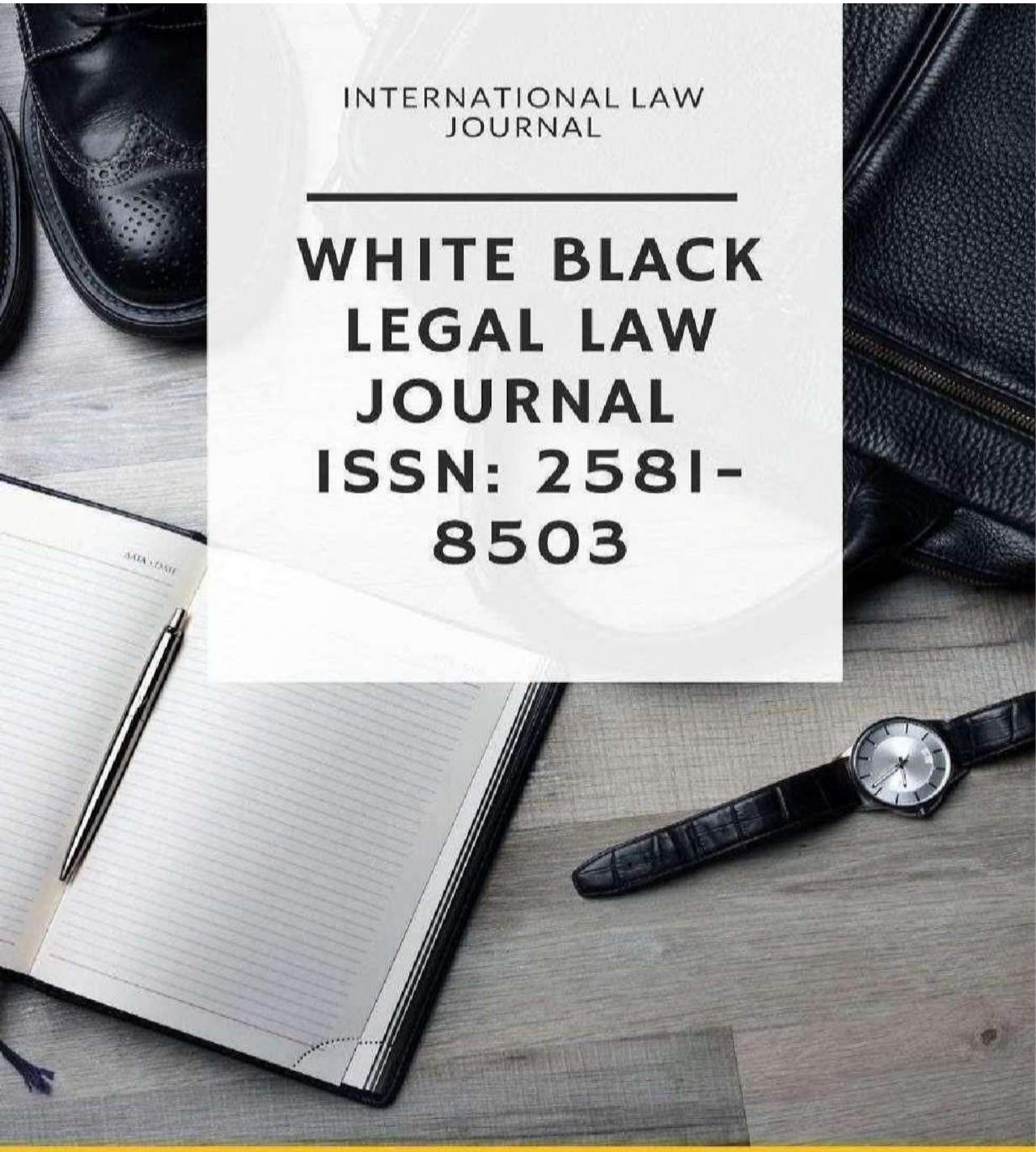

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ANTI-TRUST ISSUES IN THE DIGITAL MARKET "AN INTERNATIONAL COMPARATIVE STUDY"

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Chapter 1: INTRODUCTION

Traditionally, companies focused on marketing through print, television and radio. This option remains to this day, but the with the emergence of the Internet has changed the way companies reach consumers. This is where digital marketing comes in. This form of marketing includes the use of websites, social media, search engines, and apps etc.And these are essential elements of today's economy.

Digital platforms are significant forces for development and innovation and provide digital infrastructure and intermediation services in different markets, including marketplaces (Amazon), application stores (Apple), social networking sites (Facebook) and search engines (Google). Digital markets enhance the amount of information that is available to customers and traders, they enable small professional users to reach out to millions of customers at very low cost, and ultimately, they allow new and disruptive business models to expand into existing markets and new markets to flourish.[1]The increased use of online services has allowed digital platforms to expand and become more potent and this has led to the shift in consumer behavior toward the online market and have been advantageous for digital platforms, especially those that provide e-commerce, social networking, search, work solutions, and cloud services. But there could be long-term effects from these recent events. With the market positions of some digital platforms being strengthened, there may be consequences for competition. However, effective antitrust enforcement could assist decision-makers mitigate the risks to fully harness the benefits of the positive work done by digital platforms.[2]

[1] https://www.researchgate.net/publication/347346551_Digital_Markets_and_Online_Platforms_New_Perspectives_on_Regulation_and_Competition_Law

[2] https://openknowledge.worldbank.org/bitstream/handle/10986/36364/Antitrust-and-Digital-Platforms-An-Analysis-of-Global-Patterns-and-Approaches-by-Competition-Authorities.pdf?sequence=5&isAllowed=y

To maintain market competition, competition authorities around the world must adapt to the new market realities, company models, and dynamics.Competition regulators must adapt their assessments to multisided marketplaces and take the control of data into account in cases involving digital platforms. This makes it more difficult to define markets and to evaluate market power, market share, and the effects of anticompetitive action. In these situations, it can be more challenging to apply the most popular frameworks for identifying markets, which often depend on pricing, like the hypothetical monopolist test. Price may not always be an acceptable criterion for competition research in digital markets because some platforms offer things that are nominally free. As a result, it may be necessary for competition analysis in digital markets to:

1. widen the concept of customer welfare beyond prices
2. take into account new competition-related factors such personal data protection.[34]

Platform firms also frequently operate in a digital ecosystem where suppliers of complementary digital goods link and routinely exchange data to produce consumer goods. Along with the direct effects on platform users, it is important to comprehend how competition constraints affect these supplementary items.

Understanding how competition authorities have previously handled matters involving the digital economy is useful in this regard. Antitrust enforcement is essential for identifying companies using anticompetitive tactics, discouraging them from using them which eliminates smaller competitors, increase costs, lower customer quality, and impede innovation.

