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Google v CCI: A Tussle Over the Monopoly Culture in the Android Ecosystem

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The recent verdict of the Competition Commission of India against Google has brought to light the ongoing legal battle concerning the monopoly market in the Android ecosystem. Google has been accused of using unfair trade practices in the Android ecosystem, resulting in a series of backlashes in India. The Competition Commission of India's (CCI) recent strict vigilance over such practices highlights the gravity of such issues, which lead to serious cases of unfair practices in the business world. Google's monopolistic behaviour in the Android ecosystem has been widely criticised, and its dominant position has led regulators worldwide to take strict cognisance of the matter. The regulatory issues that the tech giant has been facing in different parts of the world have also caught CCI's attention, which imposed a hefty amount to be paid for their anti-competitive practices. The main cause of such a probe is the abuse of power, which is impersonated by the US tech giant in their dealings worldwide, resulting in serious implications. This article will analyse the judgment about the contention put forth by CCI and Google. It will cast a glance at CCI's probe into other companies as well regarding similar issues, delving deeper into the anti-competitive realms of India.

Keywords: *google, cci, monopoly, competition.*

INTRODUCTION

Google's journey in India started with the launch of Google Search in 2003. Initially, it was available only in English, but soon, support for Hindi, Bengali, Telugu, Marathi, and Tamil was added. Google India began with just five employees in 2004 and has grown to be one of the largest Google employee bases outside of the U.S., with close to 10,000 plus employees (as of 2022).

As smartphones became more prevalent, Indians became some of the most enthusiastic Google users, using products like Gmail, Translate, and Android. India is second only to the US in the total number of mobile search queries. Google has been focusing on three main areas to make the Internet more relevant and useful§ for Indians, "Improving Indian's access to the Internet, adapting Google products to work better for Indians on 2G connections, and empowering Indians to build great things for India."[1]

Google's Android platform powers "98% of India's 520 million smartphones". Google has leveraged its dominance to reduce device makers' ability to opt for alternate versions of its mobile operating system and force them to pre-install Google apps. This has led to Google's significant influence on the Android ecosystem in India. However, Google's dominance has also led to some challenges. The Competition Commission of India (**CCI**) fined Google for exploiting its dominant position in Android and asked it to change restrictions imposed on smartphone makers related to pre-installing apps.

The CCI imposed a huge fine on Google for abuse of dominance in the Android Eco-space. Google approached NCLT in relation to the above matter, but then, being aggrieved by the tribunal's decision, they approached the apex court of the country. The Supreme Court refused to listen to the petition in this regard. This left the company further aggrieved by the decision of the Court, which ultimately resulted in complying with the order of the CCI and they had to deposit 10% of the penalty amount being imposed on them[2]. This resulted in a huge blow to

[1] Caesar Sengupta, 'Google for India: Past, Present and future' (*The Keyword*, 16 December 2015) <https://blog.google/around-the-globe/google-asia/google-for-india-past-present-and-future/> accessed 11 October 2024

[2] *Umar Javed and Ors v Google LLC* (2019) Case No 39/2018

Google as CCI had imposed a fine of over Rs.1337.76 Crore on Google for the abuse of its power in the Android sphere, specifically focusing on its position in the Indian market. The CCI had also issued an order of cease and desist on Google for engaging itself in the violation of Section 4 of The Competition Act, 2002[3]. The Court clarified its position by stating that the agreements that were operated by Google were in combination with the interplay of the apps, which resulted in anti-competitive activity. The Court also went ahead with stating suggestions that could correct the tech giant's position in the existing market.

The second case which entangled the tech giant with the anti-competition watchdog in the country is the matter related to Google's dominance within the company's Play Store regime. The enforcement of the Google Play Billing Service (**GPBS**) on the app developers, the tech giant breached several provisions of Section 4 of the Competition Act, 2002[4]. Google also, in some cases, prioritised Google Pay for their in-app purchases over other apps offering Unified Payment Interference (**UPI**) payments. The allegation was also put forward over its alleged use of its dominant position to compel the licensed mobile OS and the application store markets to include Google Pay in the app-billing system. It was found that the tech giant was guilty under Section 27(b) of The Competition Act, 2002[5] and was subjected to a penalty of Rs.936.44 Crores, which was worth 7% of the average revenue of Google in India[6].

