

A Critical Evaluation of India's Proposed Digital Competition Act

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Abstract

The emergence of digital marketplaces has resulted in considerable changes in the business sector, with new competitors joining the market, offering novel products and services and challenging the supremacy of traditional players. Although digital marketplaces provide a plethora of pro-competitive benefits, they are prone to anti-competitive practices due to characteristics such as significant network effects, high innovation rates and rapidly changing technologies. This has raised concerns about the potential anti-competitive practices and market abuses that could arise in the digital economy, sparking the question of whether the current regulatory framework of the Competition Act 2002 (2002 Act) is effectively addressing the challenges. It is being seen that enterprises (either global or Indian) have been trying to subsidise users to attract them to the network effects by resorting to a series of big losses, which in other words has raised alarms regarding predatory pricing in the market. People may enjoy discounts given by enterprises. While the immediate benefits of these enterprises may appear advantageous, they will adversely affect customers in the long term, especially as customers become increasingly dependent on their services. In this study, the author illustrates how the current legislation can deal with the unique characteristics or requirements of digital marketplaces. The research further puts forth the negative implications of the ex-ante mechanism with case laws and comparative analysis with international jurisdictions. The findings of the study suggest that India should not blindly replicate what other jurisdictions, especially the European Union are pursuing i.e., taking steps towards enacting a separate digital competition law. The implications of this work would be a deliberate analysis of the provisions of the 2002 Act in line with the working

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of the Competition Commission of India (CCI) to suggest the adequacy of present law in dealing with competition issues in digital marketplaces.

Keywords: Anti-Competitive Practices, Competition Act 2002, Digital Competition Law, Digital Marketplaces

1. Introduction

In June 2022, the Standing Committee of Parliament on Commerce issued a report proposing an ex-ante regulation regime to deal with issues in digital marketplaces (Savesh Mathi, 2023). They also emphasised the need for modifications to the Competition Act 2002, which the Competition Law Review Committee had also proposed in its report in July 2019 (Report of Ministry of Corporate Affairs, 2019). Furthermore, in December 2022, India's Standing Committee of Parliament on Finance issued a detailed study on the anti-competitive practices of Big Techs and strongly advocated for ex-ante legislation to promote fair and transparent digital marketplaces in India (Lok Sabha, 2022). To promote a transparent, competitive and fair digital environment in India, the committee's report advocated an ex-ante regime via a new Digital Competition Act (DCA).

It is crucial to note that the digital economy comprises markets that thoroughly rely on technologies that help them facilitate via e-commerce, the exchange of services and goods. In general, we admire certain technology-driven companies for the innovative breakthroughs and efficiency they bring. However, we must acknowledge that some of these companies may be vulnerable to abusive practices in the market. (Parsheera *et al.*, 2017)

The expansion of digital marketplaces has also given rise to new types of competition, such as network effects and multi-sided markets. For competition law enforcement, digital marketplaces face several issues, including identifying market power, combating anticompetitive behaviour, preventing data-based discrimination and resolving cross-border competition. (Anand Pawar, 2021) These problems underline the importance of continued competition legislation updates and strengthening, as well as increasing international coordination among competition authorities. One significant problem in determining market strength in digital markets is that entry barriers and the nature of competition are frequently different than in the traditional markets.

Another problem is dealing with anti-competitive behaviour in digital markets. (Erman Ekingen, 2022) Traditional collusion and price fixing may be difficult to identify and prosecute in digital marketplaces because corporations can use algorithms and data to monitor and respond to competitors' behaviour on a real-time basis. (Sankalp Mirani, 2023)

The establishment of market power in this type of market may occur through technological innovations implemented by firms that possess substantial human capital. This advantage can subsequently enable these firms to utilise the network effect, thereby attracting a larger user base. Another option is to employ financial capital to give enticing subsidies to users. This is an appealing option for enterprises with better access to financial capital. Many digital firms have used practices such as deep discounting and providing cashback offers to their users, to develop the chain of network. Significant losses have sometimes been maintained for years. To quote an example, Zomato, since its inception has been incurring losses and its loss widened this quarter by Rs 346 crore. (Etech, 2023). Swiggy, the online food and grocery delivery application, just declared that it has turned profitable nearly 9 years after its inception. (Reuters, 2023) According to a news report, the two major taxi businesses in India, Ola and Uber, have burned around Rs. 131 billion during the last two years (Parsheera *et al.*, 2017). Payments company PayTM reported a loss of about Rs. 168 crore this quarter (Vidya Sreedhar, 2023).

In the Indian context, the competition law was enacted in 2002 and has been in effect since 2009, the time at which digital markets were less prominent. The 2002 Act is a crucial legislation designed to ensure fair competition in the market and protect consumer interests. Despite this existing law, a need was felt to examine competition in digital marketplaces ex-ante due to the rapid growth of digital enterprises. In this regard, the present research deems it important to assess the need for a new Digital Competition Act for issues in digital marketplaces and also to critically assess the applicability and relevance of the 2002 Act to deal with the issues emerging in digital marketplaces. Furthermore, the idea is to analyse competition concerns in digital marketplaces as well as the present approach of the regulatory authority i.e., the CCI in dealing with such issues under the present law.

