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FOREWARD

— Prof. (Dr.) S. Surya Prakash, Vice Chancellor

I am delighted to introduce the inaugural edition of the NLIU Journal for Research in Competition Law and Policy. This journal represents a significant milestone for the National Law Institute University, Bhopal, as we strive to make meaningful contributions to the dynamic field of competition law and policy.

In recent years, the global and national markets have experienced significant transformations, marked by numerous mergers, acquisitions, and joint ventures. The Competition Commission of India (CCI) plays a crucial role in this dynamic landscape, acting as the guardian of fairness. As markets become more complex and interconnected, the need for a robust framework to ensure fair competition and protect consumer interests has become more critical. It is against this backdrop that the NLIU Journal for Research in Competition Law and Policy aims to make a significant impact.

The primary objective of this journal is to promote rigorous academic research and dialogue on various aspects of competition law and policy. It provides a platform for scholars, practitioners, policymakers, and students to share their insights, analyses, and perspectives on the challenges and opportunities in this field. By encouraging interdisciplinary research and fostering collaboration, we hope to contribute to a more nuanced and comprehensive understanding of competition law.

This inaugural edition features a diverse range of articles that reflect the breadth and depth of contemporary issues in competition law. From theoretical explorations to empirical studies, and from legal analyses to policy recommendations, the contributions in this volume offer valuable insights into the multifaceted nature of competition law. I am confident that these articles will stimulate thoughtful discussion and inspire further research in this important field.

I congratulate Mr. Mahendra Soni, contributors, and the editorial board whose dedication and hard work have made this journal a reality. Their commitment to excellence and scholarly rigor is

evident in the quality of the articles presented herein. I also express my appreciation to the faculty, students, and staff of NLIU, whose support and encouragement have been instrumental in bringing this journal to fruition.

As we embark on this new journey, I am filled with optimism and anticipation for the future of the NLIU Journal for Research in Competition Law and Policy. It is my sincere hope that this journal will serve as a beacon of knowledge and a catalyst for positive change in the field of competition law. I invite you to delve into the pages of this inaugural edition and join us in our quest to advance the understanding and practice of competition law and policy.

With warm regards,

Prof. (Dr.) S. Surya Prakash

National Law Institute University, Bhopal

EDITORIAL NOTE

— Asst. Prof. Mr. Mahendra Soni

Dear Readers,

It is my distinct honor to welcome you to the latest issue of the Journal for Research in Competition Law and Policy (JRCLP) at NLIU. As we reflect on our journey since the journal's inception, it is remarkable to see how far we have come and the strides we have made in addressing the dynamic and ever-evolving field of competition law.

The JRCLP was launched during a period of significant transformation in competition law, both globally and within our local jurisdictions. Rapid technological advancements, shifting economic landscapes, and evolving regulatory frameworks have collectively contributed to a landscape of continuous flux. These changes have brought forth new challenges and opportunities, necessitating rigorous academic discourse and innovative research to navigate this complex environment effectively.

New challenges were emerging, particularly with the rise of digital markets and their unique complexities. Recognizing the need for a forum to explore these developments, we embarked on this ambitious journey. The introduction and integration of AI-based writing tools have revolutionized how research is conducted, analyzed, and presented. Recognizing the profound implications of these technologies, we have proactively redesigned our review process to ensure the integrity and originality of the submissions we publish. Our updated review process incorporates advanced plagiarism detection systems and AI-assisted tools to assess the quality and authenticity of manuscripts. These measures ensure that our published works uphold the highest standards of academic rigor and contribute meaningfully to the body of knowledge in competition law.

The journey of establishing a new journal comes with its own unique challenges. We encountered a few teething issues, ranging from logistical hurdles to the establishment of a robust editorial framework. However, through the unwavering commitment of our editorial team, the support of

our esteemed advisory board, and the invaluable contributions of our authors and reviewers, we have successfully navigated these initial challenges. Today, JRCLP stands as a testament to our collective resilience and dedication to advancing research in competition law.

We are proud to have created a platform that fosters intellectual growth and facilitates critical discussions on pertinent issues in competition law and policy. As we continue to grow and evolve, we remain committed to promoting innovative research, encouraging diverse perspectives, and upholding the highest standards of academic excellence.

On behalf of the entire editorial team, I extend my heartfelt gratitude to our readers, contributors, and reviewers for their unwavering support and dedication to JRCLP. We look forward to continuing this journey together and making significant contributions to the field of competition law.

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An Analysis of State Run Monopolies: The Case of The Indian Railways

~Vyshnavi Praveen and Ananya Soni[1]

Abstract

The Indian railways have been a crucial player in the Indian economy with its growing importance right from the British period to the post-independence era and even in the 21st century. The Indian railways is one of the largest public undertakings and remains a state-run monopoly. In an era of anti-trust laws focused on free market entry and focus on mitigating abuse of dominance, the Indian railways have merged as a peculiar case. With the socio-economic demographics in India being unique and unlike any other country, the question of the importance of such state run-monopolies takes a new light. If there is a necessity for the monopolization of an industry for public welfare, should it or should it not be considered anti-competitive? Does the monopoly status ensure general public interest and are there alternatives to ensuring the same? It also digs the question as to what would happen if there were to be a case where the railways to be fully or part privatised and how it would impact the competition in the industry. Furthermore, it is vital to look into what are the barriers to entry in the industry and whether or not private entities can take on the role of such a large undertaking.

Keywords: Monopolies, Public-sector undertaking, Indian Railways, State-run, dominant position

Chapter 1: Introduction

The Indian Railways is India's largest public sector undertaking in India, the largest in Asia and the third largest in the world[2]. Formally known as the Indian Railway Catering and Tourism Corporation Ltd. (IRCTC), it is a Central Public Sector Enterprise under the Ministry of Railways, Government of India. IRCTC was incorporated on 27 September 1999 as an extended arm of the Indian Railway.[3] The IRCTC is a classic example of a government owned monopoly and controls

[1] Vyshnavi Praveen and Ananya Soni are students at the Tamil Nadu National Law University. The authors may be contacted at vyshnavipraveen_ug19@tnnlu.ac.in and ananyasoni_ug19@tnnlu.ac.in respectively for any feedback or concerns.

[2] Indian Railways, 'About Indian Railways' (Ministry of Railways) <https://indianrailways.gov.in/railwayboard/view_section.jsp?lang=0&id=0,1> accessed 17 October 2023.

[3] IRCTC, 'About Us' <https://irctc.com/about.html> accessed 2nd Sept. 2022.

100% of all railway operation and ticketing services in India. Indian railways is a very integral part of the transport network of India having a track coverage of over 63000 km and over 800 Crore passengers FY 2019-2020[4]. These statistics alone highlight the sheer importance of the Indian Railways in an ordinary citizen's life. It is interesting to note that in India, driven by the principles of Liberalization, Privatization and Globalization, the Railways remains a wholly public entity and stands as the world's largest government-owned monopoly.

While the Indian government does have its fair stake in other transportation forms in India including Air India (which was recently sold to the Tata Group)[5]and road transportation, it is only in the Railway sector where there is a complete monopoly. Interestingly enough, in a country such as India where over 70 Public sector undertakings (PSU's) were loss making as of March 31, IRCTC remained a top profit maker with great favour from the general public[6]. As of June 2022, IRCTC reported a 246 Cr Net profit in Q1 making it one of the top performing public undertakings[7].

All this leads to one question: What is the role that a monopolistic PSU's play in a developing market such as India and are there any welfare objectives that are truly served? Or are state-run monopolies just as anti-competitive and there is a need for change and more inclusive policies?

Chapter 2: The History of Indian Railways and its Role in the Indian transportation system

Railways have for a long time been a very consistent and vital part of the whole transportation scene in India. Railways were first introduced under British rule in 1853. The plan to introduce the railways in India was proposed way back in 1832 however for over a decade there was no action taken in this regard. It was only in 1844 that private entrepreneurs were actually permitted to launch a railways system by Lord Harding. Following this, in 1845 there were two companies formed and the East India Company was requested to extend their support concerning this matter.

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[4] Ministry of Railways, 'Annual Reports and Accounts 2020-2021' <https://indianrailways.gov.in/railwayboard/uploads/directorate/stat_econ/Annual-Reports-2020-2021/Annual-Report-English.pdf> accessed 15th Sept. 2022.

[5] BBC, 'Air India: Tata Group takes over loss-making national carrier' (*BBC*, 2022) <https://www.bbc.com/news/world-asia-india-60150531> accessed 1st Sept. 2022.

[6] FE Online, 'Indian PSUs under massive debt; these three firms perform worst in FY19' (*FINANCIAL EXPRESS*, 2020) <https://www.financialexpress.com/industry/indian-psus-under-massive-debt-these-three-firms-perform-worst-in-fy19/1862641> accessed Sept 1, 2022.

[7] Meghna Sen, 'IRCTC Q1 results: Netprofit surges nearly 200% to ₹246 cr; revenue up 250%' (*LIVE MINT*, 2022) <https://www.livemint.com/companies/company-results/irctc-q1-results-net-profit-surges-nearly-200-to-rs-246-cr-revenue-up-250-11660126892619.html> accessed Sept 1, 2022.

Over the next few years, the railway construction scene in India progressed extremely quick and by the 22nd of December, 1851 the first-ever train came on track which was used to carry construction material at Roorkee. On 16th April 1853, the first ever passenger train ran between Bori Bunder in Bombay to Thana covering a distance of 34 km. This moment was one of the most monumental in India's History as it signified the entry into a new era of trade, commerce and connectivity.

Following what appeared to be a major success, the British approached several different private investors and tried to persuade them to come to be part of this railway development system and promised them over 5% of annual returns. The aim behind this was to outsource the development process to private entities and later the state would come forward and take control. Between 1853 to 1880, the railway lines drastically increased from 34km to 14500kms, spanning the major port cities of Madras, Bombay and Calcutta. Owing to the worldwide Industrial revolution, by 1895 India began manufacturing its locomotives and following this the Britishers began assembling the independent railway system and also covered regions such as Assam, Rajasthan and so on which were previously inaccessible. In 1901, a railway board was formulated and the powers relating to its administration were vested with the Viceroy at that time: Lord Curzon. Under the British Administration, the railway industry in India continued to grow and expand.

It was in 1901 that after years of financial investment and promotion did the railway industry finally become profitable in India. It was also during these years that there was a rapid increase in the level of government intervention relating to the railway industry. With increased focus on centralised management systems, the GPR and the East Indian Railways (EIR) were nationalised in 1923. [8]

Unfortunately, the calm never lasts. When the first world war broke out, it did take its toll on the Indian railways. With more funds and capital required to participate in the war, the British began diverting more funds towards it and in 1924 the finances relating to the railway were separated from the general budget and the railway began receiving its dividend in 1925.

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[8] Joe Baker, 'Timeline: 165 years of history on Indian Railways' (*Railway Technology*, 2020) <https://www.railway-technology.com/features/timeline-165-years-history-indian-railways/> accessed 18 September 2022.

The Indian Railway Catering and Tourism Corporation of India (IRCTC) got incorporated as a Public Limited company on the 27th of September, 1999 under the Companies Act 1956[9]. IRCTC emerged as the only entity authorized to provide railway catering and booking in India and became a central public sector enterprise. Apart from providing these booking and catering services, IRCTC was also responsible for looking into the hospitality services at railway stations. In 2008, IRCTC has also conferred the status of mini-Ratna, a category I public enterprise by the government of India. IRCTC is also a rather popular name amongst different socio-economic classes in India and is one of the most transacted websites as of 2019.[10]

It is no doubt that the IRCTC was a huge hit amongst the masses even during a time when most Public Sector Units (PSUs) such as IRCTC decided to soon after expanding into budget-friendly hotels and catering in lounges. The vision of IRCTC was clearly to evolve into the ultimate, one-stop solution for tourists.

The IRCTC has remained one of the top contenders throughout history and one of the most treasured prizes of the Indian government, but this brings us to the question: Would the IRCTC be as successful as it is if not for its monopoly status? What is the real reason behind this gatekeeping and monopoly status of the IRCTC? Are the scattered instances of private players entering the Indian railway industry a sign of a revolution? This project will focus on a vertical unbundling of the Indian railway industry

Why is IRCTC So Heavily Gated?