The tech giant is not only facing allegations in India, which is its biggest market, but they are also facing a similar backlash from the European Union (**EU**). They were imposed with a penalty of $4.2 billion for the charges of abuse of their dominant position. This brings us to the most pertinent question: whether the authorities are conforming in their actions against the tech giant. The series of backlash against Google has compelled us to relook into the anti-competitive laws and different aspects of the matter to analyse such actions.

[3] Competition Act 2002, s 4
[4] *Ibid*
[5] Competition Act 2002, s 27(b)
[6] Hemant Kashyap, 'Decoding CCI's INR 2,274 Cr Penalties: Why is Google In The Line of Fire' (*INC42*, 30 October 2022) <https://inc42.com/features/decoding-ccis-inr-2274-cr-penalties-google-line-fire/> accessed 11 October 2024

This article aims to highlight and analyse the entire matter between Google and CCI. It will also discuss the existing competition in the "Operating System Market" in the context of the matter and how the Digital Competition Act[7] can be an aid to data privacy in the present situation. It will also cast a glance over the recent probes on the other companies over their antitrust matters.

GOOGLE'S DOMINANCE IN THE OPERATING SYSTEM MARKET

Google is the sole operator and controller of the Android operating system, and it also licenses other proprietary applications. Google acquired Android Inc., which was the original creator of the Android OS, in the year 2005 and by this acquisition, Google has an edge over other operating systems. This enables it to be part of every phone and the several agreements entered by Google with the Original Equipment Manufacturer (**OEMs**) compel the parties to install Google Mobile Services (**GMS**), which gives them access to its users. The agreements entered by Google deny market access to the Original Equipment Manufacturer. Google enters into several agreements with the OEMs, including the Mobile Application Distribution Agreement (**MADA**),[8] which grants OEMs the license for the distribution of proprietary apps for Google, such as Google Search, Google Maps, Google Drive, Google Chrome, etc. These are also referred to as GMS, which, on an investigation by the CCI concluded that pre-installation of the GMS under the MADA was in contravention of Section 4(2)(a)[9]. The agreement was also in violation of 4(2)(d)[10] and 4(2)(b)(ii)[11]. It highlights the unfair practices in the purchase or sale of goods and services, either directly or indirectly, and the restriction imposed on the scientific or technical development to the prejudice of the consumers.

The other agreement entered with the OEMs is the Anti-fragmentation Agreement (**AFA**), where the OEMs are restricted from manufacturing or even developing hardware for themselves or any other third party. This is done to check the compatibility with Android, which is specified by the AFA Agreement. Android Compatibility Commitment Agreement (**ACCA**)[12] allows

[7] Digital Competition Act 2023
[8] Kashyap (n 6)
[9] Competition Act 2002, s 4(2)(a)(i)
[10] Competition Act 2002, s 4(2)(d)
[11] Competition Act 2002, s 4(2)(b)(ii)
[12] Kashyap (n 6)

OEMs to manufacture devices for third-party devices that are not compatible with Android devices. This condition stays valid only in cases where the device, in actual sense, is marketed under a third-party name and OEM itself does not manufacture such devices. The Revenue Sharing Agreement (**RSA**) precludes any third-party application or service which qualifies itself in the criteria of an appropriate application to stand as an alternative to Google Assistant. It also prohibits the OEMs from installing them and revenue which is generated in the process is shared between the tech giant and the OEMs instead of their anti-competitive activities. These agreements put unreasonable compliance levels on the OEMs and they are not in a position to deny such conditions also. The tech giant is never in the frame of negotiation with any of the terms with the existing terms of the agreements with the MADA, which showcases its increasing anti-competitive practices in the market.

The obligation with reference to the pre-installation for the Google apps is a huge compliance restriction on the OEMs. Google has also restricted the OEMs from accessing YouTube and Google Search separately, it has been done in order to link the Play Store to these platforms. It will result in the stoppage of competition in the market and will lead to a narrow window for development and a limited bucket of choices for the customers. The tech giant has used its dominant position in the Play Store to protect its position in the online search genre as well. This is against 4(2) (e) of The Competition Act, 2002[13] in terms of using the dominant position in a particular market in order to protect or enter other markets. It puts a certain pressure on the complying ability and proper functioning of these agreements with the OEMs.