Primarily, the idea for this paper is to study the question: Is there a need for enactment of a new Digital Competition Law to regulate issues emerging in digital marketplaces, when there already exists legislation in the form of a 2002 Act?

2. Literature Review

Digital markets have grown significantly in recent years, posing unique issues for competition regulators around the world. As the online economy grows, it is critical to review if existing legal frameworks, such as the 2002 Act, are effectively suited to manage developing concerns and ensure fair competition in these dynamic markets. This literature review analyses the existing corpus of research used to assess the 2002 Act's readiness to meet the serious concerns linked with ever-expanding digital marketplaces.

In the article titled *Competition Issues in India's Online Economy* by Smriti Parshera, Ajay Shah and Avirup Bose, the authors address the issues India's internet economy presents to the country's competition law framework. The authors contend that the current competition law framework must be updated to accommodate the distinct characteristics of technology-enabled marketplaces with considerable network effects. They emphasise the techniques used by internet firms, such as incurring big losses by subsidising consumers to gain network effects, which can lead to predatory pricing and market dominance. The authors recommend practical remedies for the CCI to manage these new scenarios better, as well as an examination of the role and obligations of investors who fund these internet enterprises.

The Report of Competition Law Review Committee by the Ministry of Corporate Affairs *inter alia* reviewed the 2002 Act and recommended reforms to strengthen India's competition law framework. The committee suggested amendments to address emerging issues in the digital economy, including digital markets, criminalising hub-and-spoke cartels, introducing a green channel for combinations, establishing a settlement and commitment framework to enable parties to settle cases, enhancing CCI's powers and governance by working towards the idea of digital markets and data privacy. The report aims to modernise India's competition law framework, making it more effective in promoting competition, innovation and consumer welfare in the digital age.

In the article titled *Competition Law in Asia: The Interplay of Power Dynamics in the Digital Market* by Ankita Srivastava and Aditya Richa Tiwari, the authors explore the complexities of competition law in the digital markets in Asia. The authors argue that the traditional competition law framework is inadequate to address the unique characteristics of digital markets, where power dynamics are shaped by factors such as data, network effects and platform dominance. The article highlights the characteristics of digital markets and the challenges that competition law in India may face in these marketplaces and it also makes a comparative analysis of the approach of countries towards regulating digital markets.

In the article titled *Google and the Limits of Antitrust: The Case Against Google* by Geoffrey A. Manne and Joshua Wright, the author argues that the antitrust cases against Google are misguided and lack evidence of consumer harm. The authors contend that Google's business model, which provides free services and generates revenue through targeted advertising, is innovative and beneficial to consumers. They claim that allegations of search bias, advertising restrictions and Android licensing agreements are based on a flawed understanding of Google's business practices and may lead to "error costs" in antitrust enforcement. The article concludes that antitrust law is not equipped to address concerns about large technology companies and that other regulatory approaches may be more effective.

In the report titled *Abuse of Dominance in Digital Markets* by the Organization for Economic Cooperation and Development (OECD), the pressing subject of abusive practices in digital markets has been addressed. It explores the fundamental challenges that digital markets pose for abuse of dominance enforcement and sets out some of the key issues that need to be considered. The report notes that abuse of dominance issues in digital markets is receiving increasing academic and expert attention and given the growing importance of digital markets in consumers' lives, this importance is unlikely to diminish.

In the article titled *Anti-Competitive Practices in Digital Markets* by Big Tech under Government Scanner by Seerat Bhutani and Ashima Obhan, the authors examine the growing scrutiny of big tech companies by governments worldwide for alleged anti-competitive practices in digital markets. The authors highlight the concerns around market dominance,

data privacy and unfair business practices by tech giants, citing examples of investigations and lawsuits against companies like Google, Amazon, Facebook and Apple. They argue that governments are struggling to keep pace with the rapidly evolving digital landscape and that there is a need for more effective regulatory frameworks to promote competition and protect consumer interests.

In the 2021 discussion paper titled *Ex ante regulation of digital markets* by the Organization of Economic Cooperation and Development (OECD), the paper explores the need for *ex-ante* regulation in the digital markets due to concerns about rising market power and the growing influence of large digital platforms. The paper discusses the content of *ex-ante* regulation, its relationship with competition enforcement and its implications for data privacy, consumer protection, fairness, innovation and economic concentration. It also examines the trade-offs between these factors and competition and the institutional implementation of *ex-ante* regulation. The paper aims to create a better understanding of the *ex-ante* regulation and its role in addressing digital competition concerns.

In the 2022 report titled *Anti-Competitive Practices by Big Tech Companies* by the Parliament Standing Committee on Finance, it was highlighted that there is a need for a regulatory framework to monitor the moves of big tech companies and ensure fair competition in the Indian digital market. The committee identified 10 major anti-competitive practices by big tech companies, including monopolistic threats in digital markets, preventing third-party companies on their platforms and skewing search engine rankings. The report recommends identifying big tech players as Systemically Important Digital Intermediaries (SIDIs) and subjecting them to *ex-ante* restrictions to ensure fair competition. It also stresses the need for a Digital Competition Act to address the unique challenges of the digital market.