The Indian railways have indeed been around for a long time, now this brings us to the question: Why has the state shut the doors on IRCTC? Ever since the very inception of the Indian railways, the state has always played a vital role in developing and expanding the Indian railways. The reason for this is that Railways in India are a major undertaking that plays a vital role in providing cheap transport, connecting individuals from one place to the other. Initially, the reason for gatekeeping the railways included:

[9] Joe Baker, 'Timeline: 165 years of history on Indian Railways' (*Railway Technology*, 2020) <https://www.railway-technology.com/features/timeline-165-years-history-indian-railways/> accessed 18 September 2022.
[10] Business Standard, 'Indian Railway Catering & Tourism Corporation Ltd.' (*Business Standard*, 2022) <https://www.business-standard.com/markets/indian-railway-catering-tourism-corporation-ltd-share-price-23401.html> accessed 18 September 2022.

1. The lack of awareness amongst private players relating to the various nuances of railway development.
2. The very high cost relates to laying down tracks, procuring coaches and maintenance and development.
3. The issue relating to ensuring maximum connectivity within the country. [11]

It is true that during the initial stages of British rule in India that most Indian enterprises lacked the depth of knowledge required to carry out a railway business but it is also true that it was because of the help of private players that the railways could be set up. In a period where more and more airports are getting privatised, it only stands as a testament that private players in today's world are just as if not more so capable than the state to manage such affairs[12].

As for the cost aspect, at one point in time, it might not have been feasible for private players to take on an industry as large as the railways but with more and more prominent private payers coming into the scene, privatisation might not be a far-off dream. As for the year 2020-2021, A total of Rs 11757.52 crores was spent solely on track renewal[13] The railways is no doubt a very capital-intensive industry that requires large sums of investment in terms of maintenance but there is also the narrative that once the industry is open to more private players, this sum might not be as big as a burden. Countries such as Japan follow this privatised system of railways and it has been an impeccable success.[14]

It appears that the primary reason for maintaining Indian railways as a state-run monopoly has to do with the fact that it is simply only the state that can be vested with the task of ensuring detailed connectivity and further by maintaining a monopoly status, the railways can ensure that the costs are regulated and easily accessible by individuals belonging to various socio-economic classes of the country.

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[11] Anand JC, 'The truth about colonial railways: Did the British infrastructure really benefit India?' (The Economic Times, 2023) <https://m.economictimes.com/industry/transportation/railways/the-truth-about-colonial-railways-did-the-british-infrastructure-really-benefit-india/articleshow/102691944.cms> accessed 18 October 2023.

[12] Arindam Majumder, '13 airports get approval for privatisation through clubbing mode' (Business Standard, 2021) <https://www.business-standard.com/article/economy-policy/government-gives-final-approval-to-privatise-13-airports-121090900575_1.html> accessed 18 September 2022.

[13] IRCTC, 'About Us' <https://irctc.com/about.html> accessed 2nd Sept. 2022.

[14] Stephen Smith, 'Why Tokyo's Privately Owned Rail Systems Work So Well' (*Bloomberg*, 2011) <https://www.bloomberg.com/news/articles/2011-10-31/why-tokyo-s-privately-owned-rail-systems-work-so-well> accessed 2 Sept. 2022.

Chapter 3: A Vertical Unbundling Assessment of The Indian Railways

The term "monopoly" is commonly used in economics and markets, but what does it actually mean? Adam Smith, a famous economist cleverly described the behaviour of monopolists in the form of a 3-step strategy: 1) Enforcement of their barriers to entry 2) Choice of the quantity of the commodity to be brought to the market 3) Price Fixing.

Before understanding the nature of state-run monopolies such as the Indian railways, we need to answer a simple question: Are the Indian Railways a true monopoly? There is no straightforward answer to this question but there are ways by which we can conclude.

Firstly, let us look at the industry that the Railways belong. The Railways come under the category of transportation under which several other modes of transport exist. This includes Airways, Waterways and Roadways. In India, Railways are by far one of the most popular forms of transportation with over 800 crore recorded passengers just in 2019-2020.[15] Although there are several options available in terms of connectivity, railways may seem to be the most convenient for a majority of individuals owing to the price, comfort and most importantly- the connectivity. At present, the railways offer connectivity even to the most remote locations however this might not be the case with airways.

Railways also being one of the oldest forms of long-distance travel in India remains to be the preferred method of transportation taking into account all factors and hence, it is not really in a position to be substituted. While airways are faster and more convenient, they are not the best in terms of connectivity and are also quite expensive compared to a standard train ticket. Considering how many variations exist in terms of the various modes of transport that exist in terms of cost, comfort and connectivity, they are not similar enough to be considered similar entities and hence it cannot be called a monopoly over the entire transportation industry.

Now solely looking at the railways alone, only the Ministry of Railways is in charge of running trains, operating stations and looking after all aspects related to rail travel. In terms of just the railway industry alone, different services are offered by IRCTC and not all of them are a monopoly.

[15] IRCTC, 'About Us' <https://irctc.com/about.html> accessed 2nd Sept. 2022.

To decipher whether or not the Indian railways are a monopoly, we would need to closely examine all the individual services being offered.

The Indian railways offer more than just transport services. To truly understand what exactly, we need to unbundle the various services that are offered by them. While they do offer a variety of different services, the core ones include: **Internet Ticketing, Travel & Tourism, Catering, Bottled water services**

Internet Ticketing

IRCTC offers internet ticketing services for all trains and routes via their website (irctc.co.in) and App (IRCTC Rail Connect). With the help of these interfaces, individuals can now book railway tickets from the comfort of their own homes, anytime and anywhere. Online ticketing through the Indian Railway Catering and Tourism Corporation (IRCTC) website was started in 2002 by introducing the concept of e-ticket where the ticket was booked through the IRCTC website and the physical ticket was delivered through courier at the address given by the passenger. Subsequently, in 2005, e-ticketing was introduced wherein passenger was required to take a print-out of the Electronic Reservation Slip (ERS) and carry one of the prescribed proofs of identity in original for undertaking travel subject to the appearance of the name in the reservation chart.[16] There was a point until which railway tickets could only be sold on the official 'irctc' website, however from 2015 onwards all that was about to change. IRCTC teamed up with several players in an attempt to boost the sale of tickets and open up new avenues plus increase accessibility. IRCTC teamed up with ICICI Bank to sell tickets on the bank's website and this marked a new era of collaboration and the end of the monopoly area over the sale of tickets. [17] During this period, IRCTC also made efforts to improve the existing online ticketing systems to handle 26000 tickets in a minute. [18]

The IRCTC revenue model relating to the online sale of tickets works by collecting an amount known as a "convenience fee" on the sale of every ticket. FY 2020-2021, IRCTC managed to

[16] Press Information Bureau, 'E-Ticket Facility in Indian Railways' <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579186> accessed 18 September 2022.
[17] India Today, 'Now buy your railways tickets from ICICI Bank' (*India Today*, 2015) <https://www.indiatoday.in/technology/news/story/now-buy-your-railways-tickets-from-icici-bank-278765-2015-12-24> accessed 20 September 2022.
[18] IRCTC, 'About Us' <https://irctc.com/about.html> accessed 2nd Sept. 2022.

collect Rs 17,762 crores in revenue just from the e-ticketing avenue. In fact, e-ticketing accounted for 79.63% of the sale of tickets in that financial year alone[19] which shows just how reliant people are on this model of reservation.

The IRCTCs model of collecting this convenience fee also caught the eyes of the CCI in 2018 when they were alleged to be abusing their "dominant position" by charging this said fee under Sec 4 of the Competition Act[20]. The complainants had alleged that Indian Railways and IRCTC abused their dominant position by charging a higher price than the actual base fare for the sale of e-tickets. The complainants further alleged that IRCTC rounded off amounts to the nearest highest multiple of 5 to arrive at a base price and that this was an imposition of an unfair condition relating to the sale of the tickets[21]. This resulted in a CCI-led investigation into the whole ticketing process but concluded by saying that there was no abuse of dominance. The CCI reasoned that the act of rounding off amounts on weighted assessment did not seem to have any adverse effect from the whole competition angle. The CCI further remarked that charging this convenience fee merely helped service the customers better in terms of providing better technological infrastructure. The matter was disposed of accordingly. [22] The CCI further found that there was nothing discriminatory about this policy of levying a convenience fee as it treated all the customers equally and further also stated that IRCTC did not pose a threat to competition in India. The court further held that there was no prima facie case that could be established as there was no mala fide intention that could be established and further held that even in the current scenario, individuals may still opt for purchasing tickets at traditional System counters directly. With respect to this concept of a convenience fee,

This case was perhaps one of the most ground-breaking ones in terms of addressing the dominant position of IRCTC with special respect to e-ticketing. This brings us to the next question as to whether or not IRCTC on a whole is truly a monopoly or not? This aspect will be discussed later on in this paper.

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[19] IRCTC, 'About Us' <https://irctc.com/about.html> accessed 2nd Sept. 2022.
[20] The Competition Act, (India) [2002], § 4.
[21] Press Trust of India, 'CCI orders probe against Railways, IRCTC for abusing dominant position' (Business Standard 2018) <https://www.business-standard.com/article/pti-stories/cci-orders-probe-against-railways-irctc-for-abusing-dominant-position-118111201471_1.html> accessed 17 October, 2023.
[22] *Mr Meet Shah & Ors v. Ministry of Railways*, Case No. 30 of 2018, (Railway Claims Tribunal, 3 April 2019).

Travel and Tourism

IRCTC in a bid to emerge as a name associated with tourism also launched into the travel and tourism segment. IRCTCs travel and tourism segment attempted to cater to the budget and luxury needs of customers. The revenue FY 20-21 was estimated to be around 53.85 Crores, which was significantly lower as a result of the pandemic and travel restrictions imposed as a result, this was as opposed to 392.14 crores in 19-20, an 86.79% decrease[23].

This segment of the IRCTC offers a variety of services including special trains, hotel and lodge bookings, bus tours and so on. IRCTC is most certainly not the only player in the segment of packages and tours. Other major players in the field include Thomas Cook, Make my Trip, Cleartrip and so on. While this segment does contribute to an extent, it is not the primary revenue source of IRCTC.

Packaged Drinking Water

IRCTC also offers the service of packaged drinking water to be sold in all stations and vendors on the train. To date, the sale of Rail Neer remains to be a monopoly as they are the only brand which is authorized by the Ministry to be sold on trains and at railway stations. As of 2021, there were 14 operational drinking water plants of Rail Neer across India. During the year 2020-20121, this segment alone contributed 57.24 crores to the total revenue [24]The monopoly status of the Rail Neer also caught the attention of several people when in 2016, an individual filed an RTI before the Bombay High court claiming that this monopoly status was impacting a customer's right to choose. While hearing this RTI the Bombay High court also questioned this monopoly status of their RTI but ultimately found that there was no abuse of dominant position and that there was no true violation of the right to freedom of choice. Furthermore, the Supreme Court in 2016 also removed the stay on the Monopoly right of Rail Neer and permitted the exclusive sale of it by stating that vendors ought to be aware of such exclusive sale conditions before entering into such agreements.[25]

[23] Railway Board, 'Annual Reports and Accounts 2020-2021' (*Ministry of Railways*, 2021) <https://indianrailways.gov.in/railwayboard/uploads/directorate/stat_econ/Annual-Reports-2020-2021/Annual-Report-English.pdf> accessed 17 October 2023.
[24] Ibid.
[25] HT Correspondent, 'HC Lifts stay on exclusive sale of Rail Neer (*Hindustan Times*, 2016) accessed 18 September 2022.

Although Rail Neer does not contribute much in terms of revenue to the overall proceeds, it is still one aspect of railway services in India where IRCTC enjoys a monopoly status.