Chapter 2: ANTITRUST ISSUES IN THE DIGITAL MARKET

The market's rapid pace has presented difficulties for both legislators and competition authorities. Andthe new digital eco system has thus seen the rise of new means of anti-competitive behavior. To maintain market competition, competition authorities around the world need to adapt to the new market realities, company models, and dynamics.To find businesses engaging in anticompetitive behavior, antitrust enforcement is essential. An introduction to antitrust lawsuits and a synopsis of their particulars in the context of

[3] https://www.researchgate.net/publication/347346551_Digital_Markets_and_Online_Platforms_New_Perspectives_on_Regulation_and_Competition_Law

[4] https://openknowledge.worldbank.org/bitstream/handle/10986/36364/Antitrust-and-Digital-Platforms-An-Analysis-of-Global-Patterns-and-Approaches-by-Competition-Authorities.pdf?sequence=5&isAllowed=y

digitalplatforms are listed in Table 1.

TABLE 1- A PRIMER ON ANTITRUST ISSUES AND HOW THEY APPLY TO DIGITAL MARKET[5]

TYPE OF CASE	BEHAVIOUR	SPECIFITIES TO DIGITAL MARKET	EXAMPLES
ANTI-COMPETITIVE AGREEMENTS	**COLLUSION-** Competitors agreement on market variables like pricing quantity and market segmentation.	• Data and algorithms can boost efficiency by enhancing pricing, personalization and market trend predictions, but they can also support collusive agreements without human engagement. • Hub and spoke cartels. When firms outsource pricing algorithms to the same third party, this may create coordination because competitors would be using	The likelihood of collusion has increased since e- commerce algorithms can be trained to independently collude for instance, by imitating pricing leader's actions.

[5] https://openknowledge.worldbank.org/bitstream/handle/10986/36364/Antitrust-and-Digital-Platforms-An-Analysis-of-Global-Patterns-and-Approaches-by-Competition-Authorities.pdf?sequence=5&isAllowed=y

		the same "hub" for developing their pricing algorithms and strategies.	
	•	Algorithms may result in covert cooperation. In most cases, tacit collusion is not prohibited by competition laws, but its outcomes could lead firms to suppress output and increase prices in the same ways as explicit collusion.	
VERTCAL RESTRAINTS- Agreement between businesses at various stages of a value chain that make it more difficult for downstream businesses to compete.	•	Resale price maintenance (RPM).By establishing a retail price, an upstream provider limits or regulates the retail price of its good or service delivered downstream. RPM can be used by an incumbent to defend its market share from rivals, for instance by limiting the capacity of lowcost internet retailers to offer discounts. This would make it easier to exclude less expensive distribution techniques, like customer direct online sales and downstream store alliances.	

		• Most-favored-nation clauses	Digital travel and

		(MFN). Restrictions imposed by platforms requiring a seller on the platform not to sell the product at a lower price through another platform. MFNs tend to raise prices charged by sellers and fees charged by platforms, discourage entry, and distort innovation.	tourism platforms impose MFNs on hotels by forbidding them from setting their room rates lower than those on the platform (even via offline channels)

ABUSE OF DOMINANCE	Abusing a dominant position by excluding competitors for instance by refusing to negotiate, discriminating, tying charging unfair prices, being exclusive, limiting access to necessary inputs by taking advantage of customers.	• Given the prominence of network effects, large economies of scale and scope resulting from high fixed costs/low variable cost structures, and the reliance on data and data-intensive technologies to obtain a competitive edge, digital platforms have a stronger tendency to shift towards dominance. • Given its multisided nature, dominance on one side of the platform can influence anticompetitive behavior on	• Dominance in the search markets can manifest in abuse in the shopping market. • A platform refuses to give access to information, which would allow a third party to interoperate with it. • A platform may rank its own products higher than others when returning a

another assets or compete, exclusivity platforms that sell on algorithms favor. present in given the have the by forced use market in response • A (OS) obliges	side. • Where a technology that there may be through a • Vertically that compete with their platforms preferencing, that are unintentionally) • Digital adjacent markets economies of potential to product bundling • Platforms network effects to may include to a supplier of device	platform possesses are necessary to abuse of reluctance to sell. integrated digital other companies may engage in self-including using (intentionally or skewed in their platforms that are (which is common scope 6 in place) misuse their power or forced tying. looking to swiftly dominate the predatory pricing consumer's search. operating systems manufacturers to	install the apps as a licensing the • Ride-accused of predatory taxis out market. been debate over collection personal data considered abuse.	supplier's suite of condition to OS. hailing apps are engaging in pricing to drive of the • There has whether the excessive of the of users could be an exploitative

		their business plan.[6]	

[6] https://openknowledge.worldbank.org/bitstream/handle/10986/36364/Antitrust-and-Digital-Platforms-AnAnalysis-of-Global-Patterns-and-Approaches-by-Competition-Authorities.pdf?sequence=5&isAllowed=y

Chapter 3: TACKLING ANTI-TRUST ISSUES IN DIGITAL MARKETS: AN INTERNATIONAL PERSPECTIVE

In different countries the privacy and regulatory policy makers are seeking to limit the influence of technologyhowever,it has become evident that antitrust and privacy regulations alone are insufficient to safeguard consumers and foster healthy competition. Countries must find ways to make all their policy interventions support complementary goals.Anti-trust regulators are attempting to modify and create frameworks to address the concerns with competition law posed by such prospective business models.

India

In **India**, there is one single regulation i.e., The Competition Act, 2002 and one regulating authority known as the Competition Commission of India established under the said Act. the Indian regulating authorities are facing unique challenges due to the rise of the digital sector and emerging technology which forced the competition regulator to adapt, innovate and expand the scope of their tools for evaluating competition. CCI has assessed issues like net neutrality, leveraging, network effects and collection of data leading to accumulation of market power, in enforcement cases and has adopted aggressive monitoring measures and proactively moved against tech giants involved in anti-competitive practices under the Competition Act, 2002 (Act). Under Competition Act, the anti-trust issues are dealt in sections 3 and 4.

Section 3 - Anti- Competitive Agreements.

An agreement includes any arrangement, understanding or concerted action entered into between parties. It may or may not be in writing. Anti-competitive agreements under competition law are broadly classified into two categories, the Anti-competitive Horizontal Agreement and Anti-competitive Vertical/Agreement.[7]

Anti-Competitive Horizontal Agreements-Section 3(3)

Horizontal Agreements are those agreements where enterprises engaged in identical or similar trade of goods or services. When enterprises collude amongst each other to distort competition in the markets, such agreement is presumed to have an appreciable adverse effect

[7] cci.gov.in

on competition and thus, shall be void. The following four categories of such agreements amongst competitors are presumed to have AAEC-

- agreement to fix price;
- agreement to limit production and/or supply;
- agreement to allocate markets;
- bid rigging or collusive bidding.