In the paper titled *Anti-trust Investigation against E-Commerce Platforms in Goods Category in India: A Review from Timeliness Perspective*, by Dr Navdeep Singh Suhag and Abhishek Raj, the authors examine the timeliness of anti-trust investigations pertaining to e-commerce platforms in India, specifically in the goods category. The authors analyse the duration of investigations by the CCI and identify factors contributing to delays. They argue that timely investigations

are crucial to prevent harm to consumers and competitors and suggest measures to improve the efficiency of the CCI's investigation process, such as increasing resources, streamlining procedures and enhancing transparency. The article concludes that timely anti-trust investigations are essential to promote fair competition in India's e-commerce sector.

In the article titled Digital Market, Data Analysis and the Subsequent: Competition Law Challenge in Cyberspace in India by Anand Pawar, the author explores the challenges posed by the digital market and data analysis to competition law in India. The author highlights how big tech companies collect and analyse vast amounts of data, enabling them to gain a competitive advantage and potentially stifle competition. Pawar argues that India's competition law framework needs to adapt to address these challenges, including issues related to data privacy, algorithmic bias and the use of data as a barrier to entry. The article suggests that the CCI must develop new tools and strategies to regulate digital markets and ensure fair competition in cyberspace.

In the article titled An Overview of the Concepts of 'Digital Economy' and 'Digital Markets' as Ongoing Trends in EU Competition Law by Erman EKİNGEN, the author provides an overview of the concepts of digital economy and digital markets in the context of EU competition law. The author explains how the digital economy has transformed the way businesses operate and compete, and how digital markets have become a key area of focus for competition authorities. EKİNGEN discusses the challenges posed by digital markets, including issues related to data, algorithms, and platform dominance and examines the European Commission's approach to regulating digital markets, including the use of antitrust enforcement and merger control. The article concludes that the EU's competition law framework must continue to evolve to address the unique characteristics of digital markets and ensure fair competition in the digital economy.

3. Research Methodology

This study involves a doctrinal type of research which reviews the primary as well as the secondary sources to get a bird's eye view of the problem in question. This method helps in going through the research works of several prominent writers. The study has combed through certain case laws to understand the nuances of the present topic.

Primary Sources: Competition Act 2002, Digital Markets Act (EU), Competition Amendment Act 2023, American Innovation and Choice Online Act.

Secondary Sources: Competition Law Review Committee Report 2019, Parliamentary Standing Committee on Finance (2022), case laws, articles, journals and news reports.

4. Digital Marketplaces: Characteristics and Challenges

It is important to note that before the shaping of these digital companies, existed offline-traditional companies and certainly they exist today as well. To study the impact these offline companies have faced due to the rise of digital companies, we must comprehend the fundamental difference between a digitally running internet corporation and a typical traditional offline service provider. In layman's terms, this means that those enterprises which have their working business through an online interface only can be regarded as digitally-operated companies, whereas the rest of them can be regarded as traditional offline companies as they conduct their enterprises through physical and offline means (Anand Pawar, 2021).

5. Understanding Competition in Digital Marketplaces

The growth of digital markets has evolved the way businesses function and consumers interact with certain products and services. The fast rise of e-commerce platforms has increased competition in the digital marketplace dramatically.

To begin, one must understand the significance of visibility and discoverability in digital marketplaces. With so many products and sellers vying for attention, it is difficult to stand out. Search and ranking algorithms used by marketplaces are critical in determining visibility. Optimizing product listing with relevant key phrases, attractive pictures and intriguing descriptions can increase visibility and attract potential customers.

Secondly, price tactics are extremely important in the competitive world of digital marketplaces. Customers who shop online tend to be price-sensitive and compare pricing across different platforms. As a result, to stay competitive, vendors must carefully analyse pricing trends.

In digital marketplaces, dynamic pricing algorithms, which modify prices according to factors such as consumer demand, competition and the behaviour of customers, have become common.

Thirdly, in digital markets, client's experience and endorsement are crucial. Word-of-mouth travels quickly in the day and age of social media and online feedback and customer opinion have significant clout.

Fourth, rivalry in online markets extends beyond individual merchants. Large organisations and well-known brands frequently have a strong presence on these channels. These organisations contribute substantial resources, huge product catalogues and recognition of the brand, providing them with an edge over their competitors.

6. Emergence of Digitally Operating Companies and its Impact on Traditional Companies

A digital or online economy is a sector that is based on technology and runs on data processing and communication. This economy is distinguished by high levels of technological advancement, minimal marginal costs and network effects. (Ankita Srivastava *et al*, 2023). Digitally running enterprises have disrupted established company models, transformed customer behaviour and reshaped market dynamics as technology advances and the popularity of online platforms grows.

7. Monopoly Concerns in Digital Marketplaces

Digital marketplaces, which connect buyers and sellers via online platforms, can upend existing businesses and redefine market dynamics. However, the concentration of power and dominance of certain platforms raises serious competitive concerns (OECD, 2020).