Catering and Hospitality

As the name suggests, catering and hospitality are crucial segments of IRCTC. Under this segment, catering services are available to customers both on the trains and at the railway stations. Although under the Catering policy of 2017, it was mandated that the service of meals on trains had to be done from base kitchens which were owned, operated and managed by the IRCTC, this changed following the pandemic where the service of branded, pre-cooed ready to eat meals was introduced. FY 20-21, the revenue from the catering segment was reported to be d.41 crores[26]

At one point in time, the only meals that were available on trains and at stations were those served by IRCTC-operated vendors, however, in recent times, there has been so much more in terms of choice. In 2015, IRCTC launched its pilot project on e-catering whose first phase focused on 45 select railway stations in the eastern zone and which was soon extended all across India. This allowed passengers to order food as per their choice on their train and provided them with various payment options. This was a revolutionary move as it increased the choices available and was a drastic step towards improving the quality. At present, passengers have the option of ordering from various listed restaurants and can enjoy the convenience of on-time delivery right to their compartment. Several apps allow passengers to order food right to their berth such as Travel khana, Zoop India and so on.

The catering onboard trains and in railway stations is no longer a monopoly with several different options to obtain delivery from a wide variety of restaurants which massively benefit customers in terms of price, convenience and comfort.

While there are several different segments of the IRCTC, we will solely be looking at the public passenger travel aspect of IRCTC and analyse the nature of the competition and its future scope of it in this paper.

Chapter 4: Cracking down the issues with state-run monopolies

[26] Railway Board, 'Annual Reports and Accounts 2020-2021' (*Ministry of Railways*, 2021) <https://indianrailways.gov.in/railwayboard/uploads/directorate/stat_econ/Annual-Reports-2020-2021/Annual-Report-English.pdf> accessed 17 October 2023.

Now that we have unbundled the various components of IRCTC and deciphered the nature of each of these individual services, we are in a position to focus on the primary service: railway ticketing services offered to the general public. Why is it so important that markets remain open, free and competitive? Under the Competition Act, the dominant undertaking means a position of strength enjoyed by an enterprise in the relevant market in India[27]. There are no arithmetic parameters used to define dominant position under the Competition act to decide who is a dominant player. This definition does carry a great deal of ambiguity. Is IRCTC a dominant player? Applying the understanding of a dominant player to the context of IRCTC, we see that it fits almost all of the criteria. IRCTC in terms of passenger transport faces absolutely no competition from any player, remains the majority controller of all passenger railway transport systems within the country and has significant control over the pricing.

Now that we have established that IRCTC is in fact a dominant player, wouldn't they stand in violation of section 4(b)(i) of the Competition act? [28]The answer lies with Section 18 of the competition act talks about the duty of the Competition Commission of India (CCI) to eliminate all practices having adverse effects on the competition and promote and sustain the interests of consumers and ensure freedom of trade carried out by all other participants within the country.[29]A simple reading of this provision shows that there is a keen interest given to the welfare of consumers and although the term "public interest" has not been used, it can be used synonymously. It is quite interesting how there is a use of "interest of customers" as opposed to "public interest" in the earlier MRTP Act[30]. All in all, the term interest of consumes has a wider scope as opposed to public interest as it accounts for preference of customers, satisfaction and existence however public interest is more restricted in that sense.

How is it that the Indian railways remains an "almost-monopoly" despite such provisions? The answer yet again lies in Section 18 in the phraseology "interest of consumers". While competition to a large extent helps driving down prices amidst competition, the main aim of a state-run enterprise or undertaking such as IRCTC is largely focused on social welfare. IRCTCs vision is to ensure "safe, efficient, affordable, customer focussed and environmentally sustainable integrated

[27] The Competition Act, (India) [2002], § 4
[28] The Competition Act, (India) [2002], § 4 (b) (i)
[29] IRCTC, 'About Us' <https://irctc.com/about.html> accessed 2nd Sept. 2022.
[30] The Monopolies and Restrictive Trade Practices Act, § 12, No 54, Acts of Parliament, 1969 (India).

transportation solutions"[31] The reason IRCTC maintains a monopoly status is to ensure that there is standardization of pricing to ensure affordability and also to ensure that the service caters to the needs of individuals belonging to all social groups.

Referring to Art 38 of the constitution, we see that the state is vested to undertake steps to protect the social and economic rights of individuals including efforts to minimize economic inequalities.[32] A combined reading of this provision with the preamble of the Competition Act clearly suggest that it is the responsibility of the state to take measures to protect the social and economic interests of customers and public at large and by permitting a public enterprise to enjoy a monopoly is merely in discharge of this duty. An interesting fact to note is that upon reading Section 3 of the MRTP act is that the act was not applicable to an undertaking owned by the government or a government company or owned by a corporation formed by any act of the parliament.[33] This provision is probably supported by the fact that during the enactment of the act, India was heavily focused on public sector undertakings to bolster the social economic standing and undertook several welfare measures and schemes. Further, Section 32 of the MRTP act clearly stipulated that all monopolistic acts would be considered prejudicial unless otherwise deemed by the state or to ensure the provision of essential services or commodities or if the government deems that such a practice is necessary. The railway industry comes within the ambit of this act and was probably excused for that very reason as it is to a large extent an essential service and protected by the state as a welfare service.[34] As per the Competition act as well it is stated that the government may exempt enterprises working towards public interest, performing sovereign functions.[35]

Upon consideration of all these material facts and circumstances, it appears that the primary reason for maintenance of this monopoly status of the Indian railways has to do with ensuring equitable treatment of customers belonging to all classes of society. The emphasis on public interest during the applicability of the MRTP act was also held in the Woollen Mills case.[36] All in all, it appears that the motive behind maintaining the state enterprise as a monopoly is to ensure that there

[31] Ministry of Railways, Ministry's Vision, Mission, Objectives and Targets <https://indianrailways.gov.in/railwayboard/uploads/directorate/planning/downloads/Results_Framework_Document_2011-12.pdf> accessed 18 September 2022.
[32] Constitution of India, Art. 38.
[33] The Monopolies and Restrictive Trade Practices Act (India) [1969]
[34] The Monopolies and Restrictive Trade Practices Act (India) [1969]
[35] The Monopolies and Restrictive Trade Practices Act (India) [1969]
[36] *Raymond Woollen Mills Ltd. v. M.R.T.P Commission*, [1993] 2 SCR 127

equitable pricing and that there is no unfair exploitation by private players. This also helps prevent predatory pricing and other such unfair practices. Furthermore, railways maintenance is heavily capital dependent which may be a daunting commitment for most private players and the Indian government maintains a much stronger position in terms of availability of capital procurement of land and also has an edge in terms of prior experience.

That being said, the Railways still is a monopoly and always has been one ad there are several benefits especially in terms of improvement of quality that might only come about when there is more competition which will serve as a motive for improvement of quality of service and in terms of offering variety and driving up customer satisfaction

The Fundamental Issues with state run monopolies

State run monopolies are actually quite common around the world. The general notion in competition jurisprudence is that individuals strive to maximize their profits.[37] While most state run monopolies operate towards welfare, one question that has been brought up more and more in recent times is – Are state monopolies just as anticompetitive as other monopolies? Monopolistic markets too are driven by the desire to constantly increase their profit sharing while maintaining or expanding their hold over an existing market. The core argument against monopolies is that it prevents effective competition, so why does this not hold true in the case of state-run monopolies?

We can better understand anti-competitive behaviour of firms from the Structure-Conduct-Performance-Conduct (SP) Paradigm, a model of Harvard University and developed by Edward Manson.[38] This model may be used to understand just how state-monopolies impact the competition in the surrounding market. Market structures are essentially describing the market within which a given firm operates. It almost always is a direct or indirect determinant of the competition pattern within a market. Looking into market conduct, it refers to the way in which a firm act which includes pricing etc. Performance is described as the measure of business conduct which determines whether the firm enhances economic welfare. According to this SPC paradigm, the market structure determines the conduct of firms and the conduct of firm determines its performance. Applying this model, it is easy to conclude that a large number of buyers and sellers

[37] Michael Trebilcock, *Privatization and Accountability* (Oxford University Press, 2003) 116.

[38] Frederic M. Scherer, *Industrial Market Structure and Economic Performance* (Rand McNally, 1970), summarised in ibid.

results in the welfare of consumers. Higher degree of concentration within markets prevents the entry of new entities and increases market power. This matter was also touched upon in the US Supreme court concerning horizontal mergers and their market impact with regards to competition.[39]

Market power is almost always the motivation for anti-competitive behaviour amongst firms, but considering that the IRCTC is a state enterprise, created with them aim of social-welfare, can the same logic apply? The general logic is increased market power gives participants an increased ability to influence market prices and maximise profits, thereby harming the efficacy. They are also less susceptible to competitive constraints imposed by the other competitors. Looking at the case of IRCTC, there are no close competitors or substitutes which results in no other options for customers but here the argument lies that unlike other Monopolies, there is the assumption that being a state-run enterprise, IRCTC caters to the social welfare which is permitted under Section 18 of the Act. Under this section, the CCI is to look into the welfare of customers and this term is broad which also includes aspects such as quality of service, comfort and so on. More can be understood about this from a primary survey conducted, the results of which are discussed in the upcoming section.

The primary argument against state monopolies is that they stronger incentives and more advantages in committing anticompetitive behaviour than others. Firstly, state run monopolies such as IRCTC operate with several subsidies and benefits that provide a major competitive advantage over any other potential rivals.[40] When the government is the sole party involved, there is no scope for competition which is always the force behind improving services. This might be the reason behind the average customer satisfaction (*click here for survey details*). Additionally, state monopolies such as IRCTC enjoy a major advantage in terms of a better bargaining power. The railway endeavour is one which includes a lot of aspects such a procuring land, obtaining raw materials and a player that is so large is bound to have an edge in terms of bargaining power. State monopolies also have more freedom to expand the scale or scope of their activities than private

[39] *US v. Philadelphia National Bank*, 374 US 321 (1963).
[40] Richard R Geddes, *Competing with the Government: Anticompetitive Behaviour and Public Enterprises* (Hoover Institution Press, 2004).

ones because they are not subject to takeover threats and, in general, are not restricted in terms of the discipline of capital markets.

Indian Sentiment on IRCTC

As already discussed, IRCTC has become a household name amongst everyone in India. With such heavy reliance upon the entity, what is the public sentiment on the Indian railways? Do people genuinely support and endorse this form of industry or are the people waiting for a change and believing that privatization is the way?

A small survey involving 143 participants was conducted in pursuance with this regard with participants between the ages of 19-79 and the results were interesting, to say the least as in *survey details*.[41] When posed with the primary question as to whether or not IRCTC should remain a state monopoly, there was an equal split opinion with 50.3% against the idea and 49.3% for it. When asked if they were satisfied with the quality of services offered by IRCTC, 62.9% said no whereas only 37.1% were truly satisfied. An interesting response was received yet again concerning whether or not such state-run monopolies are socially and economically beneficial. 58.7% believed that they were whereas 41.3% believed that they weren't. 77.6% of the participants believed that privatization of the Indian railways would help improve the quality of service whereas 22.4% did not seem to think that was the case. 83% of the participants responded positively when asked whether privatization would help provide more options and services to the general public. Concerning whether or not privatization would help improve connectivity, a majority of people, i.e. 46.9% believed that it would and 38.5% were split on their opinion. Concerning the cleanliness aspect, a staggering 74.1% seemed to think that privatization would improve it, 8.4% were against it and 17.5% were split. 72% of the participants believed that privatization would drastically help in terms of comfort whereas 10.5% believed that it would not and 17.5% were split on this matter. As for the price factor, 54.5% of the participants felt that there would be no positive price impact as a result of the privatization of the industry. 55.9% of the participants also believed that privatization would improve the reliance and speed of the railways. 58% of the surveyed people reported that they would not mind paying a little extra to obtain the additional perks of private

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[41] *For Survey details and results please click this link - <https://drive.google.com/file/d/1JeBlZ56oUJ2LNAbYGAuJjS1fFwiuGMYx/view?usp=sharing >*

entities. 33.4% believed that they would not be okay with that price change whereas 8.4% were not able to conclude.

Overall, we can conclude that people are more or less equally divided as to whether or not a state-run monopoly such as IRCTC is beneficial. A majority of individuals claimed to not be satisfied by the current quality of services offered. Even regarding the question as to whether or not IRCTC is socially and economically beneficial, we are able to conclude that people are equally split as to the role it plays.

Privatization: The Golden Solution?