However, such presumption is rebuttable.[8]

Vertical Agreements Section 3(4)-Vertical Agreements are those agreements which are entered into by enterprises at different stages or levels of production, distribution, supply, storage etc. Such vertical restrains include:

- tie-in arrangement;
- exclusive supply/distribution arrangement;
- refusal to deal; and
- resale price maintenance.

Imposition of reasonable conditions as may be necessary for protection of intellectual Property Right (IPR) which are listed under Section 3(5), is generally not to be treated as violative of the Act.

They are however, subject to scrutiny by the Commission to decide whether such conditions are reasonable and necessary to protect IPR.[9]

Abuse of Dominant Position (Section 4)

Dominance refers to a position of strength which enables an enterprise to operate independently

[8] cci.gov.in
[9] Cci.gov.in

of competitive force in the market or to affect its competitors or consumers in its favour. Dominant position of an enterprise itself is not prohibited; however, if the enterprise by virtue of having dominant position in the relevant market abuses its dominance, then the same stands prohibited. Abuse of dominant position impedes fair competition

between firms exploits consumers and makes it difficult for the other players in the market to compete with the dominant undertaking. Abuse of dominant position covers:

- imposing unfair condition or price, including predatory pricing;
- limiting production/market or technical or scientific development
- denying market access, and
- making conclusion of contracts subject to conditions, having no nexus with such contracts; and
- using dominant position in one relevant market to gain advantages in another relevant market.[10]

The first step in CCI's foray into the digital market was its investigation of ***Google in the Matrimony.com case,***[11]in this case, it was alleged that Google is abusing its dominance through search bias, imposition of unfair condition on its customers and imposition of exclusive conditions through agreements entered with partners etc. It was found that Google was dominant in the (a) market for online general web search services in India, and (b) market for online search advertising services in India.[12]

Google was found to abuse its dominant position on the following three counts:

- Ranking of Universal Results prior to 2010 which was not strictly determined by relevance. Rather the rankings were pre-determined to trigger at the 1st, 4th or 10th position on the SERP. Such practice of Google was unfair to the users and was in contravention of the

[10] cci.gov.in
[11] (07/2012) Matrimony.Com Limited vs Google LLC& Others (30/2012)
[12] Session-II-ANTITRUST-ENFORCEMENT-IN-DIGITAL-MARKETS-CCI-experience-Ms-Jyoti-JINDGAR-CCI.pdf

provisions of Section 4(2)(a)(i) of the Act. (Universal Results are groups of results for a specific type of information, such as news, images, local businesses etc.)

- Prominent display and placement of Commercial Flight Unit with link to Google's specialized search options/ services (Flight) amounts to an unfair imposition upon users of search services as it deprives them of additional choices and thereby such conduct is in contravention of the provisions of Section 4(2)(a)(i) of the Act.

- The prohibitions imposed under the negotiated search intermediation agreements upon the publishers were found to be unfair as they restrict the choice of these partners and prevent them from using the search services provided by competing search engines. Imposing of unfair conditions on such publishers by Google; using its dominance in the market for online general web search to strengthen its position in the market for online syndicate search services and denial of access to competitors to the online search syndication services market, were in contravention of Section 4(2)(a), (e) and (c) of the Act.

Accordingly, the Commission ordered Google to not enforce the restrictive clauses with immediate effect in its negotiated direct search intermediation agreements with Indian partners. Further, the Commission directed Google to display a disclaimer in the commercial flight unit box indicating clearly that the "search flights" link placed at the bottom leads to Google's Flights page, and not the results aggregated by any other third-party service provider. In addition to that, monetary penalty of 1.35 billion rupees was also levied on Google.[13]

In the case of ***Umar Javeed, Sukarma Thapar, Aaqib Javeed Vs. Google LLC & Ors.,***[14]it was alleged-

- Google mandates smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services in order to get any part of GMS in smartphones manufactured in/ sold in/ exported to/ marketed in India.
- Google ties or bundles certain Google applications and services (Such as Google Chrome, YouTube, Google Search etc.) distributed on Android devices in India with other Google applications, services and/ or application programming interfaces of Google.
- Google prevents smartphone and tablet manufacturers in India from developing and marketing modified and potentially competing versions of Android (so-called

"Android forks") on other devices.[13]

[13]Session-II-ANTITRUST-ENFORCEMENT-IN-DIGITAL-MARKETS-CCI-experience-Ms-Jyoti-JINDGAR-CCI.pdf [14]UmarJaveed, Sukarma Thapar, Aaqib Javeed vs. Google LLC and Ors.

The Competition Commission of India (Commission) has imposed a penalty of Rs.1337.76 crore on Google as well as issued cease and desist order against Google from indulging in anti-competitive practices that have been found to be in contravention of the provisions of Section 4 of the Act. Some of the measures that were indicated by the Commission are as follows:

I. OEMs shall not be restrained from (a) choosing from amongst Google's proprietaryapplications to be pre-installed and should not be forced to pre-install a bouquet ofapplications, and (b) deciding the placement of pre-installed apps, on their smartdevices.

II. Licensing of Play Store (including Google Play Services) to OEMs shall not belinked with the requirement of pre-installing Google search services, Chromebrowser, YouTube, Google Maps, Gmail or any other application of Google.

III. Google shall not deny access to its Play Services APIs to disadvantage OEMs, appdevelopers and its existing or potential competitors. This would ensureinteroperability of apps between Android OS which complies with compatibilityrequirements of Google and Android Forks. By virtue of this remedy, the appdevelopers would be able to port their apps easily onto Android forks.

IV. Google shall not offer any monetary/ other incentives to, or enter into anyarrangement with, OEMs for ensuring exclusivity for its search services.

V. Google shall not impose anti-fragmentation obligations on OEMs, as presently beingdone under AFA/ ACC. For devices that do not have Google's proprietaryapplications pre-installed, OEMs should be permitted to manufacture/ developAndroid forks based smart devices for themselves.

VI. Google shall not incentivize or otherwise obligate OEMs for not selling smart devices based on Android forks.

[13] Session-II-ANTITRUST-ENFORCEMENT-IN-DIGITAL-MARKETS-CCI-experience-Ms-Jyoti-JINDGAR-CCI.pdf

VII. Google shall not restrict un-installing of its pre-installed apps by the users.

VIII. Google shall allow the users, during the initial device setup, to choose their default search engine for all search entry points. Users should have the flexibility to easily set as well as easily change the default settings in their devices, in minimum steps possible.