The capacity to attract a big user base and the first-mover advantage offer dominating platforms an edge over counterparts since more users attract more merchants and vice versa. This results in a self-reinforcing loop that enhances the supremacy of the dominant platform. As a result, powerful digital marketplaces can control access to many buyers and sellers, exercising enormous influence over pricing, terms and conditions and general market dynamics. Take for example, Google, which is one of the world's largest and most powerful technology corporations, has been facing fire lately for its business practices and possible antitrust violations

(Geoffrey A, Maine *et al*, 2010). One of the major worries regarding Google's business practices has been its domination in the search engine sector. This dominance has raised accusations that Google is abusing its market position to favour its very own goods and services over its opponents (Jennifer Elias, 2020).

Another set of issues that have been highlighted about Google, is that it has favoured its shopping comparison service, Google Shopping, over its rivals, in the search results of a user (Lynn Paramore, 2021).

8. The Competition Act 2002: Key Provisions and Limitations as to Digital Marketplaces

8.1 A Brief Overview of the Act Alongside Interaction with Digital Markets

The 2002 Act is a comprehensive piece of law, which seeks "to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets." It establishes a legislative framework to govern market behaviour, ensure market efficiency and keep enterprises on a fair playing field.

The 2002 Act includes laws addressing many issues of competition, such as abuse of dominance (Section 4) by enterprises, anti-competitive agreements (Section 3) entered by companies and mergers and acquisitions. These provisions are intended to preserve consumer welfare by ensuring fair competition, preventing market distortions and ensuring fair competition. They also are aimed to discourage practices that may stifle competition, limit market access or result in consumer exploitation (Taxmann, 2023). The Act also forbids dominant corporations from engaging in unfair practices that damage competition or exploit customers.

When the 2002 Act is applied to digital marketplaces, however, some limitations and issues develop. One significant limitation of the Act could be the inadequacy in addressing the specific characteristics of digital marketplaces. Digital platforms can operate on a worldwide scale, making it difficult to precisely define relevant markets and prove market dominance (Parsheera *et al*, 2017).

8.2 Issues of Competition Dealt by CCI in the Digital Sector

One of the primary cases that is required to be looked into is **Matrimony.com Limited v. Google LLC (2018, para 191, 192 and 205)**, also known as the Google search case. The CCI had specifically highlighted that it is completely exercising 'forbearance' in not interfering with Google's search design as the same may affect future experimentation and kill innovation in digital markets. The decision in Matrimony portrays that the CCI tried to achieve a balance between competition concerns in the market and ensuring that the benefit the consumers would have been getting with Google's search design is also not compromised. In contrast to the foregoing case, the CCI in **Federation of Hotels and Restaurant Association of India and Others v. Make My Trip India Private Limited (2019)**, had given priority to establishing a level playing field, by allowing all players in the case a fair chance to participate in the market and compete with each other on merit.

In another case of **Counfreedise v. Timex Group India Limited (2018)**, the CCI investigated the alleged anti-competitive conduct in Resale Price Maintenance. It was alleged that the Timex Group had discriminated against Counfreedise, which is the distributor of Timex Group's wristwatches on e-commerce platforms, in comparison to other e-commerce players such as Cloudtail and certain others. In this case, the CCI had found no *prima facie* case against the Timex Group. As regards the Commission's approach towards enforcing Competition law in the digital circuit, we can also refer to **Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited (2020, para. 26, 27)**, wherein the CCI had said that both Flipkart and Amazon are following the "market e-commerce model and therefore any vertical agreement between the two platforms and sellers can be investigated by the Commission under Section 3(4) of the Competition Act 2002."

In the very recent case of **Umar Javeed v. Google LLC (2022)**, the CCI imposed a fine of Rs. 1337.76 crores on Google after finding it to be *prima facie* abusing its dominant position in the market for mobile operating systems, regarding pre-installation of Google-based applications in mobile devices at the time of their manufacture. In another case of **XYZ(Confidential) v. Alphabet Ltd. (2022)**, the CCI fined Google Rs 936 crores for abusing its dominant position in relation to its Play Store policy.

We therefore can infer from the above approaches of the CCI that the 2002 Act does provide a solid platform for regulating internet marketplaces. However, given the specific dynamics and challenges offered by digital platforms, their relevance must be carefully evaluated.

8.3 Challenges in Enforcement in Digital Markets

One of the most challenging obstacles in implementing competition law in internet marketplaces is defining the 'relevant market'. In the digital domain, conventional market definition techniques based on physical borders are insufficient. Digital marketplaces frequently operate across borders, making it difficult to define competition. The CCI is the regulatory body, which has acknowledged these issues and developed a more dynamic approach to market definition. For instance, in **Ashish Ahuja v. Snapdeal and Others (2014, para. 16)**, about the online e-commerce business, the CCI had held that "both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decide accordingly".

Furthermore, the CCI in the case of **Mohit Manglani v. Flipkart India Private Limited (2015)**, had noted the distinct features of e-commerce, where the e-commerce platforms allow their customers to compare prices of goods as well as other product qualities at the same time. However, the CCI did not believe it needed to define the e-commerce market as the 'relevant market' because the parties involved were not separately dominant in both the offline and online sectors.