These practices, which are being carried out in reference to these agreements, have created an anti-competitive practice in the market. It is done with the aim of not allowing other devices which are not associated with Google to outperform the Google applications. This is against the ethics of the Competition market, which is constantly in conflict with the anti-competitive activities in the market. This has amounted to an abuse of its dominant position in the market and defied the provisions of The Competition Act 2002[14], which regulates anti-competitive

[13] Competition Act 2002, s 4(2)(e)
[14] Competition Act 2002

activities in the market. This showcases the abuse of its dominant position in the market and its anti-competitive practices.

GOOGLE'S ABUSE OF DOMINANCE

The tussle between Google and the CCI is not a recent one; and it has been going on for a few years now. In 2018, CCI wound up its six yearlong investigation and found that Google used its dominant position in web search to obtrude certain restrictions on its syndicate partners and also limited the user's choice by promoting its own results like YouTube, Google Maps, Google News, etc. thereby creating a search bias. Further, it also used its dominant position to create unfair advertising terms for its partners, thus restricting them from contracting with other search engines, in addition to that, it was also accused of setting up fixed positions for some of its partners in certain categories of search results. In light of these accusations, CCI directed Google to abstain from assigning fixed positions, add a disclaimer while presenting its commercial flight results, desist from enforcing unreasonable restrictions on its syndicate partners, and also imposed with a penalty of Rs. 1.36 billion for its anti-competitive conduct.[15]

Again, in 2020, Google was accused by CCI of using its dominant position through "Android OS" and its UPI application called "G-pay". The accusations alleged Google made certain unfair and discriminatory terms in the Google Play app for app developers and also used RSA to dominate the Android ecosystem. Google mandated the app developers to sign an agreement according to which they had to use the Play Store's billing system for any purchases made in the Play Store and for in-app purchases as well. Additionally, it required that 30% of all sales revenue go to Google, but this requirement only applied to apps that didn't deal with physical goods, so services like Ola, Uber, and Amazon, among others, were exempt. This proves that the mandate was simply an attempt to take advantage of Google's market dominance. Furthermore, the Play Store's policy required users to utilise G-pay as a UPI option, which CCI ruled to be a breach of Section 4 of the Act because it excluded other G-pay app rivals from the market by only permitting G-pay in the Play Store. Google also signed RSAs with many Android

[15] Smriti Parsheera, 'CCI's order against Google: infant steps or a coming-of-age moment?' (*The Leap Blog*, 22 February 2018) <https://blog.theleapjournal.org/2018/02/ccis-order-against-google-infant-steps.html#gsc.tab=0> accessed 12 October 2024

device manufacturers, according to which they had to pre-install certain Google apps before sending them into the market, such as G-Mail, G-Pay, Hangout, etc. CCI, in this case, held Google liable for abuse of dominance by stating the theory of "status-quo-bias", according to which users are more likely to stick to the pre-installed apps rather than switching to or giving a chance to other apps, thereby creating an unfair market environment.[16]

In 2022, CCI, in its long endeavour to take down the big tech from abusing their dominant position, once more imposed a penalty of INR 13,37,00,00,000 on Google under section 27 and section 4 of the Competition Act, 2002. In this case, CCI alleged that Google has, firstly, violated its dominant position in the market by mandating pre-installation of its application in Android devices, without which they can't be manufactured or sold or marketed in any part of India, which was clear violation of using dominant position under section 4 read with section 27 of the Competition Act. Secondly, Google's bonding with other applications was an illegal conduct of not allowing access to market to other rival applications. Thirdly, Google's "disabling feature", which restricts users from developing other potentially superior versions of Android, was also held as an abuse of power. Fourthly, its anti-fragmentation agreements disabled OEMs from providing their services to Android forks, which led to abuse of dominance since most of the OEMs were signed with Google. Last but not least, CCI charged Google with employing RSAs to secure exclusivity as a search engine in every Android device, completely eliminating its rival search engines.[17]

The aforementioned cases and facts show the structural domination of Google in advertising and digital market space, which further makes it very evident how fiercely competitive the web markets may become. Additionally, consumers are also being impacted, as competitors are becoming more aggressive in their marketing strategies as the market becomes more competitive. This could lead to data privacy issues in the digital market arena as these companies use consumer data to improve their products, sometimes driving customers to

[16] Anchit Nayyar, 'Google's Antitrust Saga: Pay to Play' (*India Corp Law*, 17 November 2020) <https://indiacorplaw.in/2020/11/googles-antitrust-saga-pay-to-play.html> accessed 12 October 2024
[17] Rupin Chopra and Apalka Bareja, 'CCI Fines Google For Abuse Of Dominant Position' (*Mondaq*, 15 November 2020) <https://www.mondaq.com/india/antitrust-eu-competition-/1251070/cci-fines-google-for-abuse-of-dominant-position> accessed 12 October 2024

become addicted to their products. Therefore, a nexus needs to be drawn between big data companies and competition law. Now more than ever, the world digital market needs strong provisions dealing with personal data protection and regulating the online market.