IX. Google shall allow the developers of app stores to distribute their app stores through Play Store. [14]

X. Google shall not restrict the ability of app developers, in any manner, to distribute their apps through side-loading.[15]

The CCI has been keeping an eye out for suspected anticompetitive behavior in the digital economy and e-commerce marketplaces. Concerns concerning possible unethical behavior regarding matters like platform neutrality and exclusivity agreements, among other things, were raised in the CCI's 2020 e-commerce industry analysis. The CCI evaluated concerns about competition in a variety of e-commerce areas, such as online markets and online travel agencies, etc.Soon after its report, the CCI found merit in allegations that exclusive tie-up between one of India's largest online travel agencies and hotel franchises led to the foreclosure of other competing hotel franchises. The CCI had expressed in its prima facie order that MakeMyTrip Pvt Ltd (a hotel aggregator) website was involved in an exclusivity agreement with budget hotel undertaking Oyo Rooms (MakeMyTrip Case), which required delisting of other hotel franchises, namely Fab Hotels and Treebo. In the case of-
(FHRAI) vs. MMT*,*Ibiboand OYO,[16] it was alleged that –

- MMT & Ibibo allegedly impose price parity, room parity conditions in their agreement/contract with hotel partners and indulged in predatory pricing, charging of exorbitant commissions from hotels, registering and providing on its platform illegal and unlicensed bed & breakfast and misrepresentation.

[14] https://www.cci.gov.in/search-filter-details/4635
[15] https://www.cci.gov.in/search-filter-details/4635
[16] In Re: Federation of Hotel & Restaurant Associations of India (FHRAI) and Ors. v. MakeMyTrip India Pvt. Ltd. and Ors., (Case No. 14 of 2019) with In Re: Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd. (MMT) and anr. (Case No. 1 of 2020), http://cci.gov.in/sites/default/files/Interim_Order_14-of-2019and01-of-2020.pdf

- MMT and OYO entered into confidential commercial agreements wherein MMT has agreed to give preferential treatment to OYO on its platform, further leading to a denial of market access to Treebo and Fab Hotels[17]

ORDER-

- The Commission observed that broadly defined APPAs (where an OTA restrict a supplier from charging lower prices or providing better terms on their website, as well as through any other sales channel, including other OTAs.) may result in removal of the incentive for platforms to compete on the commission they charge to hoteliers, may inflate the commissions and the final prices paid by consumers and may also prevent entry from new low-cost platforms.
- OYO as a budget hotel chain is in a vertical relationship with MMT, which is essentially a distribution platform for hotels. Both have considerable presence in their respective market segments and any restrictive agreement which may lead to refusal to deal with some players or exclusive arrangement with some players, may potentially have adverse effect on competition.
- CCI imposed penalties of ₹223.48 crores and ₹168.88 crores upon MMT-Go and OYO respectively, besides directing MMT-Go to amend its market behaviour, for indulging in anti-competitive conduct.[18]

The CCI also had an opportunity to briefly assess the algorithmic pricing by online players and its likely fallout from cartelization. The CCI's findings, which dismissed allegations that the drivers of the two major ***cab aggregators*** in India indulged in a hub-and-spoke cartel by fixing prices through the pricing algorithms of the cab aggregators, passed the final test of the Supreme Court of India. The Supreme Court affirmed the finding of the CCI, denying the existence of a hub-and-spoke cartel between the drivers, allegedly facilitated through these aggregators. The CCI held that there was no evidence of any agreement among the cab aggregators inter se to establish a hub-and-spoke cartel. The CCI accepted the arguments of the cab aggregator that the price of each ride is decided on a number of factors such as the time, traffic, peak period,

[17] Session-II-ANTITRUST-ENFORCEMENT-IN-DIGITAL-MARKETS-CCI-experience-Ms-Jyoti-JINDGAR-CCI.pdf
[18] https://www.livemint.com/companies/news/cci-imposes-rs392-crore-penalties-on-makemytrip-goibibo-oyo11666195810469.html

etc., and are very dynamic in nature.

In another instance, however, the CCI initiated investigation on its own motion against the changes made by WhatsApp to its privacy policy. The order is a first-of-its-kind investigation into a non-price factor for abuse by an alleged dominant entity. In its prima facie view (which was issued before the investigation had commenced), the CCI pointed out that ***WhatsApp's*** new privacy policy was imposed on users mandatorily.The policy allowed WhatsApp to

share data with Facebook. The CCI ordered investigation for want of consumer consent in WhatsApp's actions which gave no choice to consumers as WhatsApp was tentatively considered to be dominant in the market of instant messaging.[19]

The order of the CCI was assailed before the Delhi High Court, for want of jurisdiction. The case sits at the interface of competition laws and the data privacy laws in the country.

Therefore, the CCI's jurisdiction was challenged, arguing that the subject matter related to privacy, and was outside its regulatory mandate. The Delhi High Court upheld the jurisdiction of the CCI. It held that, although the substantial examination of the privacy policy is subject matter of litigation before the Supreme Court of India, the CCI's investigation was limited to the examination of WhatsApp's dominant position and its ability to impose terms and conditions on its users. However, appeals have been filed against the decision and recently the Hon'ble Supreme Court Dismisses Pleas of WhatsApp-Meta Against CCI Probe into Privacy Policy.[20]

To improve the current literature from an Indian viewpoint, the CCI has also done market studies on the advocacy front. Three broad but related topics—e-commerce, telecommunications, and blockchain—have been the focus of its market research, which have a more knowledgeable audience of readers, including consumers and industry stakeholders.

An economy that is constantly growing presents the CCI with a very dynamic regulatory environment. As a result, the intricacy of the regulations that the Indian CCI is responsible for is continually changing.The CCI is adopting a calibrated approach with intervention, if any, typically occurring after a full investigation and it strives to keep in step with international

[19] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india
[20] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india

peers.[21]

USA

In USA digital markets are governed by US standard competition laws and the legal framework, including section 1 of the Sherman Act, which prohibits agreements and collusive conduct that unreasonably restraints trade, section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization and other exclusionary contracts, including tying and exclusive dealing; section 7 of the Clayton Act which prohibits mergers and acquisitions that may substantially lessen competition ; and section 5 of the Federal Trade Commission act, which prohibits unfair methods of transactions which violate section 1, section 2, and section 7 as well as invitations to collude. Most US States have general antitrust laws governing all industries, digital markets.[22]

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade

Commission (FTC) share responsibility for enforcing US antitrust laws at the federal level.