For a Industry that has for the longest time been gatekept by the government, it is interesting to think about what privatization would mean. In recent times however, there has been a shift in government policy. On the 30th of September, 2021 the government offered up a total of 12.6% of its share for sale[42]. This was a revolution for the largely monopolistic industry and marked the beginning of a new chapter. Over the years, several Railway convention committees have been of the opinion that privatization may greatly benefit the industry however there has been no detailed explanation as to how this should be gone about most positive impact that may come about as a result of privatization would be in terms of the choices offered to the customers and improvement in terms of quality and service. With more private firms in the market, there is likely to be competition which will result in firms striving to provide the best quality of services. Ultimately, this results in the benefit of customers. The year 2022 was a monumental in terms of opening the gates to private ventures when India witnessed its first ever private rail service[43]. The train was routed from North Coimbatore to Sainagar, Shirdi. The Indian government also made attempts to recognise busy routes in India to run 151 private trains and has sent out invitations for the same.[44]

[42] Keerthi Sanagasetti, 'IRCTC IPO Call: Green Signal' (*The Hindu Business Line*, 2021) <https://www.thehindubusinessline.com/portfolio/stock-fundamental-analysis-india/irctc-ipo-green-signal/article29541506.ece> accessed 28 September 2021.

[43] Trends Desk, 'Indian Railways Launches First Private Rail Service, Welcomes Passengers with Colourful Folk Performances' (*The Indian Express*, 2022) <https://indianexpress.com/article/trending/trending-in-india/indian-railways-launches-first-private-rail-service-welcomes-passengers-with-colourful-folk-performances-7971465/> accessed 16 June 2022.

[44] Avishek G Dastidar, 'Explained: Why Private Firms are Being Invited to Run Trains in India, and How the Model Will Work' (*The Indian Express*, 2020) < https://indianexpress.com/article/explained/explained-why-private-firms-are-being-invited-to-run-trains-in-india-6531252/> accessed 1 August 2020.

Privatisation and competition in other aspects of the IRCTC has proven to be a great success as it has helped enhance the overall customer experience. There however is no data or evidence to suggest that privatisation might result in any price benefits to customers. Considering the nature of the enterprise and socio-economic objectives of the Indian railways coupled with the major subsidies offered by the government, it seems unlikely that at least in the domain of ticketing and transportation, any private player may be able to effectively compete.

Although privatisation would enhance the experience in terms of the variety of choice, there exist several practical problems. First, the railway industry is a very capital intense industry and one which requires consistent investment and expansion. If the railways were to be privatised, it is rather difficult to imagine how private players will be able to bear these costs. Secondly, the railway network in India is more vertically integrated as opposed to other railway networks across the globe. This results in a constant effort to plan and simultaneously develop the railway network and in such a scenario, privatisation may result in underinvestment which could be disastrous considering the high degree of reliance.

From the competition angle, the privatisation of Indian railways at least during the initial stages is almost certain to result in drastically high prices which might not be accessible by the general public which would defeat the very vision of IRCTC. With more players and owing to the heavy investment required to enter the industry, service prices are likely to be significantly higher than the existing prices offered by the government and this could be a major deterrent to individuals belonging to all socio-economic classes. In an industry lie the railways, there never truly would exist the concept of a "free-market" as there will be barriers to entry, prices might not always rely upon market forces and there is likely to be discrimination. This again would result in a situation where a few major players control the market share while the others are unable to compete. This would in fact defeat the very reasoning behind privatisation which is to give open access to players and would also place the customers at a disadvantaged position.

Chapter 5: Findings, Suggestions and Conclusion

From our study of the paper, we have been able to come to a few conclusions:

1. The Indian railways have various aspects through them and upon vertically and horizontally unbundling them we come to understand that not all components of the

railways are a monopoly but relating to our primary study of ticketing and travel services, they are a true monopoly.

2. State monopolies do have competitive advantages which are anti-competitive in nature. These include everything from better bargaining position to security against takeovers and availability of subsidies and this allows them to maintain a stronghold over the markets.
3. Privatization may help improve certain aspects such as quality and comfort however might not work towards the welfare of customers and from the competition aspect, it does not appear that it might be the true solution.
4. We were also able to understand that the major reasons as to why privatization would not work has to do with the high capital and investment required, the dedication and effort required which might not be feasible for private players to provide.
5. Finally, we were able to understand that in a developing nation such as India with customers belonging to various socio-economic classes, privatization might not be the best solution. Privatization may result in concentration of services, increased prices which may not be accessible. It would end up setting aside an entire class of society from the narrative and creative a divide and propagate inequality and an economic divide. Privatization would not benefit even the competitors as there would be the concentration of powers in the hands of a few market players. With the capital requirements being so high, it is natural that only a few dominant players might be able to succeed and at best it will become an oligopolistic scenario. The concept of free markets with fair competition will probably never exist and the few dominant players in the market are more likely to engage in anti-competitive behaviour to strive for market power and customer acquisition.

A social enterprise such as IRCTC has more to its vision than just profit making. However, if privatisation on a large scale is considered, the benefits offered by the existence of a state monopoly will cease to exist. Although the IRCTC does hold a dominant position and although it does enjoy the various benefits of being a state-run monopoly, it does come within the ambit of consumer interest as per section 18 of the Competition Act. The act of running IRCTC as a state-run monopoly can be deemed as anti-competitive as it does fit the criteria however, it is protected within the scope of Section 18 which goes to highlight the fact that the state might have to undertake certain practices which might be construed as anti-competitive in order to act in the welfare and benefit of the general public and to work towards customer interest. The Indian railway

is the pinnacle example of commendable performance while ensuring that the social needs are catered to and this highlights its strategic importance. This is perhaps why even the government affirmed that the Indian railways most likely will ever be fully private[45].

In light of this, there are however a few suggestions which could be implemented to improve the competitive nature of the railway industry. Several countries such as the United Kingdom have adapted a system where railway operation has been divided into two segments: train and track operations. Entering into public-private partnerships (PPPs) for this sake. With a joint effort between private parties which are government authorized, there can be a mutually beneficial union. With a PPP in place, the government can adopt a model similar to Japan which designated passenger carrying services to a select 6 private players. With this logic, the government is able to monitor the quality, oversee the functioning and also ensure that there is no cartelisation or oligopolistic tendencies that arise. The government on the other hand can still deal with all aspects relating to the maintenance of tracks and land acquisition. The state being vested with a better bargaining power will be able to take on the major capital investments. A model may be directed where there are government regulations on these private parties and this enables for increased care given to competition. By regulating these private entities, the government is able to ensure they there is no collusion or predatory pricing and this allows for fair competition while also not discriminating against certain players.

The Indian Railways is more than just another player in an industry, it is a revolutionary enterprise that ensures that there is socio-economic balance and also prevents unfair pricing and abuse. Although there is much to be improved in terms of the services offered, it appears that a perfect competition might never exist for the reasons that have been discussed above. A Public private partnership might just be what India requires at this juncture. This would allow private players to get a chance to compete in the industry while ensuring that there is fair competition maintained. State run monopolies need not be anti-competitive and there are certain sectors where open markets might just be more detrimental and this appears to be one of those scenarios. Sometimes it is

[45] ET Bureau, 'Railways a strategic sector, no plan to privatise it: Government' (*The Economic Times*, 2022) <https://m.economictimes.com/industry/transportation/railways/railways-a-strategic-sector-no-plan-to-privatise-it-government/articleshow/90277625.cms> accessed 17 September 2022.

essential for an unequal status quo to protect the interests of the consumers and market in large in furtherance of the very preamble of the Competition Act.

The Indian railways have a rich history of excellence, and their enduring success as a public sector initiative is evident. With the evolving landscape and increasing collaborations between the government and private entities in the railway sector, we are on the brink of a new era that promises to redefine competition practices in India.

Competition Laws and the Petroleum and Natural Gas Industry: A comparative study of India, the UK, and the United States of America

~Sanidhya Mukund[1]

Abstract

The antitrust laws of all nations are centered around certain key issues. The abuse of its dominant position by a corporation and entering into anti-competitive agreements by more than one corporation are of particular importance. The legal framework of each of the three nations considered here incorporates provisions that deal with these issues, but due to inherent differences in the developmental history of the countries and the way their industries are structured, the application of these laws is quite different in practice. In this research, the application of antitrust laws to the petroleum and natural gas industries of the three countries has been studied by analyzing how the courts and the competition law enforcement authorities deal with nation specific challenges in implementing these laws.

Keywords: *Petroleum and Natural Gas, Abuse of dominant position, Anti-competitive agreements, Competitive neutrality, State-owned enterprises*

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Introduction:

The origins of modern-day anti-trust laws can be traced back to the late 1800s when in the United States of America, the Sherman Antitrust Act of 1890 was enacted. This laid down the fundamentals of free competition in commercial markets of the US. Antitrust laws in the US were further bolstered by two more legislations in 1914, the Federal Trade Commission Act, which created a body to enforce antitrust laws, and the Clayton Act, which built further upon the provisions of the Sherman Antitrust Act of 1890. [2] The Sherman Act contains provisions that criminalize conduct in contravention of the law. The Clayton Act, on the other hand, contains only civil penalties. The US Department of Justice (DOJ), employing its Antitrust Division is empowered to enforce both, criminal as well as civil actions, while the Federal Trade Commission is only empowered to enforce civil actions. Private parties may also bring lawsuits for damages.[3]

In the United Kingdom, the antitrust law framework underwent a major overhaul in the 1990s to overcome challenges that made the UK market cumbersome to enter into and navigate for business organizations. The Competition Act of 1998 is the key legislation and is partly modelled after the Treaty on the functioning of the EU. It works in tandem with the Enterprise Act of 2002, which specifically deals with mergers and insolvency.[4] The body responsible for enforcing antitrust laws in the UK is the Competition and Markets Authority. It encompasses four distinct areas of enforcement: competition laws, protection of consumer rights, subsidy control laws, and issues specific to the internal markets of the country.[5]

The legislation serving this purpose in India is the Competition Act, 2002. Corresponding to the enforcement bodies in the UK and the USA, this act sets up the Competition Commission of India.

The oil and natural gas industry in the US is made up of large domestic firms as well as foreign players. There are smaller companies as well, but their area of work is generally restricted to

[2] 'The Antitrust Laws' (*Federal Trade Commission*, 2022) <https://www.ftc.gov/advice-guidance/competition guidance/guide-antitrust-laws> accessed 10 April 2023.

[3] 'Antitrust enforcement and the consumer' (*United States Department of Justice*) <https://www.justice.gov/atr/file/800691/download > accessed 10 April 2023.

[4] Ali Shalchi, 'The UK competition regime' (*House of commons Library*, 2021) <https://researchbriefings.files.parliament.uk/documents/SN04814/SN04814.pdf > accessed 10 April 2023.

[5] Thomas Pope, 'Competition and Markets Authority': Explainer (*Institute of Government*, 2022) <https://www.instituteforgovernment.org.uk/explainer/competition-and-markets-authority > accessed 10 April 2023.

particular parts of the production process. [6] Given the fact that this industry is of particular interest to the consumer and the nation as a whole, the Federal Trade Commission has an elaborate policy in place to deal with issues concerning production, distribution, and pricing. [7] In the United Kingdom as well, the Competition and Markets Authority has the power to impose fines for anti-competitive arrangements, which could be as high as 10% of the company's global turnover. There could also be criminal penalties. However, it is interesting to note that there have been instances of the fuel industry being exempted from the provisions of the competition act. [8] Such instances, however, are seen only in exceptional circumstances. The general practice is that the Competition and Markets Authority particularly ensures that the antitrust laws are obeyed. Even in the context of the MER UK strategy (Maximizing the economic recovery of UK petroleum)[9], the authority had warned that the Oil and Gas Authority must exercise its powers in such a manner that the breach of competition laws is not facilitated or encouraged, even inadvertently. [10]

In India, the petroleum and natural gas sector is mostly dominated by state-owned enterprises. With the introduction of the New Exploration Licensing Policy in 1999, the sector saw private firms, domestic as well as foreign entering into it. However, the sector remains under the dominant control of state-owned enterprises. The industry is segmented into upstream, downstream, and mid-stream, depending on the kinds of activities. There are six dominant state-owned companies in this industry. Among these, three are involved in downstream, two are involved in upstream and one is involved in mid-stream activities. With the principle of competitive neutrality being effective in the country, which brings state-owned enterprises under the ambit of competition laws,

[6] Lindsay Maizland, 'How the U.S. Oil and Gas Industry Works' (*Council on Foreign Relations*, 2022) <https://www.cfr.org/backgrounder/how-us-oil-and-gas-industry-works> accessed 10 April 2023.