UMAR JAVEED VS GOOGLE LLC – AN ANALYSIS

The case highlights the judgment passed by the CCI imposing a penalty and a Cease-and-desist order in view of the abuse of the dominant position in the Android Mobile Device ecosystem by Google. The tech giant was found guilty under Section 27 of The Competition Act, 2002[18]. The case filed by the informants under Section 19 (1) (a)[19] of The Competition Act, 2002 against Google India Private Limited and Google LLC[20] highlighted the alleged abuse of its power in the mobile operating system markets under Section 4 of The Competition Act, 2002[21]. The informants went on to state that Android is an open-source mobile OS, which, in a literal sense, means that it can be developed and accessed by anyone. The range of tablets and smartphones which is manufactured in India were in the practice of using Android as their operating system in combination with other Google Mobile Services. The GMS is said to be a pool of Google applications and Application Programming Interface (**APIs**), which, in accurate terms, supports the functionality across the devices connected with it. This GMS contains a variety of Google apps that cannot be accessed or downloaded through any other device manufacturers. To download these apps, the manufacturers have to sign agreements with the tech giant, which indicates supremacy in their behaviour and abuse of their dominant position.

The arguments put forth by the complainants stated that Google had created an obstacle in the way of development and accessibility of the market applications or services that are their rival counterparts. This leads to exercising their monopoly by administering the pre-installation of such Google-owned applications to get access to GM. Google also withholds the competing application stores from providing Google's apps like YouTube. MADA places innumerable restrictions on the manufacturer's choice of a device by placing a condition of using only Google-

[18] Competition Act 2002, s 27
[19] Competition Act 2002, s 19(1)(a)
[20] *Umar Javed and Ors v Google LLC* (2019) Case No 39/2018
[21] Competition Act 2002, s 4

owned applications. This leaves the manufacturer in a fix, as they cannot make a choice in this regard and they have to use all the applications of the tech giant even when there is no requirement of the same.

The arguments put forward by Google regarding these allegations stated that such competitive limitations have been imposed by Apple as well. The question as to the market definition and dominance, which is related to the search services, does not stand valid according to them. The end users have the option of downloading the competing apps from the Play Store with very ease. GMS applications are not distributed through Android application stores other than Play Store because the third-party application store may suffer from security and malware breaches, which leads to an unsatisfying experience for the users[22]. The quality of such applications can only be sustained by Google apps.

The CCI expressed its opinion by stating that markets should be allowed to compete on merits, and the responsibility of creating a safe environment is on the companies in a dominant position, which in this case is Google. Google should allow other app developers to let their application stores be distributed by Play Store as well. Google should also refrain from instructing the users on uninstalling the pre-installed apps. Google should no longer be entering into agreements with OEMS or even go ahead with monetary incentives for encouraging their exclusive search services. The imposition of any obligations on the OEMs should also not be entertained under the agreements of AFA or ACC. Google has continued its dominant position in the online search market and has been denying access to the other apps which are in the competition, which is in contravention of Section 4(2)(c)[23]. This also indicates that Google has leveraged its dominant position in the Android OS segment of the app market at the entry, as well as in the case of protection of its position in a non-android sphere through the Google Chrome App. This is in contravention of Section 4(2)(e)[24]. The firm which holds a dominant position in the market, it becomes the duty of the firm that its conduct does not create an anti-competitive market and

[22] Aneesh Raj and Chirantan Kashyap, 'Abuse of dominance: An analysis of CCI order in Google case' (*Centre for Business & Commercial Law*, 01 April 2023) <https://cbcl.nliu.ac.in/competition-law/abuse-of-dominance-an-analysis-of-cci-order-in-google-case/> accessed 12 October 2024
[23] Competition Act 2002, s 4(2)(c)
[24] Competition Act 2002, s 4(2)(e)

distort the general competition in the market. This was an established standard by the EU[25] and the CCI has extended this version to include digital market and physical markets as well in the case of *"Fast Track Call Cab Pvt Ltd. v ANI Technologies Pvt. Ltd"*[26].