The DOJ's Technology and Financial Services Section is responsible for investigations and enforcement with respect to computer software and other high-tech markets, but current highprofile digital market enforcement matters reportedly involve staff of the Attorney General and the Antitrust Division's Assistant Attorney General as well. The FTC has a specialised unit, the Technology and Enforcement Division, which monitors and investigates potential anticompetitive conduct and transactions in digital markets. Other sectoral regulators, such as the Federal Communications Commission, also have statutory authority to review transactions and regulate certain conduct that may involve digital markets. State Attorneys General also

[21] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india
[22] https://www.crowell.com/files/2021_Digital-Competition-Digital-Edition_United-States.pdf

enforce competition laws, both federal and state. Although State Attorneys General often investigate and bring cases together with federal authorities, they have increasingly pursued their own investigations and enforcement actions, including in digital markets. In 2019, 43 State Attorneys General submitted comments to the FTC calling for greater antitrust enforcement in digital markets. Currently, New York is leading a coalition of nearly all 50 states in an antitrust investigation of Facebook, while Texas is leading a coalition of all states in an antitrust investigation of Google.[23]

State Attorneys General also enforce competition laws, both federal and state. Although State Attorneys General often investigate and bring cases together with federal authorities, they

have increasingly pursued their own investigations and enforcement actions, including in digital.

The US federal competition agencies have not specifically addressed agreements among particular platforms from hosting rival products or services. Under the general antitrust framework, an explicit agreement among competitors to refuse to deal with particular rivals can be illegal per se, absent of a plausible justification. The agencies often regard a concerted refusal to deal targeting particular customers or suppliers, or an agreement to deal with them only on certain terms, as unlawful if it appears to be a means to implement a cartel agreement. For example, in 2012, the DOJ alleged that Apple orchestrated an agreement among six book publishers not to supply a rival e-book platform (Amazon) except at higher prices. The courts ruled the arrangements illegal per se ***(United States v Apple Inc),[24]***. Agencies and courts are far less likely to characterise exclusivity and vertical noncompete agreements as per se unlawful refusals to deal, but

https://www.crowell.com/files/2021_Digital-Competition-Digital-Edition_United-States.pdfinstead consider their potential anticompetitive and pro-competitive effects under the more comprehensive 'rule of reason'. There are no formal antitrust rules or exemptions regarding agreements between competitors specific to digital markets in the US.

There are no special rules or exemptions under US antitrust law for analysing ***vertical agreements*** in digital markets. Vertical agreements are subject to potential challenge under

[23] https://www.crowell.com/files/2021_Digital-Competition-Digital-Edition_United-States.pdf
[24] UnitedStates v Apple Inc),[26] 791 F.3d 290 (2d Cir. 2015)

sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act, as well as state antitrust law. Vertical agreements are almost always evaluated under the antitrust rule of reason, under which courts evaluate evidence of both pro-competitive and anticompetitive effects of the restriction. The analysis differs depending on whether the conduct restricts solely intra-brand conduct, as with resale price maintenance and exclusive sales territories, or instead restricts inter-brand competition, as with exclusive dealing and related practices.[25]

Inter-brand, exclusionary vertical agreements that affect competitors are more likely to be challenged, but only if the government can demonstrate actual or likely competitive harm, taking into account any pro-competitive benefits. An agreement restricting inter-brand competition, such as exclusive dealing, most favoured nation provisions, conditional pricing

practices, and related distribution restraints, are deemed unlikely to harm competition, however, unless the party imposing the restriction possesses significant market power (United States v Microsoft Corp,[26]). The analysis can also be affected by whether the conduct arises in a multisided platform, in which case the Supreme Court has held that the government must prove net harm across multiple sides of the platform. Vertical agreements that facilitate horizontal collusion among firms at any level of the supply chain may be subject to harsher treatment and may even be found per se unlawful under either section 1 of the Sherman Act or section 5 of the FTC Act.[27]

US antitrust law does not use the terminology ***'abuse of dominance***.' Companies in digital markets are subject to the same general standards prohibiting the exercise of monopoly power to unlawfully exclude competition as firms in other industries, as established in the body of case law interpreting section 2 of the Sherman Act. In addition to evidence of monopoly power, enforcers must prove that the monopolist wilfully obtained or maintained its monopoly power through exclusionary or anticompetitive conduct. Examples of exclusionary conduct may include predatory (below-cost) pricing, refusal to deal, exclusive dealing, and tying arrangements. Importantly, exclusionary conduct by a monopolist is not per se unlawful. Instead, courts may consider the conduct's competitive effects relative to consumer welfare,

[25] https://www.crowell.com/files/2021_Digital-Competition-Digital-Edition_United-States.pdf
[26] United Statesv Microsoft Corp, 253 F.3d 34, 64 (2001)
[27] https://www.crowell.com/files/2021_Digital-Competition-Digital-Edition_United-States.pdf
[30]https://www.crowell.com/files/2021_Digital-Competition-Digital-Edition_United-States.pdf

whether the conduct makes economic sense in the absence of its exclusionary impact, or whether the conduct harmed rivals through efficiency-based competition. The
DOJ's 2001 monopolisation case against Microsoft is instructive in the context of digital markets. The court found that Microsoft unlawfully maintained its monopoly position in PC operating systems through various exclusionary practices, including technical integration of Microsoft's browser into Windows; contracts with manufacturers and other parties which effectively excluded competing browsers threatening to cut off customers who did not exclusively support Microsoft's browser; and subverting competing technologies that threatened Microsoft's operating system (United States v Microsoft Corp).[30]

The USA seems to be proposing some comprehensive framework for regulating tech platforms for digital markets like:

• **American Innovation and Choice Online Bill (AICO)**

The American Innovation and Choice Online Act (S.2992) is the latest bipartisan effort targeting big tech companies for potential antitrust and consumer choice violations.
AICO applies to "online platforms," which the bill defines as a "website, online or mobile application, operating system, digital assistant, or online service" that

- enables a user to generate or interact with content on the platform,
- facilitates e-commerce among consumers or third-party businesses, or
- enables user searches that display a large volume of information.[28]

The Act's main aim to prevent discriminatory practices by covered platforms by forbidding covered platforms from:

- "Self-preferencing" their own products at the expense of competitors
- Intentionally disadvantaging other Firm's products or services
- Using non-public data generated by a business user to advantage the covered platform's own products.
- Interfering with pricing decisions set by another business user

[28] https://www.mondaq.com/unitedstates/antitrust-eu-competition/1232122/american-innovation-andchoice-online-act

• Retaliating against a business user that notifies law enforcement about the activities of covered platforms.

AICO does not cover all online platforms. Rather, the bill focuses on large-scale platforms of a certain size—a metric that depends on the number of active users on the platform, its annual sales within a set period of time, and its market cap.

Under AICO, the Federal Trade Commission (FTC), Department of Justice (DOJ), and state attorneys general have enforcement power.6 These antitrust agencies will have the authority to pursue civil penalties and injunctions against so-called "covered platforms" in federal court. Failure to comply with the law would result in fining the offending platform up to 15% of their U.S. revenue in the prior calendar year or up to 30% of their U.S. revenue for any one line of business harmed by their actions and violation of AICO may also result in restitution, return of property, refunds, disgorgement etc.