[7] 'Oil and Gas prices' (*Federal Trade Commission*) <https://www.ftc.gov/news-events/topics/competition-enforcement/oil-gas > accessed 10 April 2023.

[8] 'Oil for one and one for oil? UK government suspends competition rules applicable to fuel industry amid supply chain issues' (*Norton Rise Fullbright*, 2021) <https://www.nortonrosefulbright.com/en/knowledge/publications/f45e3602/oil-for-one-and-one-for-oil-uk-government-suspends-competition-rules-applicable-to-fuel-industry> accessed 10 April 2023.

[9] Maguellone De Brugiere & James Robson, 'A revised MER UK Strategy: Implications for UK Oil & Gas Participants' (*Herbert Smith Freehills*, 2020) <https://hsfnotes.com/energy/2020/06/17/a-revised-mer-uk-strategy-implications-for-uk-oil-gas-participants/> accessed 10 April 2023.

[10] North Sea Transition Authority, 'Competition and Collaboration' (*Oil and Gas Authority*, 2016) <https://www.nstauthority.co.uk/media/2952/oga_competitioncollaboration_ukcontshelf_16.pdf > accessed 14 April 2023.

the Competition Commission of India has the power to check anti-competitive practices even when undertaken by state-owned companies.[11]

The interaction of competition laws with the energy sector has always been relevant. Since the petroleum and natural gas industry is structurally integral to the economic and political stability of a nation, competition laws work towards ensuring that there are no malpractices that can act to the detriment of this stability. Further, the industry is highly essential to the day-to-day lives of the ordinary consumer for their energy needs. Due to this, it is extremely important to protect consumer interests. The industry is also highly prone to issues pertaining to competition laws, such as abuse of dominant position and cartelization. In 2018-19, it was found that the petroleum and Natural Gas industry ranked 7th highest among all the sectors, in terms of the number of complaints received.[12]

In recent times, due to the occurrence of major global events, studying the interaction of competition laws with the Petroleum and Natural Gas industry has increasingly gained relevance. The COVID-19 pandemic saw a sudden fall in demand for energy as nations and economies came to a standstill. Companies involved in the industry took to measures such as mergers and acquisitions to survive the crisis and national governments were also in damage-control mode, rendering financial assistance to, and working closely with oil and natural gas producing companies. These measures often raised questions about antitrust practices.

Soon after the effects of the COVID-19 pandemic showed signs of receding, Russia's invasion on Ukraine, the OPEC's refusal to boost production of crude oil and the post-COVID recovery in demand all led to crude oil prices rising globally. [13] During such exigencies, the regulatory authorities need to make additional efforts to ensure that the market remains competitive and fair. A balance needs to be attained between the measures needed to tide over the crisis at hand and the prevention of anti-competitive practices. For instance, The European Competition Network, which is a body that represents competition regulatory authorities, had clarified that it will not actively

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[11] Vijay Kumar Singh, 'Reforming SOEs in Asia: Lessons from Competition Law and Policy in India' (*ADB Institute*, 2019) <https://www.adb.org/sites/default/files/publication/546871/adbi-wp1056.pdf > accessed 10 April 2023.

[12] Annual Report on Competition Policy for the Developments in India' (*Organization for Economic Co-operation and Development*, 2019) <https://one.oecd.org/document/DAF/COMP/AR(2019)45/en/pdf> accessed 10 April 2023.

[13] 'War in Ukraine and OPEC production limits pushed February petrol prices to eight-year high' (*ACCC*, 2022) <https://www.accc.gov.au/media-release/war-in-ukraine-and-opec-production-limits-pushed-february-petrol-prices-to-eight-year-high > accessed 14 October 2023.

act against strictly necessary and temporary business cooperation measures that are specifically aimed at avoiding disruptions caused by the impact of the Russian invasion of Ukraine and the resultant sanctions. However, it had also warned that companies that companies that were attempting to abuse the crisis to gain undue advantage would be penalized.[14]

This research compares the application of antitrust laws in the petroleum and natural gas sector of three jurisdictions: India, UK, and USA. This has been done with specific reference to provisions relating to anti-competitive agreements and those dealing with the abuse of a dominant position.

Application of competition laws in the petroleum and natural gas sectors of India, the UK, and the USA:

1. United States of America:

Antitrust regime in the US:

Under the US regime, abuse of dominant position is covered by Section-2 of the Sherman Act. This provision does not actively consider the abuse of a dominant position by an entity, but it has been used by the US Supreme Court and other courts to that effect. The offenses directly mentioned in the provision deal with the act of monopolization. A corporation can be said to possess monopoly power if it can control prices and exclude rivals. Since it is not very feasible to establish a monopolistic position using direct evidence, the same is usually inferred by way of circumstantial evidence.[15] It may however be noted that simply being in a monopolistic position in a given market is not unlawful. What is prohibited is such conduct that aids the obtaining or maintenance of a monopolistic position. Section-2 of the Sherman Act thus describes three types of offenses: monopolization, an attempt to monopolize[16], and a conspiracy to monopolize. [17]

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[14] 'Competition Authorities in Europe respond to Ukraine Crisis' (*Pinsent Masons*, 2022) <https://www.pinsentmasons.com/out-law/news/competition-authorities-in-europe-respond-to-ukraine-crisis> accessed 14 October 2023.

[15] 'Abuse of Dominant Position in US and EU' (*MHRD, Govt. of India*) <https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/03._competition_law/18._abuse_of_dominant_position_in_us_and_eu_/et/5657_et_18et.pdf > accessed 10 April 2023.

[16] Edward A. Adler, 'Monopolizing at Common Law and under Section Two of the Sherman Act' (*Harvard Law Review*, 1917) <https://www.jstor.org/stable/1327529?typeAccessWorkflow=login> accessed 10 April 2023.

[17] Kenneth S Reinker & Lisa Danzig, 'Dominance 2020 (United States)' (*Cleary Gottilieb*, March 2020) <https://www.clearygottlieb.com/-/media/files/getting-the-deal-through/getting-the-deal-throughs-2020-guide--dominance--united-states-pdf.pdf > accessed 10 April 2023.

Anti-competitive agreements are prohibited by Section-1 of the Sherman Act, which refers to such agreements as "Contracts, Combinations and conspiracies" and prohibits them when they can be said to impact competition adversely. [18]

In the Petroleum and Natural Gas industry in the US, the Federal Trade Commission (FTC) is the body responsible for the implementation of antitrust laws, in addition to which, there are several other federal and state-level regulatory bodies responsible for regulating specific areas of the industry.[19] The Federal Trade Commission not only serves as a regulator of the state of competition in the market, but it also works towards ensuring that the interests of individual consumers are protected.

FTC's Role in Safeguarding Competition in the Petroleum and Natural Gas Industry:

Taking examples of antitrust law enforcement by the FTC in the petroleum and natural gas industry, in a case where the acquisition of one entity by another would have led to the elimination of head-to-head competition and could have increased the likelihood of collusion and coordination among the remaining competitors, the Federal Trade Commission ordered divestiture of all the assets and business of the entity being acquired.[20] In another case where consumers were aggrieved due to false claims being made by a manufacturer of architectural coatings, the Federal Trade Commission intervened and prohibited such conduct. [21] When a case involved an acquisition transaction that included an agreement to not compete, leading to the interests of the consumers suffering concerning retail gasoline and diesel, the Federal Trade Commission intervened and ordered an amendment to this agreement.[22] In a case in which two main competitors involved in coal mining proposed a joint venture that would effectively eliminate free competition in the

[18] 'Horizontal Agreements in US and EU' (*MHRD, Govt. of India*) <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/03._competition_law/12._horizontal_agreements_in_us_and_eu_/et/5653_et_12et.pdf > accessed 10 April 2023.
[19] 'U.S. Regulatory Agencies' (*Library of Congress Research Guides*) <https://guides.loc.gov/oil-and-gas-industry/laws/agencies > accessed 10 April 2023.
[20] 'EnCap/ EP Energy, FTC Matter/File Number 2110158, Docket Number C-4760' (*Federal Trade Commission of U.S.*, 2022) <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110158-encapep-energy-matter> accessed 10 April 2023.
[21] 'F & G International Group Holdings, LLC' (*Federal Trade Commission of U.S*., 2022) < https://www.ftc.gov/legal-library/browse/cases-proceedings/f-g-international-group-holdings-llc > accessed 10 April 2023.
[22]'ARKO/GPM Investments, FTC Matter/File Number 211 0187, Docket Number C-4773' (Federal Trade Commission of U.S., 9 August 2022) <https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0187-arkogpm-investments-matter> accessed 10 April 2023.

market for thermal coal in a particular area, the Federal Trade Commission ordered a preliminary injunction and the parties aborted the proposal.[23]

Antitrust Challenges and the 'State Action Doctrine' in U.S. Oil and Gas Industry:

It may, however, be noted that the federal and state government entities do not come under the ambit of antitrust laws.[24] State agencies and local governments are also immune when they act under state policy to replace competition with regulation. This immunity can also extend to private entities if they act under the state policy and have their actions closely monitored and guided by the state. [25] Thus, it would have been illegal for US oil producers to collectively take actions to increase oil prices, but if the federal government or state regulators impose production level limits on them, it is legal for them to do so. This is per the 'State action doctrine'. [26]

Corporations operating in the US oil and gas industry often work with each other in various areas through collaborations. However, a key challenge is to ensure that such collaborations do not take the color of anti-competitive practices. A landmark case where the US Department of Justice was faced with this issue in the context of bid-rigging in the oil and gas industry was the case of ***U.S V. Gunnison***. [27] The Bureau of Land Management auctions onshore oil and gas leases to private entities. In the context of this auction, two key rivals, Gunnison and SGI entered into an MoU wherein only SGI would participate in the auction. A maximum price would be set up jointly by the two entities. If SGI would be successful in the auction, then it would allocate half of the interest acquired to Gunnison at a cost. These actions were found to be in contravention of Section-1 of the Sherman Act when a claim was raised by a whistleblower. This claim was taken over by the

[23] 'Peabody Energy/ Arch Coal, FTC Matter/File Number 191 0154, Docket Number 9391' (*Federal Trade Commission of U.S.*, 16 October 2020) <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0154-peabody-energyarch-coal-matter> accessed 10 April 2023.

[24] State Action Antitrust Immunity' (*Cornell Law School, Legal Information* I*nstitute*) <https://www.law.cornell.edu/wex/state_action_antitrust_immunity > accessed 12 April 2023.

[25] Kenneth S Reinker & Lisa Danzig, 'Dominance 2020 (United States)' (*Cleary Gottilieb*, 2020) <https://www.clearygottlieb.com/-/media/files/getting-the-deal-through/getting-the-deal-throughs-2020-guide--dominance--united-states-pdf.pdf > accessed 12 April 2023.

[26] Reuters Staff, 'Explainer: Antitrust law will not get in the way of U.S. acting to raise oil prices' (*Reuters*, 2020) <https://www.reuters.com/article/us-global-oil-antitrust-explainer-idCAKCN2233E2 > accessed 12 April 2023.

[27] J. Bruce McDonald, 'U.S. v. Gunnison: Antitrust Risk in Oil & Gas Joint Bidding and Other Collaborations' (*Jones Day*, 2012) <https://www.jonesday.com/en/insights/2012/11/ius-v-gunnisoni-antitrust-risk-in-oil--gas-joint-bidding-and-other-collaborations> accessed 12 April 2023.

US Department of Justice. Eventually, the parties made a settlement agreement that satisfied all U.S. claims.

