DIFFICULTIES REQUIRING REFORMS IN INDIA'S E-COMMERCE MARKET

Dr. Meghabahen Nareshbhai Nayak

Assistant Professor, Dr. B. R. Ambedkar Law College, Ahmedabad, Gujarat, India.

ABSTRACT

The emergence of e-commerce firms and their operations have resulted in a rewrite of antitrust laws. India's e-commerce sector is one of the fastest growing in the world. While this offers a number of advantages, there are a growing number of antitrust issues as a result of such firms' anticompetitive behaviour. This article will analyse and dive into several criteria that are critical for assessing whether an E-commerce platform has engaged in anti-competitive behaviour, the resulting antitrust issues, and the Competition Commission of India's modus operandi. Additionally, it analyses Indian cases decided by the Competition Commission of India and highlights the evolution of different elements affecting the E-commerce marketplaces and their operation. Additionally, the study offers insight on the global strategy used by other nations to address comparable issues and discusses particular international cases adjudicated by the European Union and other authorities. A vibrant, healthy competitive market is critical for the country's economy and general trade and commerce. Competition Law regulations established by the government dictate how many parts of the market operate, and so play a critical role in the business sector. The field of competition is composed of a variety of dynamic elements that must be constantly monitored to ensure that anti-competitive activities and an imbalance in power dynamics do not adversely effect the economy or consumer welfare.

KEYWORDS: E-commerce Market, Deep Discounts, Preferential Treatment.

INTRODUCTION:

Antitrust rules governing e-commerce marketplaces have been arguably the most discussed and disputed subject in recent years. Recent antitrust proceedings and investigations worldwide against major e-commerce platforms for their questionable behaviour have reintroduced the need to revisit current antitrust legislation. India is the fastest expanding market for e-commerce, rising at a pace of 51% annually.

E-commerce platforms have a considerably different market structure than conventional brick and mortar businesses. E-commerce platforms have a huge edge since they build and develop their user base not only by gathering consumer data but also by analysing consumer purchase habits. 2 Such behaviours are also feasible in conventional marketplaces, but they are constrained geographically. E-commerce platforms are subject to fewer limitations and have a broader scope for data gathering. As previously said, the e-commerce markets are thriving. However, despite the fact that the E-commerce sector is always increasing, there are a few large companies that are more influential than the rest. To illustrate, the Indian internet food delivery market is dominated by only two players: Zomato and Swiggy. When Uber Eats was bought by Zomato, the Indian anti-trust authorities made no objections.

Numerous elements are considered when determining a firm's market strength, including market share, size and available resources, entry obstacles, and customer dependency. However, one noteworthy benefit that large E-commerce platforms have is access to massive amounts of data. Data serves as the foundation for E-commerce businesses and provides them with market strength. This implies that if a platform has a larger consumer base as a result of the data acquired, it will have greater market power. The capacity of a business to gather, retain, and exploit such data might act as a barrier to entry. For example, Amazon and Flipkart will have greater access to customer data than a newcomer.

The Competition Commission of India ("CCI") has lately launched numerous investigations into the market's main e-commerce firms, including Amazon, Flipkart, Uber, MMT, and OYO. This is not the first time complaints have been levelled against them by other market participants; nevertheless, this is the first time the CCI has opened an active inquiry. The purpose of this study is to examine the Indian e-commerce markets, the resulting antitrust issues, and the CCI's response. Additionally, we explore the worldwide approach to anti-competitive behaviour by online platforms, and in conclusion, the study recommends amendments to the Act to include the new market structure and compliance requirements necessary for successful and attentive anti-competitive enforcement.

ANALYSIS OF E-COMMERCE MARKET IN INDIA:

E-commerce market platforms have opened up a plethora of options for merchants that were previously excluded from offline markets or were unable to participate owing to specific constraints. However, these internet platforms have provided such sellers with the opportunity to sell to millions of customers, something they could never achieve as an independent company. Adopting an online business strategy and collaborating with an E-commerce platform, on the other hand, comes with substantial trade-offs. The primary issues that international authorities and CCI5 have identified in India are vertical restrictions in the e-commerce business. Exclusivity agreements, price parity clauses, and selective distribution agreements are all examples of such constraints. There are numerous fears that these established online platforms would utilise the data collected from third-party merchants to sell their private information to these consumers. 6 To illustrate, in the Amazon Home & Kitchen category, the brand "Solimo" is a popular seller. Solimo is an Amazon-owned private label.

Thus, the platform itself is the primary competitor for such merchants. Following that, the report8 expresses worry about select merchants receiving preferential treatment and an opaque system of product listings on the platforms. In such situations, the CCI has the authority to investigate such constraints under Sections 3 and 4 of the Competition Act, 2002 (hereinafter referred to as "The Act"), which deal with Anti-Competitive Agreements and Abuse of Dominant Position, respectively.