However, practicalities of enforcement and the corresponding real-world effects of AICO on business operations are still unknown.[32]

• **Ending Platform Monopolies Act**

In June 2021, the Ending Platform Monopolies Act was proposed in the House. By restricting a company's capacity to run a business that competes with other businesses on its platform, it adopts a strategy akin to that of the American Innovation and Choice Act.[33]

The Act's main aim is to promote competition and economic opportunity in digital marketsby eliminating the conflicts ofinterest that arise from dominant online platform's concurrent ownership or control of an online platform and certain other businesses.

It proposes to holistically ban dominant platforms from offering their own products or services at all in a marketplace that it controls. It also proposes banning covered platforms from owning a line of business that otherwise presents a "conflict of interest" or that would enable the covered platform to advantage its own products or services over those of its competitors.

US FTC and DOJwould be responsible fordetermining whichplatforms are & "covered Platforms" and would betasked with enforcement.

• Augmenting Compatibility and Competition by Enabling Service Switching

(ACCESS) Act

The ACCESS Act of 2021, also known as the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, is a proposed antitrust law in the US House of Representatives. The legislation's goal is to require big tech businesses to offer data portability so that customers can move their data between platforms. Its main aim is to stimulate market-based competition against large online communications platforms (with more than 100 million active users in the United States) by requesting them to make user data portable and their services interoperable with other platforms. The act aims to allow users to delegate the supervision of their privacy and account settings and online interactions to trusted third-party services.

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[32] http://www.mondaq.com/unitedstates/antitrust-eu-competition/1232122/american-innovation-andchoice-online-act

[33]https://cei.org/blog/ten-terrible-tech-bills-from-the-117th-congress-ending-platform-monopolies-act/

The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act would increase market competition, encourage innovation, and increase consumer choice by requiring large communications platforms (products or services with over 100 million monthly active users in the U.S.) to:

- Make their services interoperable with competing communications platforms.
- Permit users to easily port their personal data in a structured, commonly used and machine-readable format.
- Allow users to delegate trusted custodial services, which are required to act in a user's best interests through a strong duty of care, with the task of managing their account settings, content, and online interactions. [29]

US FTC would be tasked with enforcement of the law**.**

CANADA

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[29] https://www.warner.senate.gov/public/index.cfm/2022/5/lawmakers-reintroduce-bipartisan-legislation-toencourage-competition-in-social-media#:~:text=Warner%20(D%2DVA)%20led,make%20user%20data%20portable%20%E2%80%93%20and

Canada has a **Digital Enforcement and Intelligence Branch** that, according to reports, will detect wrongdoing in the marketplace and put a stop to it using cutting-edge analytics, intelligence methods, and behavioural economics. In addition, Canada modified its**Competition Act, R.S.C., 1985, c. C-34** to address the problems that may arise in the digital age.

The Bureau is an independent law enforcement organization that safeguards and fosters competition for the advantage of businesses and consumers in Canada. The Competition Commissioner, who is in charge of administering and enforcing the Competition Act and other federal laws, serves as its head. In addition to the Bureau, the Act is decided by the Competition Tribunal and the courts. Government policies, legislation, and regulations regarding competition are created and coordinated by Innovation, Science, and Economic Development Canada.Internet and other electronic marketing are subject to the federal Competition Act, which is the most significant Canadian regulations governing Canadian advertising and marketing (e.g., social media, e-mail and other new media).

The Competition Act also includes specific electronic marketing provisions under section 74.011, which make the following practices reviewable where they are made to promote a product or any business interest:

i. false or misleading sender or subject matter information;

ii. false or misleading electronic messages; and

iii. false or misleading locators.[30]

False and deceptive digital marketing has been a primary priority for the Competition Bureau (Bureau) in terms of enforcement over the past few years. In this regard, the Bureau has started proceedings involving typical selling price claims, endorsements/testimonials, drip pricing, astroturfing, insufficient disclaimers and other disclosures, false/misleading contests, and false/misleading online price claims (e.g., in connection with sales).

The Bureau also regularly conducts Internet enforcement sweeps for online deceptive advertising and has published particular enforcement guidelines for online/Internet advertising (Application of the Competition Act to Representations on the Internet.

[30] https://www.ipvancouverblog.com/internet-digital-marketing/

Competition Act contains lists of factors to be considered when assessing abuse of dominance by companies in the digital sector. The enlisted factors are –

- effects on barriers to entry, such as network effects;
- effects on both price competition and non-price competition, such as quality, choice or consumer privacy;
- the nature and extent of change and innovation in the relevant market; and
- any other factor that is relevant to competition in the market that is or would be affected by the practice.

CASES

1) TORONTO REAL ESTATE BOARD INVESTIGATION[31]

The Toronto Real Estate Board (TREB actions)'s with regard to data were successfully contested by the Canadian Competition Bureau. The Bureau alleged that TREB was abusing its power by limiting real estate brokers' access to and use of MLS data. The Bureau added that TREB restricted the use of virtual office websites among other innovative products made by present or potential competitors in order to safeguard its members from those items. The Federal Court of Appeal (FCA) rejected TREB's appeal, the Competition Tribunal (the Tribunal) concurred with the Bureau, and the Supreme Court of Canada (SCC) declined to consider an appeal of the FCA's ruling in 2018.[32]

The TREB case demonstrates how having substantial volumes of data under your control can give you a competitive advantage and how access constraints can prevent you from entering a market. An organization or business that owns data does not have to be in direct competition with the parties who are said to have been injured by the conduct, as the Tribunal further confirmed, for a finding of an abuse of dominance. In order to preserve individual privacy and as a legitimate use of its intellectual property, TREB claimed that the restrictions placed on the use and access to its data were permissible. Both arguments were rejected by the court. Regarding privacy, the court determined that there were no proof TREB's privacy policies had any bearing on the data restriction regulations because TREB had adopted them in an effort to limit competition and preserve control over the data. The court noted that if restrictions were put in place to fulfil a legal or regulatory requirement, privacy could be an acceptable reason

[31] Toronto Real Estate Board v. Commissioner of Competition
[32] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india

for them. Both the Tribunal and the FCA rejected TREB's claim that the limits were a legitimate use of its intellectual property in the MLS system, concluding that there was no copyright in the MLS database and that "dependence on copyright as a defense to an anti-competitive act is prohibited by the Competition Act.[33]

2) AMAZON INVESTIGATION[34]

The Canadian Competition Bureau announced investigation into whether Amazon engaged and is continuing to engage in anticompetitive behavior on Amazon.co, its Canadian marketplace. Areas of interest to the Bureau include:

- any past or existing Amazon policies which may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels, such as their own websites or other online marketplaces;
- the ability of third-party sellers to succeed on Amazon's marketplace without using its "Fulfilment by Amazon" service or advertising on Amazon.ca; and
- any efforts or strategies by Amazon that may influence consumers to purchase products it offers for sale over those offered by competing sellers.[40]