2. United Kingdom:

Antitrust regime in the UK: Post-Brexit framework:

In the United Kingdom, the Competition and Markets Authority could act against a breach of the European Union competition laws before Brexit. However, post-Brexit, EU competition laws no longer hold good in the UK. Nevertheless, Section-60A of the Competition Act, 1998 stipulates that the Competition and Markets Authority and the courts of the country should continue to use EU antitrust laws and case laws as references. [28]

The law relating to the abuse of a dominant position in the UK is based on Article-102 of the Treaty on the Functioning of the European Union. [29]Just like under the US law, it is not unlawful to hold or acquire a position that is dominant or monopolistic. However, it becomes a violation when such a position is abused. Thus, there has to be an operative link between the dominant position held by an organization and the alleged acts of abuse to bring an action under the antitrust laws. [30] The relevant legal provision is Section-18 of the Competition Act, of 1998. Section-18(1) prohibits conduct that can be treated as an abuse of a dominant position and can affect trade in the country. Section-18(2) enlists types of conduct that could be deemed as abuse of dominant position. [31]

Abusive conduct can be broadly categorized into two types: conduct that functions to the detriment of the consumer and conduct that operates to exclude competitors unfairly. Certain types of conduct are by their very nature abusive, even if they do not lead to adverse effects on consumers and competitors. [32]

[28] Regina S. Bost, 'Oil & Gas Regulations USA 2023' (*International Comparative Legal Guides*, 2023) <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/usa > accessed 12 April 2023.
[29] Art. 102, Consolidated Version of the Treaty on the Functioning of the European Union <https://www.legislation.gov.uk/eut/teec/article/102>
[30] Cleary Gottlieb Steen & Hamilton LLP, 'In brief: abuse of dominance in United Kingdom' (*Lexology*, 2020) <https://www.lexology.com/library/detail.aspx?g=046d442a-27d3-4437-8c6b-1aa7c198bf7e> accessed 12 April 2023.
[31] Competition Act 1998 s 18.
[32] Cleary Gottlieb Steen & Hamilton LLP, 'In brief: abuse of dominance in United Kingdom' (*Lexology*, 2020) <https://www.lexology.com/library/detail.aspx?g=046d442a-27d3-4437-8c6b-1aa7c198bf7e> accessed 12 April 2023.

Anti-competitive agreements are covered under Chapter-I of the Competition Act, of 1998. The corresponding provision of EU law is Article-101 of the TFEU.[33]

Anti-competitive agreements are prohibited under Section-2 of the Competition Act, 1998. The primary requirement of this Section is that there has to be more than one entity acting in such a manner that they enter into agreements or arrangements or undertake decisions and practices that affect trade in the country or work with the intent of adversely impacting competition. Section-2(2) enlists the kinds of decisions, agreements, and practices that could be categorized as 'anti-competitive'. Section 2(3) specifies that such practices must be limited to the United Kingdom and Section 2(4) makes such agreements void. [34]

Case Studies: Enforcing Antitrust Laws in the UK Petroleum and Natural Gas Industry:

Actions to ensure fair practices in the Petroleum and Natural gas industry have been seen in several cases.

In 2004, the Office of Fair Trading referred the supply of domestic LPG to the Competition Commission for investigation after certain concerns were identified. It was noticed that the terms of the contract for the supply of domestic LPG could be unfair toward consumers, causing them to be locked into contracts having substantial and unavoidable price increments. The competition commission identified factors adversely affecting competition and issued orders in this regard. [35]

In another instance, Post the September 2000 fuel crisis, the UK government along with oil companies, transporters trade unions, and other parties had entered into a memorandum of understanding to maintain the supply of fuel and in case of disruption, to preserve supplies to essential users. In 2001, the Director General of fair trade concluded that the MoU did not constitute an abuse of dominant position, but came under the ambit of 'anticompetitive agreements' as defined in chapter-I of the Competition Act, 1998. However, since it was for the benefit of the

[33] 'Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)' (*Eur-Lex*, 2020) <https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-on-the-application-of-article-101-3-tfeu-formerly-article-81-3-tec.html#:~:text=Article%20101(1)%20TFEU%20prohibits,prevent%2C%20restrict%20or%20distort%20competition > accessed 12 April 2023.
[34] Competition Act 1998, Chapter-I.
[35] 'Domestic bulk LPG suppliers: unfair contract terms' (*Competition and Market Authority projects and cases*, 2012) <https://www.gov.uk/cma-cases/domestic-bulk-lpg-suppliers-unfair-contract-terms > accessed 14 April 2023.

consumers, catered to resolving an exigency, and involved only necessary steps, it was to be individually exempted. [36]

Along similar lines, in 2021, there was a sudden wave of panic buying of fuel by consumers due to pumps running dry. This was being caused by a post-Brexit shortage of truck drivers in the country, disrupting the supply chain. [37] To mitigate this situation, the UK government came up with the 'Downstream Oil Protocol'[38], which temporarily exempted the fuel supply industry from certain provisions of the Competition Act, of 1998. [39] This was done to facilitate the key players of the fuel industry and the government to share information amongst themselves, in order to effectively prioritize the delivery of fuel as per demand and supply. [40]

<u>Balancing Collaboration and Competition: The Unique features of the UK Oil and Gas Industry:</u>

In the UK, sector-specific regulators do not have conflicting powers with the Competition and Markets Authority. Such regulators, when exercising their concurrent powers concerning competition laws, are required to promote competition in their respective sectors. They have to analyze whether the use of their powers to curtail anticompetitive practices outweighs the use of their sector-specific powers. [41]

Just like in the oil and gas sector in the U.S., collaboration among companies is an issue of key importance. In fact, collaboration in the UK oil and gas industry is not only a custom, but it has

[36] 'Memorandum of Understanding on the supply of oil fuels in an emergency' (Decision of the Director General of Fair-Trading No. CA98/8/2001*)' (*Office of Fair Trading*, 2001) <https://assets.publishing.service.gov.uk/media/555de4bded915d7ae5000168/fuel.pdf > accessed 14 April 2023.

[37] Reuters, 'Panic buying leaves up to 90% of fuel pumps dry in major British cities' (Economic Times, 27 September 2021) <https://energy.economictimes.indiatimes.com/news/oil-and-gas/panic-buying-leaves-up-to-90-of-fuel-pumps-dry-in-major-british-cities/86553484 > accessed 14 April 2023.

[38] Andreas Exarheas, 'UK Activates Downstream Oil Protocol' (*Rigzone*, 2021) https://www.rigzone.com/news/uk_activates_downstream_oil_protocol-27-sep-2021-166541-article/ accessed 14 April 2023.

[39] 'Oil for one and one for oil? UK government suspends competition rules applicable to fuel industry amid supply chain issues' (*Norton Rise Fullbright*, 2021) <https://www.nortonrosefulbright.com/en/knowledge/publications/f45e3602/oil-for-one-and-one-for-oil-uk-government-suspends-competition-rules-applicable-to-fuel-industry> accessed 14 April 2023.

[40] PTI, 'U.K. suspends competition law to cut petrol station queues' (*Economic Times*, 2021) <https://energy.economictimes.indiatimes.com/news/oil-and-gas/uk-suspends-competition-law-to-cut-petrol-station-queues/86557054> accessed 10 April 2023.

[41] Alexander Waksman & Henry Mostyn, 'Dominance 2020 (United Kingdom)' (*Cleary Gottlieb*, March 2020) <https://www.clearygottlieb.com/-/media/files/getting-the-deal-through/getting-the-deal-throughs-2020-guide--dominance--united-kingdom-pdf.pdf > accessed 14 April 2023.

also been made into a statutory obligation under the amended Section-9A of the Petroleum Act, 1998. This section talks about the alignment with the Maximization of Economic Recovery of UK petroleum (MER UK) strategy[42] and states that maximum economic recovery is something that collaborative efforts must be aimed towards. However, as was seen in the context of the US industry, care must be taken to ensure that such collaborations do not become anti-competitive. The Competition and Markets Authority has recognized this as well. In a letter addressed to the concerned Secretary, the CMA had reiterated that the Oil and Gas Authority (OGA) has to ensure that the exercise of its powers under the MER UK strategy does not encourage or facilitate the breach of antitrust laws. Collaborations, when made for economic benefits, are good in law. However, it must be ensured that the outcome of such collaboration is not anti-competitive. [43]

3. India:

The antitrust regime in India:

Sections 3 and 4 of the Competition Act, 2002 prohibit anti-competitive agreements and the abuse of a dominant position in the market. Section-3(1) stipulates that no enterprise or an association of enterprises should enter into an agreement concerning the production, supply, distribution, storage, acquisition, or control of goods or provisions of services, which causes or has the potential to cause a significant adverse impact on the competition of the country.[44] Section-3(2) invalidates all such agreements. Section-3(3) enlists the kinds of agreements, between business entities, that can be considered as something that has a significant adverse impact on competition. This provision also goes on to state that the classes of agreements mentioned therein do not apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in the production, supply, distribution, storage, acquisition, or control of goods or provision of services.[45]

Section-3(4) defines situations in which agreements and arrangements between enterprises or persons at different stages and levels of production become agreements in contravention of section-

[42] 'Maximizing Economic Recovery (MER) UK Strategy' (*Thomson Reuters Practical Law*) <https://uk.practicallaw.thomsonreuters.com/w-018-5573?transitionType=Default&contextData=(sc.Default)> accessed 14 April 2023.

[43] North Sea Transition Authority, 'Competition and Collaboration' (*Oil and Gas Authority*, 2016) <https://www.nstauthority.co.uk/media/2952/oga_competitioncollaboration_ukcontshelf_16.pdf > accessed 14 April 2023.

[44] Competition Act, 2002, s 3(1).

[45] Competition Act, 2002, s 3(3).

3(1). Section-3(5) provides that the provisions of section-3(1) to section-3(4) do not restrict the rights of a person to restrain any infringement of, or to impose reasonable conditions, as may be necessary, for protecting any of his rights which have been or may be conferred upon him under the legislations enlisted therein. Section-3(5)(ii) further provides that the preceding provisions will not restrict the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution, or control of goods or provision of services for such export.[46]

Section-4(1) prohibits enterprises from abusing their dominant position in the market. Section-4(2) specifies the situations which can be deemed to construe an 'abuse of dominant position'. [47]

A Balancing Act: The Competition Commission of India's Role in the Petroleum and Natural Gas Sector:

The Competition Commission of India has been proactive in enquiring into allegations relating to Section-3 and 4 of the Competition Act, 2002.

In the case of ***In Re: East India Petroleum Pvt. Ltd. and South Asia LPG Company Pvt. Ltd.***[48], the information was filed by East India Petroleum Pvt. Ltd. (EIPL) alleging concerns in respect of access to terminalling infrastructure operated by South Asia LPG Company Pvt. Ltd. (SALPG) at Vishakhapatnam Port. The CCI held that SALPG, owing to its dominant position, was insisting on the mandatory use of its cavern, and imposing certain terms and conditions which were held to be in contravention of provisions of Section 4 of the Act. [49]The Commission accordingly directed SALPG to not insist on the mandatory use of its cavern and that it shall allow bypass of the cavern for both, pre-mixed and blended LPG, without any restrictions; allow access to its competitors, potential and existing, without restrictions and subject to compliance of safety standards and other legal requirements. The Commission also imposed a monetary penalty on the offending party. [50]

[46] Competition Act, 2002 s 3(5).
[47] Competition Act, 2002 s 4.
[48] In Re: East India Petroleum Pvt. Ltd. and South Asia LPG Company Pvt. Ltd. (Case No. 76 of 2011) <http://164.100.58.95/sites/default/files/Case%20No%2076%20of%202011.pdf>.
[49] Saba, 'CCI: Penalty imposed on SALPG for abuse of dominant position for terminalling services at Vishakhapatnam Port' (*SCConline Blog*, 2018) <https://www.scconline.com/blog/post/2018/07/12/cci-penalty-imposed-on-salpg-for-abuse-of-dominant-position-for-terminalling-services-at-visakhapatnam-port/> accessed 14 April 2023.
[50] OCED, 'Annual Report on Competition Policy for the Developments in India' (*Organization for Economic Co-operation and Development*, 2019) <https://one.oecd.org/document/DAF/COMP/AR(2019)45/en/pdf> accessed 14 April 2023.