Also, in **Albion Infotel Limited v. Google Inc. (2014, para. 16)**, the CCI in its first review of a set of cases filed against tech-giant Google alleging abusive practices committed by it in its online search and search advertising businesses, highlighted "the market for online search advertising in India as the relevant market. Moreover, the CCI had *prima facie* found Google to be in a dominant position in the said market".

Contrary to the observation made by the CCI in the case of **Ashish Ahuja**, wherein it was observed that "the e-commerce and normal traditional markets are different channels of distribution of the same product and are not two different relevant markets". In the case of **All India Online Vendors Associations v. Flipkart India Private Limited (2018, para. 24)**, the CCI observed that "there is a difference between an

online retail store, which is an extension of the overall retail chain, and the online marketplace platform". However, in the case of **Meru Travel Solutions Private Limited v. Uber India Systems Private Limited (2015, para. 18)**, where a complaint was filed by a Kolkata-based Taxi company against Uber for doing anti-competitive practices, the CCI had looked into the "active presence of yellow taxis in the city" and had inferred that both the yellow taxis and cabs of Uber form part of the same relevant market.

9. Does India Really Need an *Ex-ante* Regulation for Digital Marketplaces?

Despite the existing provisions of the 2002 Act, considering the fast-growing digital market, the need for an *ex-ante* regulation may be enacted to evaluate competition in digital markets. The report of India's Parliamentary Standing Committee on Finance (2022), which issued a detailed report on Big Tech's anti-competitive practices strongly advocated for *ex-ante* legislation to promote fair and transparent digital marketplaces in India. To promote a "fair, transparent and contestable digital environment in India", the committee's report advocated an *ex-ante* regime via a new 'Digital Competition Act' (DCA) (Lok Sabha, 2022).

Under the recommendation above, the Ministry of Corporate Affairs recently formed a panel for discussion on enacting an *ex-ante* regulation of Digital Competition Law (KR Srivats, 2023). It seems that the *ex-ante* regulation or legislation that takes effect before problems exist, has been proposed to solve concerns and possible harms in digital marketplaces. The need for the same must be judged on certain parameters.

10. Does the Existing Competition Act 2002 Effectively Regulate Digital Marketplaces?

As was previously highlighted, the 2002 Act seeks "to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets". The present research argues that the framework of the existing competition law provides a sufficient basis for addressing issues of ever-growing digital markets. (Parliamentary Standing Committee on Finance, 2022)

10.1 Anti-Steering Provisions

These are provisions that ban the business users of a platform from guiding their clients to offers that are not provided by the platform. For example, a particular application will require the users of its platform to use its payment methods for purchases. These give rise to anti-competitive behaviour (Seerat Bhutani *et al*, 2023). The Committee advised SIDIs not to draw a condition for users in terms of accessing their platform on the verge of the fulfilment of certain conditions. The present study believes that this recommendation of the Committee can be effectively addressed under the ‘abuse of dominance’ criteria, specifically by provisions under **Section 4(2)(a)** and **Section 4(2)(c)** of the 2002 Act (A reference to the case of **XYZ (Confidential)** satisfies this issue).

10.2 Platform Neutrality or Self-Preferencing

An entity may serve as both a competitor and a platform provider on the same platform. Self-preferencing or platform neutrality is a practice in which a particular platform favours its own or subsidiary services. According to the Parliament’s Standing Committee, SIDIs should not favour their services over those of competitors when providing access. It is believed that this recommendation of the Committee can be effectively addressed under the ‘abuse of dominance’ criteria, specifically by provisions under **Section 4(2)(a)**, **Section 4(2)(e)** and **Section 3(4)** of the 2002 Act (A reference to the case of **Umar Javeed** satisfies this issue).

10.3 Bundling and Tying

Many digital companies compel customers to purchase associated services. The Committee recognised that this led to pricing imbalance and the loss of competition. This allows market leaders to transfer their strength from one main platform to another. This recommendation of the Committee can be effectively addressed under the ‘abuse of dominance’ criteria, specifically by provisions under **Section 4(2)(a)**, **Section 4(2)(d)** and **Section 3(4)(a)**, which talks about Tie-In arrangements. (A reference to the case of **Umar Javeed** satisfies this issue. Also, in the case of **Kshitij Arya v. Google LLC (2021)**, “the CCI had launched an inquiry into Google for allegedly negotiating into agreements with device manufacturers that oblige them to pre-install the whole suite of Google apps and forbid them from picking and choosing which Google apps to install”).

10.4 Data Usage

The Committee observed that market leaders with access to the personal data of consumers tend to grow, whereas new entrants struggle to obtain new users and user data. It advised that SIDIs should not process the personal data of end users who utilise third-party services if those third-party services use the SIDI's core services. (Seerat Bhutani *et al*, 2023) This recommendation of the Committee can be effectively addressed under the 'abuse of dominance' criteria, specifically by provisions under **Section 4(2)(a)**, **Section 4(2)(c)** and **Section 4(2)(e)** of the 2002 act. (A reference to the case of **In Re: Updated Terms of Services and Privacy policy for WhatsApp users (2021)**, "wherein an investigation was conducted against Meta and WhatsApp for abusing its dominant position about privacy policy rolled in by WhatsApp, address the issue.")