There has not yet been a finding of wrongdoing in the ongoing abuse of dominance investigation. The Bureau previously looked into Amazon's marketing strategies and discovered that claims made about the typical selling price of items on Amazon.ca were false. Amazon paid a punishment of C$1.1 million and signed a settlement agreement on January 11, 2017, putting an end to the investigation.[35]

THAILAND

In Thailand, the Trade Competition Act is the Legislation dealing with the Anti-trust issues. Digital platforms, particularly those that serve as online marketplaces, food delivery services,

[33] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india
[34] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india
[40]https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india
[35] https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/india

and ride-hailing services, are currently playing significant roles in offering convenience to consumers in Thailand.Thailand has published the guideline in the Government Royal Gazette namely the Notification of **TCC Re: Guidelines on Unfair Trade Practices between Online Food Delivery Service Providers and the Restaurant Business Operators (the "Guideline").**

The following definitions under Clause 2 of the Guideline apply to the food delivery service made through "Digital Platform" between "Online Food Delivery Service Provider" and "Restaurant Business Operator". The online food delivery service provider must refrain from actions that could harm the owner of the restaurant (Clause 3).The prohibited acts of the Online Food Delivery Service Provided are under Clause 4 of the Guideline, the following acts of the Online Food Delivery Service Provider are deemed causing damage to the Restaurant Business Operator which are prohibited under Section 57 of the Trade Competition Act of 2017 ("TCA"):

- Anydemands for unfair expenses,compensation, or other benefitsfrom the Restaurant BusinessOperator are not allowed.
- Any unfair trading conditions thatrestrict or prevent the RestaurantBusiness Operator to operate thebusiness are not allowed;
- Any utilizing of unfair superiormarket power or superiorbargaining power against theRestaurant Business Operator is notallowed
- Other unfair trade practices whichmay cause damage to theRestaurant Business Operator is notallowed e.g., forcing or settingspecial conditions or preventing orobstructing the business operationof other business operators.

If the Guideline is not followed, TCC has the authority to impose constraints on the online food delivery service provider, order the operation to be suspended, or demand that the performance be corrected. Additionally, the provider of the online food delivery service is subject to a severe administrative fine of up to 10% of its annual income for the year in which the offence was committed. The fine cannot exceed one million (1,000,000) Baht if the offence was committed within the first year of operation.

EUROPEAN UNION (EU)

European antitrust policy is developed from two central rules set out in the Treaty on the Functioning of the European Union (TFEU):

Article 101 of the Treaty prohibits agreements between two or more independent market operators, which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e., an agreement between a manufacturer and its distributor). Only limited exceptions are provided for in the general prohibition. The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.[36]

Article 102 of the Treaty prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

The Commission is empowered by the Treaty to apply these rules and has a number of investigative powers to that end (e.g., inspections at business and non-business premises, written requests for information, etc.). The Commission may also impose fines on undertakings which violate the EU antitrust rules. The main rules on procedures are set out in Council Regulation (EC) 1/2003.

National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted. National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. Building on these achievements, the Communication on Ten Years of Antitrust Enforcement identified further areas to create a common competition enforcement area in the EU.[37]

As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts to ensure that EU competition rules are applied coherently throughout the EU.[38]

[36] https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en
[37] https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en
[38] https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en

In the case of ***Google and Alphabet v Commission (Google Android),***[39]Various complaints were submitted to the Commission regarding some of Google's business practices in the mobile internet, leading the Commission to initiate a procedure against Google in relation to Android.The Commission fined Google for having abused its dominant position by imposing anticompetitive contractual restrictions on manufacturers of mobile devices and on mobile network operators, in some cases. Three types of restriction were identified:

1. those contained in 'distribution agreements', requiring manufacturers of mobile devices to pre-install the general search (Google Search) and (Chrome) browser apps in order to be able to obtain a licence from Google to use its app store (Play Store);[46]

2. those contained in 'anti-fragmentation agreements', under which the operating licences necessary for the pre-installation of the Google Search and Play Store apps could be obtained by mobile device manufacturers only if they undertook not to sell devices running versions of the Android operating system not approved by Google;

3. those contained in 'revenue share agreements', under which the grant of a share of Google's advertising revenue to the manufacturers of mobile devices and the mobile network operators concerned was subject to their undertaking not to pre-install a competing general search service on a predefined portfolio of devices.

According to the Commission, the objective of all those restrictions was to protect and strengthen Google's dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements. The common objective and the interdependence of the restrictions at issue therefore led the Commission to classify them as a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA). Consequently, the Commission imposed a fine of almost €4.343 billion on Google, the largest fine ever imposed by a competition authority in Europe.[40] The action brought by Google is largely dismissed by the General Court, which confines itself to annulling the decision only in so far as it finds that the portfolio-based revenue share agreements referred to above constitute, in themselves, an abuse. In the light of the particular

[39] T-604/18 - Google and Alphabet v Commission (Google Android)

[40] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf

circumstances of the case, the General Court also considers it appropriate, in the exercise of its unlimited jurisdiction, to set the amount of the fine imposed on Google at €4.125 billion.

The European Commission is currently facing new calls to follow through on its 2017 antitrust decision against Google Shopping by forbidding Google from displaying its own shopping comparison ad units in search results — boxes that Google fills with revenuegenerating advertisements. Critics contend that the AdTech giant is continuously abusing the competition by self-preferencing these units, which they claim are self-preferencing units.

The companies are requesting that the Commission intervene and shut down Google's https://www.skadden.com/insights/publications/2022/10/eu-digital-markets-act-enters-intoforce ruling "allows no competition," results in "higher prices and less choice for consumers," and facilitates what they call an "unfair transfer of profits" to Google.[41]

Digital Markets Act (DMA)

Recently, The European Union's **Digital Markets Act (DMA) was** published in the Official Journal of the EU on 12 October 2022. The legislation, which regulates large technology platforms, enters into force on 1 November 2022 (20 days after publication) and the notification and review process by which the European Commission (EC) will designate companies as 'gatekeepers' starts six months later, on 1 May 2023.[42]

The subject of the regulation is unfair practices by "very large online platforms" (VLOPs), also known as the gatekeepers. Only companies with an annual turnover of €7.5 billion in the EU or with a global market value of €75 billion will therefore fall within the scope of the DMA. The gatekeepers must also have at least 45 million monthly individual end users and

100,000 business users.[43] Moreover, these companies must control at least one "core platform service" such as marketplaces and app stores, search engines, social networks, cloud services, advertising services, voice assistants and web browsers. Previous EU rules did not apply to them or were ineffective in preventing monopolistic practices and effectively protecting smaller