On the other hand, in the case of ***Bharat Garage and Indian Oil Corporation Ltd. and Ors (Case no. 87 of 2014)***[51], the CCI found no grounds to act upon the complaint. Here, a partnership firm engaged in the distribution of CNG had alleged that an agreement executed between Indian Oil Corporation and Mahanagar Gas, wherein IOC would be selling the products of Mahanagar Gas through its outlets, is anti-competitive and limits the production/supply of CNG. It was also alleged that the agreement causes an appreciable adverse impact on competition and that the two firms showed cartel-like behaviour. The CCI rejected these allegations, stating that the agreement is not exclusive and is hence, not anti-competitive.

Upon analyzing the allegations pertaining to the charging of commission by IOC, the issue regarding the termination of the agreement with the complainant, non-supply of CNG directly to it by Mahanagar Gas, and other issues raised, the CCI did not find a prima-facie violation of the Competition Act. It was noted that Mahanagar Gas was vested with the function of ensuring an adequate supply of CNG to customers in the state of Maharashtra. To discharge this function, it had executed agreements with dealers and oil companies for the distribution of CNG. The CCI found no prima facie evidence of unfair practices here.[52]

In the 2012 case of ***Faridabad Industries Association (FIA) and M/s Adani Gas Limited (CCI Case No 71 of 2012)***, Adani Gas Limited[53] was found to be dominant in the market and the clauses of their agreement, such as the Billing and Payment clause, the Expiry and termination clause, the force majeure clause, and the shutdown clause were found to be unfair and discriminatory, the CCI imposed a penalty of INR 25.67 crore on them.[54] On the other hand, in ***Indian National Ship owners Association (INSA) and Oil and Natural Gas Corporation (ONGC) (Case no. 1 of 2018)*** [55], ONGC had incorporated in a contract, with offshore support vessel service providers, a

[51] 'Bharat Garage V. Indian Oil Corporation Ltd. and Ors. (CCI Case No. 87 of 2014)' (Vlex.in) <https://vlex.in/vid/bharat-garage-vs-indian-577496934> accessed 14 April 2023.
[52] PTI, 'CCI rejects anti-competitive case against Indian Oil Corporation, Mahanagar Gas' (*Economic Times*, 2015) <https://economictimes.indiatimes.com/industry/energy/oil-gas/cci-rejects-anti-competitive-case-against-indian-oil-corporation-mahanagar-gas/articleshow/46466956.cms?from=mdr> accessed 15 April 2023.
[53] 'Faridabad Industries Association (FIA) and M/s Adani Gas Limited (CCI Case No 71 of 2012)' (CCI.Gov.in, 3 July 2014) <https://www.cci.gov.in/antitrust/orders/details/758/0> accessed 15 April 2023.
[54] Ankush Walia & Pushpit Singh, 'Inquiry by the Competition Commission of India in the Petroleum and Gas sector under the Competition Act, 2002' (*Indian Journal of Projects, Infrastructure and Energy Law*, 25 April 2022) <https://ijpiel.com/index.php/2022/04/25/inquiry-by-the-competition-commission-of-india-in-the-petroleum-and-gas-sector-under-the-competition-act-2002/ > accessed 15 April 2023.
[55] 'Indian National Ship owners Association (INSA) and Oil and Natural Gas Corporation (ONGC) (Case no. 1 of 2018, Competition Commission of India)' (CCI.Gov.in, 2 August 2019) <https://www.cci.gov.in/images/antitrustorder/en/0120181652254118.pdf > accessed 10 April 2023.

unilateral right to terminate the contract, the CCI did not impose penalties even though ONGC was found to have a dominant market position. This was because ONGC was able to demonstrate that it was exposed to significant risks and that termination at the behest of the provider would result in huge losses and delays. The CCI observed that the mere existence of a unilateral right of termination is not unfair and anti-competitive if objective justifications and commercial reasoning associated with such a right could be shown. [56]

Navigating regulatory overlaps and striking a balance between competitive neutrality and special privileges in India:

The provisions of the Competition Act, of 2002 are enforced by the Competition Commission of India. However, the Petroleum and Natural Gas Industry also has a regulatory body specific to itself, the Petroleum and Natural Gas Regulatory Board. This body has been set up by the Petroleum and Natural Gas Regulatory Board Act, of 2006. It has the duty of regulating the production, distribution, storage, etc. of products and services in this industry. The interests of the consumers as well as the participants have to be protected to ensure that the market remains competitive. It can thus be inferred that though the two bodies were established under different acts, they both end up serving similar fundamental functions. The Competition Commission of India is a regulatory body with an overarching and general duty towards all markets, including the petroleum and natural gas sector while the Petroleum and Natural Gas Regulatory body is specific to the industry. This had led to ambiguities about the overlapping jurisdiction of the two bodies, which has subsequently been resolved through judicial precedents laid down by the courts in the country. The CCI not only acts upon complaints but can also take *suo moto* cognizance of matters relating to the use of anti-competitive practices in any market. On the other hand, the PNGRB can adjudicate only when a dispute arises and results in damages. While the CCI conducts proceedings to correct defects in the market and to penalize those who engage in anti-competitive practices, the PNGRB conducts proceedings to resolve disputes between parties.[57]

[56] Ankush Walia & Pushpit Singh, 'Inquiry by the Competition Commission of India in the Petroleum and Gas sector under the Competition Act, 2002' (*Indian Journal of Projects, Infrastructure and Energy Law*, 25 April 2022) <https://ijpiel.com/index.php/2022/04/25/inquiry-by-the-competition-commission-of-india-in-the-petroleum-and-gas-sector-under-the-competition-act-2002/ > accessed 15 April 2023.

[57] Ankush Walia & Pushpit Singh, 'Inquiry by the Competition Commission of India in the Petroleum and Gas sector under the Competition Act, 2002' (*Indian Journal of Projects, Infrastructure and Energy Law*, 25 April 2022) <https://ijpiel.com/index.php/2022/04/25/inquiry-by-the-competition-commission-of-india-in-the-petroleum-and-gas-sector-under-the-competition-act-2002/> accessed 15 April 2023.

Another key challenge is the balance of competitive neutrality against the strategic importance of state-owned enterprises in this sector. With the advent of the concept of **competitive neutrality**, state-owned enterprises in India have also been brought under the purview of competition rules and regulations. This has been achieved by including government departments engaging in economic activity in the definition of 'enterprise'. [58]

In the recent past, enterprises owned by the state have also been penalized for violations. However, it is often seen that these state-owned enterprises get preferential treatment from the government, which manifests itself in the form of concessions, relaxed norms, and financial aid. In India, a state is empowered to confer some benefit on a government enterprise over and above what it confers on private undertakings. This was recognized by the Supreme Court in *D.R. Venkatachalam v. Deputy Transport Commissioner.*[59]

However, a distinction between the monopoly created by a state in its favour and in favour of a third party has to be made. While the former may be allowed, the latter would be subject to judicial review on the grounds of arbitrariness. Even so, there are still various ways in which State-owned enterprises get an upper hand compared to private players. For instance, to facilitate mergers and share purchases among state-owned oil and gas enterprises, the Indian government exempted all Central Public sector Undertakings in the oil and gas industry from implementing the combination provisions of the Competition Act. To compete globally, the government aims to establish a sizable energy corporation. Despite the fact that this action is praised for producing a national champion, it contradicts the government's effort to promote competitive neutrality. [60]

Also, there are agreements between the Ministry of Petroleum and Natural Gas and the PSUs, wherein the PSUs get cash assistance and discounts in getting crude oil from upstream oil market companies in return for fixing prices of petroleum products lower than the market price. This leads to the indirect determination of prices, and hence, has an adverse effect on the competitors. [61]

[58] Vijay Kumar Singh, 'Reforming SOEs in Asia: Lessons from Competition Law and Policy in India' (*ADB Institute*, December 2019) <https://www.adb.org/sites/default/files/publication/546871/adbi-wp1056.pdf > accessed 15 April 2023.
[59] AIR 1977 SC 842
[60] Vijay Kumar Singh, 'Reforming SOEs in Asia: Lessons from Competition Law and Policy in India' (*ADB Institute*, December 2019) <https://www.adb.org/sites/default/files/publication/546871/adbi-wp1056.pdf > accessed 15 April 2023.
[61] Majeet Sahu, 'Anti-Competitive Practices in Oil and Gas Downstream Sector' (*SSRN*, 12 September 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837381 > accessed 10 April 2023.

It has also been seen that orders of the CCI are at times, inconsistent with each other in this context. As mentioned above, Adani Gas was penalized in 2012 for an abuse of its dominant position by means of prescribing abusive GSA clauses. [62] However, when on a similar set of facts, allegations were brought against GAIL, a state-owned enterprise, the commission found no grounds for holding them liable for an abuse of its dominant position. This was contradictory to the findings of the DG's investigation. [63]

Comparative analysis and Conclusion:

As has been seen, the abuse of dominant position and the entering of firms into anti-competitive agreements are key issues that antitrust laws are tasked with dealing with. Each of the three nations compared above has incorporated into its legislative framework, mechanisms to combat these challenges. The Laws in the US have been built upon three legislations. In the US, the Sherman Act has direct provisions for anti-competitive agreements under section-1, while the practice of abuse of dominant position is curtailed by interpreting the provisions of Section-2 on monopolization to that effect.

The competition laws in the UK have borrowed heavily from the EU laws. Their mode and manner of operation has not seen much of a change even post-Brexit, as Section-60A of the Competition Act, 1998 continues to refer to EU laws. There are direct provisions dealing with abuse of dominant position and anti-competitive agreements in the UK Competition Act, 1998. Similarly, the Indian regime also has detailed provisions dealing with anti-competitive agreements and abuse of dominant position under Sections 3 and 4 of the Competition Act, 2002. It is seen that the US has the oldest legislation in this regard, dating back to more than a century. Even in the UK, the antitrust regime is fairly old, with the previously enforced EU laws dating back to the 1950s. The competition Act, however, is fairly recent. The youngest economy here is India, where antitrust laws gained traction post liberalization in the early 1990s. Therefore, India has the newest antitrust regime among the three countries. The application of EU laws is a unique feature of the UK regime.

[62] Vijay Kumar Singh, 'Reforming SOEs in Asia: Lessons from Competition Law and Policy in India' (*ADB Institute*, December 2019) <https://www.adb.org/sites/default/files/publication/546871/adbi-wp1056.pdf > accessed 15 April 2023.

[63] 'CCI Dismisses Abuse of Dominance Allegations against GAIL (India) Limited' (*AZB Partners*, 31 December 2018) <https://www.azbpartners.com/bank/cci-dismisses-abuse-of-dominance-allegations-against-gail-india-limited/> accessed 15 April 2023.

Neither of the other two have any influence from external legislations. Their respective antitrust frameworks are purely based on their domestic laws.

In the US, the body responsible for enforcing competition laws is the Federal Trade Commission (FTC), in addition to which, there are several other federal and state-level regulatory bodies responsible for regulating specific areas of the industry.

The FTC has evolved an elaborate scheme to deal with issues specific to the Petroleum and natural gas industry. The other regulatory bodies specific to the industry have no jurisdictional conflict since their area of operation is well-defined.

The body responsible for enforcing antitrust laws in the UK is the Competition and Markets Authority (CMA). Even in the UK, there is no jurisdictional conflict between the competition regulator and the sector-specific bodies. Corresponding to the FTC in the US and the CMA in the UK, India's enforcement body is the Competition Commission of India. A key highlight here is that there has in the past, been a conflict of jurisdiction between the industry-specific bodies, such as the PNGRB and the national competition regulator in India. This has, however, been resolved by rules laid down by the Supreme Court and the CCI itself.

The enforcement bodies of all three jurisdictions seem to be prompt in their actions. The US FTC has actively intervened in cases of deceptive practices, anti-competitive agreements and bid-rigging. They have even taken actions to protect consumer interests. A notable case dealing with bid-rigging was the case of U.S V. Gunnison.

The enforcement bodies in the UK have addressed concerns pertaining to domestic LPG supply contracts having unfavourable clauses for consumers and have also taken steps to preserve fuel-supplies during a post-Brexit shortage of truck drivers by means of the 'Downstream Protocol'. However, when the UK government along with oil companies, transporters trade unions, and other parties had entered into a memorandum of understanding to maintain the supply of fuel and in case of disruption, no actions were taken as the measures catered to an emergency situation.