10.5 Deep Discounting

Most digitally operated businesses receive money from investors, which they use to indulge in practices such as cash-back offers, heavy discounting and other incentive schemes aimed at attracting new clients. This frequently permits them to expand their network effect. This recommendation of the Committee has been effectively addressed in **Section 4(2)(a)** of the 2002 act", which provides for 'abuse of dominance'.

10.6 Exclusive Tie-ups

This is also one of the issues raised by the Committee, which talks about a deal with a brand that allows a platform to sell their brand's items solely, which can be regarded as exclusive tie-ups. The present researcher believes this recommendation of the Committee can be effectively addressed under **Section 4(2)(a)** of the 2002 act, which provides for "abuse of dominant position", also by **Section 4(2)(c)** and **Section 3(4)** of the 2002 act. ("The case of **Federation of Hotels and Restaurant Association of India (2019)** is referred, wherein "the Commission found the Competition Act to be violated by MakeMyTrip and GoIbibo's (collectively referred to as MMT-Go) as regarding extensive price parity terms and exclusivity conditions with lodging partners, as well as distortion of information to users").

Apart from the above, a perusal of the Standing Committee's Report would suggest that one of the other reasons it called for the enactment of an *ex-ante* regulation for digital marketplaces was that "digital markets often 'tip' quickly and one or two winners or leading players emerge in a short span of time" (Lok Sabha, 2022). It is humbly argued that the present regime of the 2002 Act has itself provided a solution to this i.e., Section 33, which provides for issuance of interim orders. The researcher herein submits that this provision is sufficient to address the foregoing issue, as interim measures can be issued by the CCI till the completion of the investigation, to avoid short-term harm caused due to violation of any provisions under the 2002 act.

11. Implications of *Ex-ante* Regulation in Dealing with Issues Arising from Digital Marketplaces

Ex-ante regulation, or regulation implemented before the issue arises, has been recommended to handle concerns and possible harms in digital marketplaces. However, while the goal of *ex-ante* regulation is to address issues about competition, consumer protection and market fairness in advance, it is vital to evaluate the potential negative consequences of this regulatory strategy.

11.1 Suffocating Entrepreneurship and Innovation

Ex-ante regulation in digital marketplaces can hinder innovation and entrepreneurship, which is one of its principal negative consequences. (Indrajeet Sircar, 2022). To substantiate the foregoing, a reference can be made to the case of **Matrimony.com Limited v. Google LLC (2018)**, where the CCI had specifically highlighted that it is completely exercising 'forbearance' in not interfering with Google's search design, which has been alleged to be an abusive practice, as the "same may chill future experimentation and kill innovation in digital markets."

11.2 Rigid and Out-of-Date Regulations

Digital marketplaces exist in a fast-paced, ever-changing setting. *Ex-ante* regulations may face the risk of generating rigid and out-of-date norms that are unable to evolve to keep up with the rapid rate of technical improvements and changing dynamics of the market.

An *ex-ante* regime, by definition, would impose rule-based constraints rather than effect-based constraints (OECD, 2021).

In the case of **Harshita Chawla, (2020)**, the informant argued that Facebook is exploiting its supremacy in an “internet-based instant messaging App” to bundle its app i.e., WhatsApp with the WhatsApp Pay payment option, thereby allowing it to enter the “UPI-enabled Digital Payments Market”. Furthermore, it was also argued that by enabling automatic installation of WhatsApp Pay in the Messaging App, WhatsApp is said to be pushing its major user base to popularise its payments app. In its decision, the CCI had observed that “the informant had failed to establish the necessary elements of a leveraging claim as the users retain full discretion and optionality in choosing whether to use WhatsApp Pay” (Harshita Chawla, In re, para. 43).

In another case, **Vinod Kumar Gupta v. WhatsApp Inc. (2017)**, the WhatsApp privacy policy of 2016 was challenged and said to be an “abuse of dominant position” by WhatsApp. However, the CCI at the outset dismissed WhatsApp’s charges of abuse of dominance in relation to its 2016 privacy policy. In its decision, the CCI stated that WhatsApp only collected limited information and that “users could ‘opt-out’ of sharing their account information with Facebook within 30 days of subscribing to the amended terms of service and privacy policy” (Vinod Kumar Gupta, para. 15).

Furthermore, in another case of **Baglekar Akash Kumar v. Google LLC and Another (2021)**, the Informant alleged that tech-giant Google is a dominant player concerning internet-related services and products. By virtue of this domination, the informant argues that Google has integrated the Meet video-conferencing App into the Gmail App which may result in abuse of dominance under Section 4 of the Act by Google. In its decision, the CCI had dismissed complaints of Google’s abuse of dominance in connection with the integration of Google Meet with G-mail, based on Google’s submissions that users may use either app with all its features without having to use the other (Baglekar Akash Kumar, para. 14).