The conduct of using the platform to promote its app over other competitive apps amounts to the creation of discriminatory behaviour. The CCI reported wide inconsistency and disclaimers in the revenue points by Google as well. This falls well within the definition of abuse in The Competition Act 2002[27]. The same situation was witnessed in the case of Amazon, where there was alleged information about anti-competitive practices in the Indian business market. CCI took this up in the case of *Delhi VyaparMahasangh v Flipkart Internet (P.) Ltd*[28]. The CCI held that the merit of such complaints can only be based on an investigation and ordered the same. This leads us to the conclusion that Google has been using its dominant position to promote anti-competitive activities. The CCI has created an effective precedent in order to prevent further malpractices in the market by imposing monetary penalties and other legal compliances on the tech giant. The scenario of the case proves to be an eye-opener in relation to the anti-competitive behaviour undertaken by the companies. The people operating in the marketplaces also compete against their rivals and, in the process, set the rules which are advantageous to them but leave others in a disadvantageous position. These practices, in turn, result in superior behaviour, leading to the abuse of their position in the market and creating an unfair environment for competition.

DIGITAL COMPETITION ACT: EX ANTE OR EX POST APPROACH?

Anti-trust laws were established globally following the industrial revolutions to curb monopolistic practices in competitive markets. Over time, people began to comprehend the workings of the traditional market ecosystem, leading to the creation of provisions and separate

[25] Arjun Nayyar and Jayadeep Manchikalapudi, 'Google's Unfair Trade Practices: A Cause for Action' (*Centre for Business & Commercial Law*, 01 April 2023) <https://cbcl.nliu.ac.in/competition-law/googles-unfair-trade-practices-a-cause-for-action/> accessed 12 October 2024
[26] *Fast Track Call Cab Pvt Ltd v ANI Technologies Pvt Ltd* (2015) Case No 06/2015
[27] Competition Act 2002
[28] *Delhi Vyapar Mahasangh v Flipkart Internet (P) Ltd* (2019) Case No 40/2019

committees to oversee and maintain healthy competition. This was achieved by regulating anti-competitive strategies such as predatory pricing, collusions, cartels, and mergers.

However, with the advent of the digital economy, understanding new market practices has become increasingly challenging. To maintain a balance between regulation and innovation, various legislations and provisions are being introduced worldwide. Digital competition differs significantly from traditional market competition. Traditional marketing is about reaching a broad general audience and winning by numbers. In contrast, digital marketing allows businesses to reach a larger audience more quickly, making it a more competitive form of marketing. Digital marketing also focuses on two-way communication, unlike traditional methods that rely on one-way communication.[29]

Further, data privacy plays a crucial role in this context. In today's competitive business landscape, data privacy can be a key differentiator for businesses. Consumers are becoming more selective about which brands they trust with their personal information. Prioritising data privacy can help businesses stand out from the competition. Data privacy safeguards individuals' personal information from unauthorised access, ensuring that sensitive data remains secure. When companies prioritise data privacy and demonstrate their commitment to protecting personal information, they build a reputation for reliability and integrity.

Timely market correction and market welfare are the two key features of the competition law regime.[30] As the digital market grows, it's getting harder and harder to regulate it. As a measure to regulate the big tech companies and the digital market space in general, a 53rd Parliamentary Committee on Finance was set up to discuss the "Anti-competitive measures by the big tech companies". The report focuses on differentiating various nuances between traditional and digital markets. It suggests that as the size of the traditional businesses increases, the returns also increase, but only up to an equilibrium point after that, it continues to decrease, whereas in

[29] 'Digital Marketing vs Traditional Marketing: what are the differences and how to use both strategies?' (*Rock Content*, 26 October 2023) <https://rockcontent.com/blog/digital-marketing-vs-traditional-marketing/> accessed 13 October 2024

[30] G R Bhatia and Manav Gupta, 'India's Digital Competition Act' (*Mondaq*, 20 January 2023) <https://www.mondaq.com/india/antitrust-eu-competition/1271904/indias-digital-competition-act> accessed 13 October 2024

cases of the digital market, as the marginal cost rapidly decreases, the companies tend to scale up quickly.[31] In the digital economy, the bigger the company, the more returns it gets, which ultimately leads to a winner-take-all type of market outcome.