ENDEAVOURS BY THE INDIAN AUTHORITIES:

Consolidated Foreign Direct Investment Policy 201864: According to the Consolidated Foreign Direct Investment Policy 201864, E-commerce firms in India are only permitted to engage in business-to-business transactions and not business-to-consumer transactions. The Policy permits 100 percent foreign direct investment in a marketplace-based E-commerce model; however, no foreign direct investment is authorised in an inventory-based model. When it comes to marketplace and inventory-based models, the fundamental difference is that the marketplace model acts as a facilitator between third-party sellers/service providers and consumers, while the inventory-based model owns the inventory of goods and services and can be sold directly to consumers. The most basic goal of imposing such a restriction on the inventory-based model is to protect traditional brick-and-mortar businesses from being targeted by well funded foreign E-commerce corporations, as previously stated. However, it should be emphasised that the limitation only applies to foreign corporations, which implies that there is a potential that local corporations will not be able to do the same amount of harm to brick and mortar businesses. The Policy further emphasises that e-commerce platforms are not permitted to affect the prices of products and services and are required to ensure a level playing field for all participants. Among the additional restrictions put on e-commerce platforms are the requirements that no firm with any equity involvement in the marketplace concurrently supply products and services on the platform, and that the marketplace itself should not hold any inventory on the platform. Furthermore, if the marketplace provides any service to its vendors on the platform in which it has direct or indirect equity ownership, this service must be provided in a fair and nondiscriminatory way. As a result, the FDI Policy has imposed limits on inventory-based marketplaces, in addition to a number of other prohibitions. Nonetheless, there is some question as to whether such limitations are ultimately accomplishing the stated objective.

DRAFT E-COMMERCE POLICY:

An extensive range of concerns involving data and e-commerce platforms, as well as the deep interconnectedness of numerous elements, are addressed in the Draft E-Commerce Policy65 developed by The Department for Promotion of Industry and Internal Trade (DPIIT). The Draft also indicates that certain rules, particularly in the area of data management and access, must be implemented, particularly in the area of e-commerce platforms. In terms of competition, the Draft also acknowledges that a small number of firms operating on E-commerce platforms have a substantial presence and, as a result, may monopolise the market. It is proposed in the draught that a regulatory framework be established for many concerns that have arisen in several areas of law as a result of the growth of E-commerce and online platforms. Because of this, rules in the fields of law and taxes will be necessary to ensure fair competition. Regulations in the field of competition law will be necessary to ensure fair competition. The Draft is a step in the right direction, and it can give advice and direction for those who are concerned about the growing antitrust problems in the market.

RECOMMENDATIONS AND CONCLUSION:

In India, the situation regarding E-commerce platforms and their influence on competition has not been particularly bad and detrimental. However, given the market's volatile and irregular character, it would not take long to reach a tipping point, making it extremely difficult to govern and regulate all the variables impacting the market's many aspects, such as competition, the economy, and consumer welfare, among others. As a result of their essentially digital nature, e-commerce platforms are fundamentally different from traditional market structures. Its unique dynamics are based entirely on algorithms, data collecting, and other novel aspects that are not fully understood by everyone 66 Thus, it is critical to comprehend the underlying market structure67, and this comprehension and acceptance of the new market structure should be reflected in the country's competition legislation, as well as the operation of law enforcement institutions. The Competition Act was created to cover a wide variety of circumstances and is not intended to be exhaustive. However, the adjudicating authorities' method created some gaps (may change term) that, if filled, would result in an exhaustive sequence of judgments.

To do this, market power considerations should encompass not just traditional characteristics but also network effects, data availability, entry hurdles, aggregation of services supplied, and cross-leveraging of market power. While the present market is extremely concentrated, no one player is deemed "dominant." Such a concentrated market structure encourages anti-competitive behaviour. 68 There has to be understanding of the concentrated market structure in which important companies wield influence in the digital market, resulting in increased reliance on such entities by third-party sellers/service providers, which might result in potential market abuse. According to the CCI study, inspection can be conducted on a case-by-case basis, with cases falling under vertical integration or abuse of power. 69 However, the burden of evidence is on the informant to establish vertical integration, as there is no presumption of AAEC in situations of vertical integration. 70 As previously said, the operation of E-commerce platforms is extremely technical and not easily understood by the general public. Thus, it would be far simpler for the companies being sued to demonstrate that they have not engaged in anti-competitive behaviour than it would be for the informants. Along with structural improvements, the emphasis should be on preventative measures such as compliances that promote openness and a fair bargaining power balance. Transparency regarding the factors that influence the listing of products/services is necessary to minimise preferential treatment based on discounts provided and favouritism toward private brands and preferred sellers/service providers. Complete clarification regarding the terms of agreements and services entered into between online platforms and third-party sellers/service providers should be provided, as well as the cost-sharing mechanism that is enforced. Non-compliance with the same should be dealt with harshly by the imposition of severe fines and the revocation of licences until the compliances are met.

As power is concentrated in the hands of a few, it is likely to have a detrimental influence on our democratic principles, as well as overall economic efficiency and consumer welfare over time. The CCI should adopt more proactive steps and suo moto actions to gain a better understanding of the market's complicated structure and discourage businesses from engaging in ex-ante anti-competitive behaviour. After all, competition is what ensures not just the survival of businesses, but also their growth.

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