economic development,

<sup>36</sup> Amazon & Another v Competition Commission of India [2021] (Hon’ble Karnataka High Court).

<sup>37</sup> Section 3(1), Competition Act 2002

<sup>38</sup> Section 4(a), Competition Act 2002

<sup>39</sup> Section 19, Competition Act 2002



by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition;

- m. any other factor which the Commission may consider relevant for the inquiry”.

In addition to the abovementioned there are other allied contributive elements which could be extracted from the CCI order against Google LLC (Google Pay) whereby it was contended that “it is important to consider the following factors in delineating the relevant market as the market for app stores for android mobile operating systems<sup>40</sup>.

- i. The Play Store, accounts for more than 90% of apps downloaded on Android devices.
- ii. Google’s app store dominance is not constrained by Apple’s App Store, which is only available on iOS devices
- iii. In this relevant market, Google prima facie appears to be dominant on the basis of the material brought on record by the Informants wherein inter alia they have stated that as per statista.com, in 2017, Android accounted for 80% of India’s mobile OS market.

In order to support the antecedent provision relying hereby on the judgement of the Hon’ble High Court of Karnataka in the case of Amazon Seller Services Private Ltd & Flipkart Internet Private Ltd vs Competition Commission of India<sup>41</sup> in which the Hon’ble High Court construed the dictum of contentions put forth by CCI which includes “that petitioners have entered into vertical agreements with 'preferred sellers' and this has led to foreclosure of 'non- preferred sellers' from the Online Market places whereby in furtherance of the complexity involving the parameters of 'inter- platform',

'intra-platform' and 'inter-channel distribution'. Commission has recorded the existence of preferred sellers, preferential listing etc. From these arrangements with preferred sellers, it is evidentry that the Amazon has dominant position in the market as to control the market. In furtherance of this dominance, it is simple to construct the abuse of dominance.

III. Abuse of Dominance<sup>42</sup> {Sec 4(2)}

The phraseology portrayed in this provision is an instance of elaborative approach towards “Abuse of dominant position which includes these acts cumulatively:

- a. “Directly or indirectly, imposes unfair or discriminatory—
  - i. condition in purchase or sale of goods or services; or
  - ii. price in purchase or sale (including predatory price) of goods or service; or Explanation. — For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adapted to meet the competition; or
- a. limits or restricts—
  - i. production of goods or provision of services or market therefore;
  - ii. technical or scientific development relating to goods or services to the prejudice of consumers;
- b. indulges in practice or practices resulting in the denial of market access; or

<sup>40</sup> See Supra Note 36

<sup>41</sup> See Supra Note 37

<sup>42</sup> Section 4(2), Competition Act 2002



- c. Makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- d. uses its dominant position in one relevant market to enter into, or protect, other relevant mark”

Further if we construe the judicial rational behind the order of the CCI dated 09-11-20 against the Google LLC (Google Pay)<sup>43</sup> which specifically states that “Google’s Payment Policy specifically provides that developers charging for apps and downloads from Google Play must use Google Play’s payment system. The Payment Policy further provides that developers offering products within another category of app downloaded on Google Play must use Google Play In-app Billing as the method of payment. By making listing of an app on Play Store conditional on the app using Play Store’s payment system and Google Play In-App Billing for charging their users, the Informant alleges that Google is imposing a “take it or leave it” condition on all app providers. If apps do not comply with Google’s demand of using the Play Store’s payment system and Google Play’s In-App billing, they will not be able to access more than 90% of the target users in India, which is not a feasible option for any app provider”. Further it includes “Google through the Play Store is differentiating between Google Pay and other apps facilitating payment through UPI, such as, BHIM, Paytm, PhonePe, etc. by only allowing its payment offering i.e., Google Pay on its platform. As per the Information,

at present, the accepted methods of payment on Play Store’s payment system in India are: credit or debit cards; online banking; mobile phone billing; Google Play balance and Google Play gift cards; and Google Pay. Thus, the Play Store’s payment system does not allow any mobile wallet or other apps facilitating payment through UPI as an alternative to Google Pay which is alleged to restrict the choice for app providers as well as users”

In addition to the abovementioned ascertaining the juridical dictum of the Hon’ble High Court of Karnataka in the case of Amazon Seller Services Private Ltd & Flipkart Internet Private Ltd vs Competition Commission of India<sup>44</sup> it was stated that “the Commission has held that Act does not provide for an inquiry or investigation in cases of Joint/Collective dominance” whereby including a separate provision for joint or collective dominance would create efficacy in terms of the initiation of the investigation.

From the preceding mentioned it would easier for us to construct positively on the notion of the arrangements as the concept of the arrangements is inherently linked with joint and collective dominance.