The increase in returns after a firm has been set up without a proportional increase in its costs attracts a lot of competition in the market. In cases where two companies are working with similar products, it gets difficult for them to cover their costs, and both companies will find it much more profitable to decrease their prices to poach the other's clients. As a result, companies tend to avoid getting into a market dominated by the incumbent unless they are armed with a much cheaper and effective technology. The report also emphasises the impact of network externalities in the digital market, i.e., if an "incumbent platform" has already been established with a significant user base, it has already dominated the market because no user would want to switch to a different platform unless there was a significant shift in the user base to that platform.[32]

The combined effect of "network externalities" and "increasing returns to scale" leads to the monopolistic, "winner-takes-all" type of market. Further, these giants use their domination to buy off the new innovative competitors in the market. In the digital market ecosystem, it often takes three to five years for a victor to emerge from a particular market area, and by the time regulators intervene, the harm has already been done. The fundamental cause of this is the ex-post strategy used in India's present Competition Law. In light of this, the report also recommends using the ex-ante approach in the impending changes and new laws, such as the Digital Competition Bill.[33]

The ex-ante approach, at first instance, may seem progressive because of the certain goals it claims to achieve. But is it the right way to approach the new digital regime? Or is the current competition law regime more than enough to tackle anti-competitive conduct among the big tech players? To begin exploring this matter, it is important to keep in mind that the

[31] Ministry of Corporate Affairs, *Anti-Competitive Practices by Big Tech Companies* (Report No 53, 2022-2023) pgs 1-84
[32] *Ibid*
[33] *Ibid*

aforementioned report was based on a number of other laws and bills from around the world, the majority of which have not yet been implemented, including the Digital Markets Act, European Union (**DMA (EU)**) the American Innovation and Choice Online Act, Open App Markets App (US) etc. As a result, it cannot be entirely trusted as the real-world application of the provisions on which the report has relied is yet to be seen.

The committee's report focuses on the ex-ante approach to identifying "market winners" based on the size of the company and its end users. But this approach might lead to certain "false positives", i.e. acts which do not lead to anti-competitive practices might also be labelled as such. In the case of *"Harshita Chawla v. Whatsapp &ors. (CCI, Case no. 15 of 2020)"*,[34] It was held that WhatsApp's pay feature does not amount to anti-competitive conduct since it is an optional feature and requires users to sign in and register; thus, it cannot be viewed as an imposition. Further, in the case of *"Baglekar Akash Kumar v. Google LLC & other (CCI, Case no. 39 of 2020)"*,[35] it was observed that the integration of Google Meet with Gmail didn't amount to dominance by Google since the users were allowed to use either of the apps separately. The above-mentioned cases and many more are prime examples of the efficiency of CCI in handling anti-competitive matters related to the digital ecosystem with their ex-post approach. On the other hand, the ability of enterprises to defend themselves, offer factual arguments, and demonstrate efficiencies resulting from their action may not be provided by an ex-ante framework, which increases the risk of innovation, competition, and consumer choice being stifled.[36]

Moreover, the ex-ante approach goes against the jurisprudence of the competition law, according to which the mere size of the company does not amount to an offence. This further discourages foreign players from entering the Indian markets because of the lower incentives, multiple barriers to entry and additional regulatory costs. In addition to that, it might cause overlap with other legal regimes. Currently, most of e-commerce companies are already subjected to certain ex-ante regimes, which include obligations under the Foreign Direct

[34] *Harshita Chawla v Whatsapp and Ors* (2020) Case No 15/2020
[35] *Baglekar Akash Kumar v Google LLC and Ors* (2020) Case No 39/2020
[36] Naval Satarawala Chopra and Yaman Verma, 'Does India require ex-ante competition regulation in digital markets?' (*Shardul Amarchand Mangaldas*, 03 April 2023) <https://www.amsshardul.com/insight/does-india-require-ex-ante-competition-regulation-in-digital-markets/> accessed 13 October 2024

Investment Policy, Consumer Protection Act, Competition Act, etc. Therefore, the ex-ante approach towards competition law might be viewed as ominous dark clouds, and this approach might contravene in the cases where the conduct is controlled by both ex-post and ex-ante legislations.