12. Conclusion

Apart from the present study, the reference to the “Standing Committee Report and the Competition Law Review Committee Report and the

Market Study on E-Commerce conducted by the Commission”, also suggests that the present regime of the 2002 act can deal with issues arising from the ever-growing digital marketplaces. Saying that the same is not at all capable, would be an understatement considering that the regulatory body under the act has been adjudicating cases pertaining to the digital world. Despite the novel challenges presented by digital marketplaces, the 2002 act remains a robust and effective tool for addressing anti-competitive conduct in these markets.

Although the Act’s provisions were drafted before the digital era, they possess the necessary flexibility and adaptability to be successfully applied to the digital economy. The CCI has the requisite jurisdictional reach and powers to tackle anti-competitive behaviour in digital markets and has demonstrated its ability to evolve and apply the Act to the digital landscape through its decisions and guidelines. The Act’s core focus on promoting competition and preventing anti-competitive practices, rather than regulating specific industries or technologies, makes it particularly well-suited to address the rapidly changing and dynamic nature of digital markets.

Furthermore, the Act’s provisions on abuse of dominance, anti-competitive agreements, and merger control are relevant and applicable to digital marketplaces. The CCI’s ability to impose penalties and remedies as highlighted earlier in cases about Google, including behavioural and structural remedies, provides a strong deterrent against anti-competitive conduct in digital markets. Accordingly, in light of the above, the major key findings pertaining to acceptance of the present 2002 act would include the flexibility of the act, CCI’s jurisdictional reach and proactive approach in terms of dealing with cases and the adequacy of the act in dealing with the issues arising in the digital domain.

13. Suggestions and Possible Approaches Towards Competition Law Enforcement

While some may argue that the 2002 act requires amendments to specifically address digital marketplaces, the CCI’s proactive approach and adaptability as stated earlier, have demonstrated that the existing framework can address the unique challenges posed by these markets. If there would have been no mechanism under the present competition law,

the digital marketplaces which are ever-growing today at an immense space would not have been regulated at all. However, this is not the case i.e., the approach preferred by CCI in dealing with competition issues in the digital marketplaces shows that the present law can deal with issues arising other than in traditional marketplaces.

Based on the research done and major key findings analysed, it is believed that below stated suggestions may be considered by the CCI for better application of the provisions of the 2002 act in context with digital marketplaces:

13.1 Time as an Essence for Anti-Trust Investigation

Time is of importance in antitrust investigations involving digital markets. Because digital marketplaces are dynamic and fast-evolving, prompt action is required to address any anticompetitive behaviour and ensure consumer welfare. The pace at which investigations are conducted has a significant impact on enforcing antitrust laws in digital marketplaces. A time-bound investigation must be adopted by the CCI to ensure that the findings that are reached hold some value (Parsheera *et al*, 2017). This was observed by the Supreme Court in one of the important cases of **Competition Commission of India v. Steel Authority of India Limited (2010)**.

“In the event of a delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, to the country's economy cannot be ruled out” (Steel Authority of India, para. 10).

In this regard, a research study of the year 2020 is referred to where the time taken between the filing of cases against e-commerce platforms and investigatory steps and conclusion of the case is stated. The said study highlights the necessity of fixed-time guidelines for digital marketplaces. (Dr. Navdeep Singh Suhag *et al*, 2020) Therefore, considering the same, the timeline as laid down by the Supreme Court of 60 days in the **Steel Authorities of India** case, the same should be considered and steps may be taken by the authorities to follow the same in letter and spirit and specifically in the cases of digital marketplaces. The foregoing is necessary considering the pace at which the digital marketplace is ever-growing.

13.2 Ex-ante regulation may give rise to the prohibition of dominance per se regime; restriction in innovation will be ‘death-knell’ for platforms. The voluntary settlement mechanism introduced by the Competition Amendment Act 2023 could be the possible approach

As previously highlighted, the introduction of an *ex-ante* regulation would result in prohibiting dominance per se. Such a regulation would go directly against the basic object of Competition Law i.e., prohibiting appreciable adverse effects on the market. The enactment of an *ex-ante* regulation would give the impression to platforms that their dominance per se in a particular market may lead them into trouble.

It is emphasised that the Standing Committee’s recommendation for specialised legislation to ex-ante regulate competition in the digital sector mirrors developments in jurisdictions such as “the European Union, United States of America, and United Kingdom”, all of which have legislation in force or are developing similar legislation.

The European Union’s Digital Markets Act, 2022 (DMA) has been subject to criticism globally for its rigid prohibition system. Mainly the provisions of Articles 5, 6 and 7 of the DMA contain several per se rules. The per se rules do not need proof that there are real detrimental effects of behaviour but instead forbid it. On one hand, the present researcher does not deny that such ex-ante rules increase legal certainty. The researcher argues that on the contrary, such rules could forbid behaviour that has no adverse effects and might not regard detrimental behaviour as such. As a result, the only way these rules or obligations may be interpreted under the act is by imposing an inflexible, universal approach on gatekeepers with varying business models (Miguel Maximo & Dos Santos, 2023).