Arrangements<sup>45</sup> {Section 3}

The arrangements or the agreements are defined in Sec 3(1) whereby the terminology is prohibitive in nature & deciphered as “No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production,

<sup>43</sup> CASE 07/2020 www.cci.gov.in, <https://www.cci.gov.in/sites/default/files/07-of-2020.pdf> (last visited Nov 09, 2021)

<sup>44</sup> Amazon & Another v Competition Commission of India [2021] (Hon’ble Karnataka High Court).

<sup>45</sup> Section 3, Competition Act 2002



supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India<sup>46</sup>”. Further these agreements were held to be void<sup>47</sup> under Section 3(2) of the act.

Further Section 3(3) reflects certain considerations specifically for cartels whereby the phraseology includes “Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

- a. directly or indirectly determines purchase or sale prices;
- b. limits or controls production, supply, markets, technical development, investment or provision of services;
- c. shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.

Provided that nothing contained in this subsection shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production,

<sup>46</sup> Id

<sup>47</sup> Id

<sup>48</sup> Id

<sup>49</sup> Overview of the Competition Act 2002 Amity.edu, [https://amity.edu/UserFiles/aibs/2e892019%20AIJJS\\_37-](https://amity.edu/UserFiles/aibs/2e892019%20AIJJS_37-)

46.pdf#:~:text=Competition%20Act%2C%202002%

supply, distribution, storage, acquisition or control of goods or provision of services<sup>48</sup>”.

In consonance of the abovementioned Section 3(4) includes two types arrangements between two competitors:

- a. Horizontal Agreements: These agreements include agreement being executed on the part of two entities or enterprises which have equal footing in terms of the production, supply distribution etc. in the same market<sup>49</sup>.
- b. Vertical Agreements: The vertical agreements are those agreements which take place among enterprises or persons at different stages or levels of production in respect of production, supply, distribution, storage, sale or price of goods etc<sup>50</sup>.

In order to corroborate the above mentioned, and construing the judgement of the Hon’ble High Court of Karnataka in the case of Amazon Seller Services Private Ltd & Flipkart Internet Private Ltd vs Competition Commission of India<sup>51</sup> whereby it the dictum includes “the petitioners have entered into several vertical agreements with preferred sellers and following aspects require investigation and consideration by the Commission:

- Deep discounting;
- Preferential Listing;
- and
- Exclusive Tie-ups

Further, it is also included in the phraseology of the same judgement that “With regard to

20prohibits%20following%20types%20of%20horizontal,of%20particular%20products%20and%20for%20a%20particular%20quantity.105 (last visited Nov 09, 2021)

<sup>50</sup> Id

<sup>51</sup> Amazon & Another v Competition Commission of India [2021] (Hon’ble Karnataka High Court).



deep discounting the Amazon has several preferred sellers and notably among them are 'Cloudtail India' and 'Appario Retail', which are related to Amazon. It provides incentives to its preferred sellers to sell their products at 'predatory prices' throughout the year to the detriment of non-preferred sellers, who are not compensated for the amount of loss which they would incur to keep competing in the market. Appario Retail' is wholly owned subsidiary Joint Venture between Amazon and another entity. It has received investments from Frontizo Business Services Pvt. Ltd. Both Appario and Frontizo have common Director by name Ankit Papat. Frontizo and Amazon Retail India Pvt. Ltd., also have a common Director. Cloudtail is a joint venture between Amazon and Catamaran Ventures. Amazon perpetuates the practice of listing its preferred sellers in the first few pages of the search results, thereby creating a search bias. In number of search results, the products are sold by preferred sellers such as 'Appario Retail' and 'Cloudtail' and they dominate the first few pages, whereas, products with same ratings, which are sold by non-preferred sellers are listed in later pages”

From the analysis of the term Joint Ventures it could be deduced that as the term “Joint Ventures” is defined as “a way of putting together or combining the resources and expertise of two companies that are otherwise unrelated<sup>52</sup>” in addition to this in the Companies act 2013 the term demonstrate the “ joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement” whereby these Joint Venture Companies are also known as Associate Company<sup>53</sup>. So, if we specifically equalize the preceding

contentions with the proviso clause of Section 3(3) it could be deduced that there is a contrary opinion as these joint ventures of the Amazon are also objectified as arrangement to increase the supply end side.