Apart from the aforementioned criticism, the ex-ante approach in the Competition law regime lacks global support. The DMA (EU) was criticised by Fedric Jenny, the Chair of the OECD Competition Committee, according to her, the DMA might restrict innovation and growth in the market and will make the future market less flexible. Further, the ex-ante approach was criticised in the US as well. In contrary to these legislations, the UK's take on the matter is something that can be looked upon. UK's approach is much narrower and more specific in the sense that it will not focus on the market as a whole but will rather choose to focus on some particular companies and impose a code of conduct tailored according to their circumstances. So, in a nutshell, the overarching approach of bringing an ex-ante approach might not be the right way to regulate the digital market, as it might kill the motivation for small online businesses and startups to innovate and grow.

CCI's PROBE ON BIG TECH COMPANIES OTHER THAN GOOGLE

In terms of market competition, Google is undoubtedly one of the most infamous firms. However, other tech behemoths are also far from spotless. Cases involving other tech behemoths should also be examined to gain a better understanding of the competition in the digital market. Some of these giants may be Zomato, Swiggy, Amazon, Flipkart, WhatsApp, etc.

First, let's delve a bit into "Amazon's Antitrust Paradox" Amazon began its journey as an e-commerce website and is now into logistics, movies & web series, credit cards, bookstores, music, etc. This amount of expansion and growth was achieved by Amazon through predatory pricing, i.e., pricing the costs lower than any other competitors in the market and choosing to expand widely. Through this plan of action, Amazon has now dominated the digital market space and is now a major source of income for the business that depends on it. Even though predatory pricing might have been considered irrational earlier in the traditional market space, in the digital age, it is considered one of the best strategies, i.e., prioritising growth over profit.

All businesses are now integrating themselves into the digital market space, so, now more than ever, these strategies shall be brought into the limelight of anti-competitive conduct.[37] Further, practices like predatory pricing, preferential treatment, exclusive tie-ups, etc., were also observed by CCI among two big e-commerce giants, namely Amazon and Flipkart.[38]

Second, the domination of tech giants can also be observed in the food industry. In the case of *National Restaurant Association of India v. Zomato India Ltd. (2022 SCC OnLine CCI 22)*[39], NRAI alleged that companies like Zomato and Swiggy violated section 3(4) read with section 3(1) of the Competition Act, 2002. It was alleged that these companies were not allowing the restaurants to avail of their listing services and were mandated to join these platforms, they also alleged that these companies practised data masking, i.e., restaurants were not aware of the end-consumers or where the food is being delivered thus creating lack of transparency. Further, it was also alleged that they also practice vertical integration and one-sided contracts, thereby participating in anti-competitive practices. The claims regarding the delayed payment cycle, the imposition of one-sided conditions in the agreement, the charging of exorbitant fees, etc., did not appear to have an impact on competition, in the CCI's opinion. In its decision, the Commission stated that the DG needed to conduct an investigation on Zomato and Swiggy's conduct in order to assess if their actions violated Section 3(1) of the Act when read in conjunction with Section 3(4).[40]

Finally, it may be said that CCI has been successful in upholding healthy competition to a point as a watchdog of the Indian Market. But as the digital market develops, new types of unfair trade practises appear on the market, which can be dealt with through the evolution of competition law keeping digital market space in mind.

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[37] Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 Yale Law Journal <https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf> accessed 13 October 2024

[38] Akshay Shrivastava, 'CCI Probe: Will Amazon and Flipkart Pass Legal Scrutiny?' (*India Corp Law*, 22 August 2021) <https://indiacorplaw.in/2021/08/cci-probe-will-amazon-flipkart-pass-legal-scrutiny.html#:~:text=The%20legal%20tussle%20on%20the,19(1)(a)%20of> accessed 13 October 2024

[39] *National Restaurant Association of India v Zomato India Ltd* (2022) Case No 16/2021

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CONCLUSION

The ongoing investigations by the CCI into tech giants such as Google, WhatsApp, Amazon, and other companies have resulted in a more stringent regulatory environment in an already fiercely competitive market. However, these investigations have not been able to completely limit these companies from engaging in anti-competitive behaviour. The current ex-post approach has been able to handle huge IT businesses up until a point, but it is not adequate to handle the current market regime. While an ex-ante strategy may appear to be a good way to deal with this regime, it will ultimately make the market less flexible, less innovative, and less attractive to new entrants. Therefore, it may be inferred that while dealing with competition in the digital world, a nexus should be created between both ex-post and ex-ante approaches to ensure a fair and competitive market.