[41] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf
[42] https://www.skadden.com/insights/publications/2022/10/eu-digital-markets-act-enters-into-force
[43] https://www.ey.com/en_pl/law/digital-markets-act-the-path-to-a-fair-and-competitive-digital-economy

players in the market. The DMA is therefore intended to benefit smaller players. It aims to prevent large platforms from imposing unfair conditions on businesses and end users, and to ensure the openness of important digital services. The DMA will promote innovation, growth and competitiveness, and facilitate the scaling up of smaller platforms, SMEs and start-ups.[44]

According to the DMA, the gatekeepers will be required to:

- enable end users to easily uninstall pre-installed applications or change default settings on operating systems, virtual assistants or web browsers that direct to the gatekeeper's products and services and provide selection screens for key services;
- allow end users to install applications from other developers or app stores that use or work with the access gatekeeper's operating system;
- allow end users to opt out of the gatekeeper's core platform services as easily as they sign up for them;
- allow third parties to interact with the gatekeeper's own services;
- provide companies advertising on the platform with access to the gatekeeper's performance measurement tools and information necessary for advertisers and publishers to conduct their own independent operations.[45]

At the same time, the following practices will be prohibited:

- using business user data when the gatekeepers compete with them on their own platform;

- classifying their own products or services more favourably compared to those of third parties;
- requiring app developers to use certain gatekeepers' services (such as payment systems or identity verification) in order to appear in the gatekeeper's app stores;[46]
- tracking end users outside of the gatekeeper's main platform service for the purposes

[44] https://www.ey.com/en_pl/law/digital-markets-act-the-path-to-a-fair-and-competitive-digital-economy
[45] https://www.ey.com/en_pl/law/digital-markets-act-the-path-to-a-fair-and-competitive-digital-economy
[46] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf

of profiled advertising without giving effective consent.[47]

SANCTIONS

In the event of the gatekeeper's non-compliance with the above-mentioned obligations, the EC may impose fines of up to 10% of its total worldwide turnover from the previous fiscal year, or, notwithstanding the penalty already awarded, may impose a further penalty of up to 20% of worldwide turnover in the event of a repeated violation of at least the same type.

Moreover, the EC may impose periodic fines of up to 5% of the average daily worldwide turnover achieved in the previous fiscal year for each day, calculated from the date specified in the decision, in case of non-compliance with prior recommendations. In addition, in case of systematic violations, the gatekeeper may be banned from carrying out mergers with other entities, at least for a specified period. These sanctions are accompanied by broad powers for the EC to check entities' compliance with DMA requirements through information requests, market studies and the possibility of inspection.[48]

Chapter 4: CONCLUSION AND SUGGESTIONS

Many governments are taking proactive measures to address problems with competition in the digital era. Among them, there is a global trend toward the adoption of specific new regulations or the amendment of competition laws aimed at such issues, as well as the clarification or organization of current competition laws.[49] Not just in developed nations, but also in certain developing nations and growing economies, has this trend been observed. For example, in the developed nations like USA, Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) share responsibility for enforcing US antitrust laws at the federal level. They take steps to enforce antitrust laws against technology corporations and online services. And also, the USA proposed some comprehensive framework for regulating tech platforms for digital markets like American Innovation and Choice Online Bill (AICO), Ending Platform Monopolies Act and Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act.However, practicalities of enforcement and the

[47] https://www.ey.com/en_pl/law/digital-markets-act-the-path-to-a-fair-and-competitive-digital-economy
[48] https://www.ey.com/en_pl/law/digital-markets-act-the-path-to-a-fair-and-competitive-digital-economy
[49] https://www.thehindubusinessline.com/business-laws/antitrust-regulation-in-an-era-ofinnovation/article65233869.ece

corresponding real-world effects of the Acts on business operations are still unknown.[50]In European Union the digital markets will soon come to into force. It identifies gatekeeper platforms and forbids certain practices by these platforms, such as selfpreferencing and preventing users from uninstalling any pre-installed software or application, with sanctions in the case of violation, may be seen as an extension or complement to the current competition law regime. The Canadian government has been diligent in assessing the various tools available to guarantee that the country's digital markets are operating properly. They have updated the factors provided under the Canadian Competition Act for determining abuse of dominance by acompany and it also has Digital Enforcement and Intelligence Branch that will detect harm in the marketplace. Even developing countries like Thailand is publishing guidelines on Unfair Trade Practices between Online Food Delivery Service Providers and the Restaurant Business Operators and also imposing penalties for violating the same.

Whereas in India, which is emerging as one of the biggest and fastest digital economy, there is only one competition regulatory authority i.e., the Competition Commission of India which

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was established under the competition act, 2002. The digital market is rapidly evolving and in order to sustain fair competition and prevent anti-trust among business entities functioning on digital platform, it is essential to modify the Competition Act proactively.

A regulatory body, comprising of members with expertise in the field of competition, economics, e-commerce mechanics etc, may be established to tackle new challenges and provide quick resolve. India can establish a separate digital enforcement branch for regulating the digital market. Additionally, the competition law in India was framed with the traditional market in mind, the antitrust watchdog encounters several unique challenges when looking into cases involving the digital market. And CCI while dealing with any antitrust case either have to determine whether an agreement has an appreciable adverse effect on competition (AAEC) or has to ascertain whether the entity in question is dominant within relevant market.[51]

To determine if an agreement has an appreciable adverse effect on competition, CCI considers

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[50] http://www.mondaq.com/unitedstates/antitrust-eu-competition/1232122/american-innovation-andchoice-online-act

[51] https://www.medianama.com/2022/06/223-competition-act-amend-parliamentary-report/#:~:text=Certain%20practices%20that%20may%20be,business%20users%20and%20the%20platform.%E2%80%9D

a limited set of factors provided under section 19(3) of the Act. But this section does not include any specific factor relating to the digital market. Section 19(3) may be widened by adding specific factors like sharing of customer's data with the partners or using the data to customize ads etc without consent of the users, for determining whether an agreement pertaining to the digital market has an appreciable adverse effect on competition. And to ascertain if the entity in question is dominant in relevant market, CCI shall have due regard to all or any of the factors provided under section 19(4). Therefore, factors like effect on barriers to entry, such as network effects; effect on both price competition and non-price competition, such as quality, choice or consumer privacy; effect on the nature and extent of change and innovation in the relevant market; can be added to ascertain dominance of an entity in the digital market as there are no such factors provided under section 19(4) so far.

The Competition Commission of India is also investigating the food aggregators, and CCI can also issue certain guidelines for restricting food aggregators from making any demands for unfair expenses, compensation, or other benefits from the Restaurant Business Operator

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or from imposing any unfair trading conditions that restrict or prevent the Restaurant Business Operator to operate the business.

In India traditional remedies have a limited ability to address the market failure in digital marketplaces, there is a requirement for an ex-ante regulation for the gatekeepers as the expost enforcement, particularly where gatekeepers are involved, does not necessarily result in the best restoration of competition in dynamic and quick-moving markets.

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