From equalization of these provision and conclusion of the UNCTAD 19<sup>th</sup> session we would be able to identify the possible challenges before CCI and remedial measures to be adopted in the Indian Competition Policy

## 6. FINDINGS

In this part we are evaluating the possible challenges before CCI in execution of investigations against the digital oriented corporations and in furtherance of this we are also going to analyse the stringent provision to be adopted by the CCI against the anticompetitive practices by the tech-oriented corporations. In this sense we are going to analyse this part under two notional criteria which includes:

### A. Challenges before CCI while controlling digital market

In this part we are going to analyse the challenges before CCI associated with search-oriented markets whereby on equalization of the UNCTAD 19<sup>th</sup> session, EU Competition Law, Indian Competition Law and features offered by digital platforms which distort competition whereby these challenges include:

### I. Technical Challenges

From equalization of the UNCTAD 19<sup>th</sup> session report's issue which thereby includes

<sup>52</sup> Section 2(49), The Companies Act 1956

<sup>53</sup> Section 2(6), The companies Act 2013



“Review of capacity building on the technical assistance in competition law” & the notional features offered by the digital platform which are considered as threat web search-oriented market competition is reinstated in UNCTAD survey report<sup>54</sup> published on 28-04-2021 & includes these as technical challenges before the Competition Commission of India:

- a. Lack of appropriate tools for analysing anticompetitive practices.

Existence of difficulty in using the conventional competition tools based on the prices & consumer welfare to tackle emerging competition issues in the digital era. The rationale behind this includes distinctive characteristics of digital markets, such as their multisided nature, as well as zero-price services, network effects, economies of scale and; scope and; the importance of access and monetization of data. On the equalization of the European procedure for establishment of notional concepts & Indian procedure for establishment of notional concepts which are dragged along due to the use of digital platforms features it could be deduced that there is an absence of the standard economic analysis mechanisms like SSNIP (small but significant and non-transitory increase in price) Test which would result in insufficiency in the effective competition control whereby traditional tools for determining these notional features would not be sufficient.

The absence of considerations while defining markets and establishing market power in digital markets into the dynamic structure of digital markets, zero-price services, network

effects, market tipping, lock-in effects and multihoming (in this context, the practice of using more than one digital platform simultaneously, such as using two different search engines at the same time) which cumulatively consequence in non-clarity in terms of the competition of the digital markets is with traditional business or brick-and-mortar traders or whether there is the establishment of the separate relevant markets. This requires careful analysis and an understanding of market dynamics.

Assessing dynamic efficiencies, such as increased innovation, requires extensive knowledge and understanding of the sector and the technologies involved, as well as making predictions despite the unpredictable nature of innovation which in turn requires extreme technical knowledge of the technologies used in specific search-oriented markets.

- b. Collection and analysis of data in competition investigations

The competition investigation in search-oriented markets relies on accessing accurate data to conduct comprehensive and sound analyses and contacting the parties involved and gathering quality data from them whereby this scenario is accurate circumscribing to the multi-sided platforms due to multiplicity of parties & high segment of users on each side. In addition to this segment also involves elements of extraterritoriality in terms of investigation in which the commission requires collection of data from the abroad which could only be done through rules of letters rogatory (documents making a request through a foreign court to obtain information or

<sup>54</sup> Competition Policy & regulation in digital era (United Nation Conference on Trade & Development)

(2021), [https://unctad.org/system/files/official-document/ciclpd57\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd57_en.pdf) (last visited Nov 10, 2021)



evidence from a specified person within the jurisdiction of that court) and therefore written replies may not be provided before the end of an investigation despite the time and effort put into the process. Other related challenges include inadequate specialized skills to handle competition issues raised by online platforms and difficulty in analysing digital market data, as well as inadequate tools to identify anticompetitive practices.

## II. Provision-oriented Challenges

We are elucidating this part of research paper, on the basis of the parallel analysis of the EU and Indian Competition Policy and includes herein after mentioned setbacks:

- a. Absence for the separate provision of investigation for joint & collective dominance

From the contention of the CCI in the case of Amazon Seller Services Private Ltd & Flipkart Internet Private Ltd vs Competition Commission of India<sup>55</sup> it could be deduced that there is no specific provision which deals with an inquiry for Joint & Collective Dominance & the same was included in the Section 3 of the Competition Act 2002<sup>56</sup> which deals with Abuse of dominance whereby it is regarded as a consequence of joint & collective dominance wherein in the EU Competition Law, both joint & collective dominance is separately dealt . In this sense it would be difficult for the CCI to assess the penalty on the corporation which is on first instance liable for joint/collective dominance & then would be awarded with the liability of

the abuse of dominance. One more thing specifically it will help the Competition Commission of India to initiate the proceeding at early instance before the execution of the abuse of dominance by the tech-giants.

- b. Exemption incorporated in proviso clause of Section 3 for the Joint Ventures<sup>57</sup>

The exemption provided for the joint ventures under section 3 which is narrated as “that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services” whereby companies act 2013 also determine these joint ventures as associate companies<sup>58</sup>. If we equalize these two provisions with the decision of the Hon’ble High Court of Karnataka in the case of Amazon Seller Services Private Ltd & Flipkart Internet Private Ltd vs Competition Commission of India<sup>59</sup> it could be deduced that in search-oriented markets the joint venture is being executed in order to increase efficiency in production, supply and distribution which has happened in the case of Cloudbail India & Appario Retail whereby on the backdrop of this anticompetitive business practice also transpose hand in hand & due to the proviso clause these tech corporation would be able to evade their responsibility before CCI. By amending this provision one of the greatest lacunas would be sorted out of the Competition Act 2002.