Furthermore, instead of a complete replication of the European Union’s digital market model, India should also consider that this Digital Markets Act has also been questioned by Fredric Jenny, Chair of the OECD Competition Committee, who warned that the DMA could result in competition or innovation restrictions in the guise of safeguarding competition in the digital marketplace.

Similarly, as we have previously discussed as well, the “American Innovation and Choice Online Act” in the United States of America have not garnered unanimous congressional support due to fundamental

differences and worries about the unforeseen repercussions of ex-ante regulation on consumers, growth and innovation (Project Disco, 2023).

In the United Kingdom, the Digital Markets, Competition and Consumer (DMCC) Bill received royal assent in May 2024. Unlike the European Union, the United Kingdom's choice not to create a 'blacklist' of locations into which gatekeeper corporations can penetrate without governmental authorization is one of the most significant contrasts (Alessandra Venier, 2021). Indeed, the United Kingdom's rules of conduct will include additional 'tailoring' to specific corporations' abusive practices (OECD, 2022). The said provisions are highly improved ones as compared to that of the European Union.

To highlight the possible substitute of this *ex-ante* aspect, the researcher suggests the 'voluntary settlement' of cases, which has also been introduced in the 2002 Act, by the introduction of a new provision of Section 48-A by the Competition Amendment Act 2023. This will allow market participants who may be working in violation of the 2002 Act to change their conduct without requiring a whole inquiry by the Competition Commission. This will ensure that the CCI be properly positioned to prevent any violation before it occurs, or when it is still occurring, but before the entire framework of the market has irreversibly changed in favour of one participant. In this regard, for better application of this newly introduced provision, the CCI can also refer to a decision by the Madras High Court in 2015 in the case of **Tamil Nadu Film Exhibitors Association v. Competition Commission of India and Others (2015, para. 37)**, where it was held to be possible within the framework and scheme of the 2002 act, to allow settlements and compromises to be reached between parties, provided the CCI is of the considered view that such settlements and compromises would not lead to the continuance of anti-competitive practices.

13.3 Specialised Authority and Officers to Deal with Issues of Digital Markets

The present researcher had discussed previously that the CCI had in October 2022 announced that a step for setting up a Digital Markets Data Unit (DMDU) will be done, "in view of number of cases and complexity in the digital sector and the increasing need of data and technology skills." (ET Government, 2022).

Taking reference to the practice of the United Kingdom, where a specialised Digital Market Unit (DMU) has been established “as a centre of expertise for digital markets, with the capability to understand the business models of digital firms, including the role of data and the incentives driving how these firms operate”. (Aniko Adam *et al*, 2022). The researcher therefore suggests that the authorities must consider declaring the Digital Market Digital Unit (DMDU) comprising specialised officers with an understanding of digital markets, along with the regulations governing it.

13.4 Factors Considered for Determining Dominance Need to Looked in a Wider Perspective

As per Section 19(4) of the 2002 Act, the factors that are used for determining the dominance of the firm include market shares, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise, vertical integration of the enterprises or service network of such enterprise, market structure and entry barriers. The researcher humbly submits that while the CCI has clarified that market share is not conclusive proof of dominance, it continues to depend on it as the major criterion in dominance proceedings, particularly at the *prima facie* stage. (Meru Travel Solutions Private Limited v. Uber India Systems Private Limited, CCI, February 10, 2016) However, in the case of **Meru Travels Solutions Private Limited and Another v. Competition Commission of India (2016)**, the Competition Appellate Tribunal (COMPAT) has specifically brought the fact that the dominant position under Section 4 of the 2002 act means a ‘position of strength’ but ‘it does not say that this position of strength necessarily has to come out of market share in statistical terms’ (Meru Travel Solutions Private Limited v. Competition Commission of India, COMPAT, para. 16). As a result, the Competition Appellate Tribunal urged the CCI to assess the issue of dominance considering the whole picture of the ‘radio taxi services’ industry, which was the issue in the instant case, including its financial status, global trends, network expansion strategies and accompanying discounts.

The researcher therefore submits that subject to Section 19(4) of the 2002 Act, the CCI when looking into the dominance of digitally-based businesses, should consider the characteristics of such enterprises, such as rapid technical advances, the phenomenon of growing returns, the

benefits of behavioural data obtained from users and most importantly, network effects. It is stated that the presence of network effects imparts a large first-mover advantage on businesses that can create scale at an early stage, allowing them to continue expanding at an exponential rate until more efficient competitors are forced to abandon the market. Therefore, according to this research, the dominance should thus be evaluated taking into consideration all these criteria, as the self-reinforcing nature of network effects ensures that the person who gets out ahead will surely be rewarded with the largest market share. Even the Competition Appellate Tribunal in the **Meru Travels (2016)** case had asked the CCI to just not focus on the market shares of these digital firms but also to consider the 'overall picture', which includes the status of finance in the business, the existence of discounts and incentives and the principal purpose of network expansion. This decision in **Meru Travels** was also upheld by the Supreme Court in **Uber (India) Systems Private Limited v. Competition Commission of India (2019)**.

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