<sup>55</sup> Amazon & Another v Competition Commission of India [2021] (Hon’ble Karnataka High Court)

<sup>56</sup> Section 3, Competition Act 2002

<sup>57</sup> Id

<sup>58</sup> Section 2(6), The companies Act 2013

<sup>59</sup> Amazon & Another v Competition Commission of India [2021] (Hon’ble Karnataka High Court)



c. Absence of the Global assistance & support

From the UNCTAD 19<sup>th</sup> session conclusions, it could be deduced that one of the setbacks in front of the CCI includes absence of the global support. Whereby the same could be assessed from <sup>60</sup>the narration UNCTAD 19<sup>th</sup> session conclusions which include “, it is crucial to be in consonance with regional & international cooperation for the effective enforcement of the competition laws wherein the subject matter is circumscribed to online platforms or web search-oriented markets due to its global nature.

From the preceding setbacks, it would be easier for us to reinstate effective technical, regulatory & legislative measures to be adopted by the CCI in order counter act the dynamic challenges associated with search-oriented markets.

B. Recommendations

In this part we are going to reinstate effective technical, legislative & regulatory measures in order to counter act on the antecedent mentioned challenges & hereby it includes:

I. Adopting new technical tools

In consonance with UNCTAD 19 session key issue 2. Review of capacity building on the technical assistance in competition law it is crucial to adopt emerging technical tools such as algorithmic compliance for research on behavioural tendencies of the consumers with the feature of improvisation of those algorithms in consonance with the emerging evasive algorithm pattern used by the tech-

oriented corporations. Further it is also important to envisage tools for data encryption & data storage in order to filter which of the search-oriented corporation is manipulating the market competition through data driven-tools.

II. Amendment to certain provisions of the Competition Act 2002

Amendment of the proviso clause of section 3(3) circumscribed to joint venture is indeed required so as to fill the lacuna which cumulatively consequence in the evasion of the liability on the tech-oriented corporations. Further it is also important to envisage a separate provision for the joint & collective dominance as being incorporated in the European Union Competition Policy so as to initiate enquiry prior to the abuse of dominance in order to prohibit the same.

III. Competition Law Enforcement

In this part we are going to analyse the enforcement of the competition law through the enactment of the crucial legislative act & evaluating hereby on the basis of the two important provision which includes:

a. Incorporation of the Digital Market Act

Enactment of a semi-flexible instrument, combining a set of self-executing obligations and obligations with regulatory dialogue, a mechanism for updating the practices, and a mechanism for identifying emerging gatekeeper companies (key structuring tech-corporations of today’s digital economy). This is supported with two rations for the scope which includes: Research on the basis

<sup>60</sup> UNCTAD Intergovernmental Group of Experts on Competition Law & Policy 19th Session, in Intergovernmental Group of Experts on Competition Law & Policy 19th, Single

Page, <https://unctad.org/es/node/29990> (last visited Nov 10, 2021)



of quantitative thresholds and qualitative designation & Research based on a high threshold whereby in this way it would be easy to reinforce the duties on the search-oriented corporation & making them liable on very early stages.

b. Incorporation of effective merger regulation scheme

From the equalization of UNCTAD reports and EU competition policy, we need specific merger control provisions to be able to specifically address and scrutinize transactions merger in the digital space that bring about highly potential growth for one party to avoid market concentration. Every national as well as regional authority must be equipped with regulatory tools to enforce the competition prohibition rules independently. Empowerment of the Competition Commissions in their respective regime is essential and reflects the government policy on the matter of mergers. The competition regulators must play an active advocacy role to notice and notify the fallouts in the Competition Law in digital market such as provision for merger control, market assessment as well as capacity building to tackle the unique characters digital market economy.

include dynamic structure of digital markets, zero-price services, network effects, market tipping, lock-in effects and multihoming are the elements that need compact observation. Further, only way to ramify these attributes is to be equipped with technical expert committee, co-operation with other competition authorities at international level and incorporating the provisions which are in line with the considered threat of AI towards digital market competition. Thus, it is positively true that Indian Competition Policy deviates in terms of certain aspects and to conclude our hypothetical statement is proved to be incorrect.

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7. CONCLUSION

Ascertaining the antecedent mentioned research theology, it could be concluded that the traditional theories incorporated in the Competition Act 2002 should not be considered as null in terms driving the digital market competition. But at the same time there are other factorial attributes put forth by the UNCTAD survey report published by 24-04-21 and incorporated in the EU Competition policy. These factorial attributes