Similarly, the Competition Commission of India has also imposed penalties when unfair practices come to light, such as the case involving an abuse of dominant position by Adani Gas. However, when no grounds for action are seen such as the Bharat Garage and IOCL case, or when objective justifications are provided, such as the INSA and ONGC case, the CCI does not impose penalties.

All three jurisdictions have challenges and features unique to themselves. In the US, federal and state government entities do not fall under the ambit of antitrust laws. In fact, this immunity can also extend to private entities if they act under the state policy and have their actions closely monitored and guided by the state. Something similar is seen in the Indian context as well. With the advent of the concept of competitive neutrality, state-owned enterprises in India have also been brought under the purview of competition rules and regulations, but some special exemptions from antitrust laws can still be conferred upon them. A balance needs to be attained between state-owned enterprises being given certain benefits due to their strategic importance to the energy sector and the nation as a whole, and the maintenance of free competition in the market to benefit all players involved. At present, India seems to lean towards conferring benefits to these public sector undertakings, even if it is to the detriment of competition.

Even in the UK, it has been seen that there have been instances where certain sectors of the petroleum and natural gas industry have been temporarily exempted from antitrust laws to cater to exigencies.

Collaborations appear to be a common practice in the US and UK. In the UK, a statutory obligation to align collaborations to the MER UK strategy exists in the Petroleum Act, 1998. However, for both countries, it is of utmost importance to ensure that collaborations do not take anti-competitive colour.

The respective regimes of all three jurisdictions seem to be functioning well, with their enforcement bodies taking strong actions to ensure that the industry remains competitive. While challenges do exist, they all seem to be working towards finding an appropriate balance that is ultimately in the best interests of the nation.

Deal Value Threshold – A boon or bane for mergers and Acquisitions in India

~Sparsh Jain and Tanisha Agarwal[1]

Abstract

The Competition (Amendment) Bill, 2022, was recently passed by both Houses of Parliament. The present amendment seeks to establish a more structured regulatory scheme for Mergers and Acquisitions ("M&A") in India. M&A transactions have become a critical aspect of the corporate world, and their importance as means of inorganic expansion of companies, ultimately boosting the economic growth not only in India but across the globe, cannot be understated. However, such M&A activities also raise concerns with respect to the indulgence in anti-competitive practices and the formation of monopolies by reducing the competition in the market and directly affecting consumer welfare. It attempts to address the issue in the regulatory framework in a multi-faceted manner. The amendment seeks to introduce a new "Deal value threshold" ("DVT") for companies having "substantial business operations" in India as a tool to regulate M&A transactions (or combinations) in India. However, the method for computation of the "value of the transaction" and the criteria or indicators for determining whether a business has "substantial business operations" in India has not yet been defined. Therefore, the present paper tries to delve into the need and implication of such changes in the current merger control regime in the context of the digital ecosystem with the help of a comparative analysis drawn from foreign jurisdictions such as Germany, Austria, etc. The authors try to explore, along with the above-mentioned unexplored avenues, the rise of a new asset class, i.e., data. The paper highlights the current enforcement gap that exists in the regulation of the data industry, on account of the target not holding sufficient assets or not generating requisite turnover. Therefore, it was necessary to introduce such additional thresholds to strive for a more co-operative regime for growth in M&A environment.

Keywords: Deal Value Threshold (DVT), Competition (Amendment) Bill 2022, Substantial Business Operations, Digital ecosystem, Mergers and Acquisitions.

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INTRODUCTION

The objective of "combination regulation" is to investigate whether a combination transaction could lead to a detrimental impact on market competition and to prevent or modify such a potentially anti-competitive merger or acquisition before it is finalized. The Indian Merger Control Regime comprises of the Competition Act, 2002,[2] ancillary regulations,[3] and the Competition Commission of India ("CCI")[4] as the statutory regulating body. In India, the CCI regulates mergers and acquisitions to avoid any significant negative impact on competition in the relevant market. A merger is considered undesirable only if it results in the formation of a dominant company that misuses its dominant position.[5] It could be by way of entering into anti-competitive agreements that ultimately lead to the formation of cartels or by the form of abuse of dominance. Therefore, the existence of such anti-trust is necessary to pre-empt the potential abuse of dominance where it is probable, as subsequent unbundling can be both difficult and socially costly. [6]

Globally, the turnover and assets threshold method has been widely regarded as an effective mechanism for regulating mergers. Despite this, some of the well-known combinations such as that of Flipkart-Myntra, Facebook-WhatsApp, and Microsoft-LinkedIn have not been subject to regulatory scrutiny, there are concerns among authorities about an apparent lack of enforcement, which is thought to be due to the rise of digitalization.

Under Section 5 of the Competition Act 2002,[7] combinations are classified under three broad categories:

a) acquisition of assets or control of an enterprise, voting rights, shares;
b) acquisition of the control of a company by a company engaged in a similar line of business; and
c) mergers or amalgamation.

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[2] The Competition Act 2002
[3] CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011; CCI (General) Regulations, 2009
[4] F.No. 1/10/2003-CL.V, Department of Company Affairs, Ministry of Finance (Official Gazette of India, 14 October 2003) <https://www.cci.gov.in/legal-framwork/notifications/details/133/0> accessed 21 April 2023
[5] Abhir Joy, *Competition Law in India: A Practical Guide* (Kluwer Law International 2016) 270
[6] Himanshu Handa, 'Evolution of Competition Law in India' (2014) 5 ISSN <https://www.ukca.in/wp-content/uploads/2019/08/EVOLUTION-OF-COMPETITION-LAW-IN-INDIA.pdf > accessed 21 April 2023
[7] The Competition Act 2002, s 5

In India, it is mandatory to notify the CCI when the prescribed thresholds for assets or turnover are met, as per the rules set forth in the Competition Act. These are

THRESHOLDS FOR FILING NOTICE				
		Assets		**Turnover**
Enterprise Level	**India**	> 2000 INR crore	**OR**	>6000 INR crore
	Worldwide with India leg	>USD 1 bn with at least >1000 INR crore in India		>USD 3 bn with at least >3000 INR crore in India
OR				
Group Level	**India**	>8000 INR crore	**OR**	>24000 INR crore
	Worldwide with India leg	> USD 4 bn with at least >1000 INR crore in India		> USD 12 bn with at least >3000 INR crore in India

*Source[8]

By virtue of the Competition (Amendment) Bill, 2022,[9] the anti-trust laws of India now prescribe an additional threshold, i.e., the Deal Value Threshold (DVT), for notification of combinations that cross the prescribed limits. The prior approval of CCI will also be required if:

1) The "***value of any transaction***" exceeds Rs. 2,000 crores (Rs. 20 billion), and;
2) The enterprise which is being acquired, taken control of, merged, or amalgamated has **"*substantial business operations*"** in India."[10]

"De minimis exemption"[11] provides that a transaction would be exempt from notification requirement under the Competition Act, 2002 if the target (i.e., acquiree or transferor company) has:

1) assets in India of not more than INR 3.5 billion, or;
2) turnover in India of not more than INR 10 billion.[12]

[8] Competition Commission of India, 'Frequently Asked Questions' <https://www.cci.gov.in/faqs> accessed 20 April 2023
[9] The Competition (Amendment) Bill, LS Bill (2022-2023) [185]
[10] The Competition (Amendment) Bill, LS Bill (2022-2023) [185]
[11] F.No. Comp-05/4/2022-Comp-MCA, Ministry of Corporate Affairs (Official Gazette of India, 16 March 2022) <https://www.cci.gov.in/combination/legal-framwork/notifications/details/14/0> accessed 21 April 2023
The notification has been extended further for a period of five years, i.e., till 28th March 2027
[12] Press Information Bureau, Government of India, Ministry of Corporate Affairs' <https://pib.gov.in/newsite/PrintRelease.aspx?relid=160236> accessed on 19 April 2023

CONCERNS WITH THE CURRENT THRESHOLDS IN NEXUS WITH THE DIGITAL ECOSYSTEM

Digital platforms are characterized by high economies of scale and network effects, and particularly in the early stages, they typically aim to expand their user base. The CCI has suggested that the traditional metrics of assets and turnover may not be sufficient to capture the transactions in the fast-paced digital ecosystem.[13]

"The business model of digital companies often means that they fail to generate significant revenue for several years, focusing initially on user growth. For countries relying solely on turnover thresholds to apply jurisdiction, this is a significant issue that must be addressed."[14]

Therefore, there is a need for the "value of the transaction" criterion as an additional means of notifying mergers and acquisitions to the CCI.[15] To date, no mergers have been blocked, i.e., there have been no false positives involving the major digital platforms, and all of them have been permitted.[16]

ANALYSIS

DATA AS AN ASSET IN THE NEW WORLD

As highlighted above, companies in the digital market typically focus on creating or acquiring a large user base,[17] and usually, the products/services that they offer are free to their customers. These companies tend to have insignificant turnover, but due to the access to data, technical know-how, and degree of innovation, these platforms are significantly valued. For social media and digital companies, data is often their most valuable asset, and it differs significantly from traditional physical assets as data promises new methods and means of capital accumulation as the

[13] 'Fair Play' (The Quarterly Newsletter of Competition Commission of India (CCI) Vol 42, July-September 2022) <https://cci.gov.in/public/images/publications_fairplay/en/volume-42-july-september-20221666260876.pdf> 8 accessed 21 April 2023

[14] Directorate for Financial and Enterprise Affairs, *Start-ups, Killer Acquisitions and Merger Control* (OECD, 2020) <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 20 April 2023, 94

[15] 'n13

[16] Digital Competition Expert Panel (UK), *Unlocking digital competition* (March 2019), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 20 April 2023, para 3.43

[17] n13

critical resource of future digital economies.[18] The significance of digital personal data as a new asset class[19] can be seen through the success of tech giants such as Facebook, Google, Apple, and Microsoft.[20] As per a report on " Competition in Digital Markets," based on an investigation made by the US Congress, these companies have been leveraging their control over digital ecosystems and data to establish their market dominance.[21] Google was even sued by the US Department of Justice in 2020 for violating anti-trust laws.[22] Therefore, personal data has become a critical resource of the future, and the importance of data monopolies helps to explain the enormous growth in valuations of these Big Tech companies. These companies transform users, user engagement, and their access to users into assets by using personal data to create measurable and valuable user metrics.[23] They then use this data to analyse user behaviour, preferences, and interests to create metrics that help them understand their users better. This information is valuable to Big Tech companies and investors because it can help them target their products and services more effectively and make more informed business decisions.

Therefore, the valuation of these companies is not derived from the traditional methods of asset/turnover; the combination transactions involving these digital companies usually escape the threshold limit on account of the target not holding sufficient assets or not generating requisite turnover. This highlights the current enforcement gap necessitating the introduction of a new threshold. To name a few transactions that have escaped the CCI's scrutiny over the past are the[24]

1) Acquisition of Freecharge by Snapdeal for approximately USD 400-450 million;[25]

[18] Kean Birch, 'Data as asset? The measurement, governance, and valuation of digital personal data by Big Tech' (2021), *Sage Journals* < https://journals.sagepub.com/doi/10.1177/20539517211017308> accessed 20 April 2023
[19] World Economic Forum, 'Personal Data: The Emergence of a New Asset Class. Geneva' (2011)
[20] Kean Birch, 'What kind of asset is our Digital Personal Data?' (*The FinReg Blog*, 15 June 2021) <https://sites.duke.edu/thefinregblog/2021/06/15/what-kind-of-asset-is-our-digital-personal-data/ > accessed 21 April 2023
[21] US House of Representatives, 'Investigation of Competition in Digital Markets. Washington DC' (2020)
[22] Department for Justice, '*Justice Department Sues Monopolistic Google for Violating Anti-Trust Laws'* (2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 21 April 2023
[23] n18
[24] The Competition Law Review Committee, 'Report of the Competition Law Review Committee-2018' (CLRC Report, July 2019), <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 20 April 2023, para 5.11
[25] 'Snapdeal acquires Freecharge' *The Hindu BusinessLine* (Bangalore, 8 April 2015) <www.thehindubusinessline.com/info-tech/snapdeal-gets-freecharge-to-rev-up-mobile-biz/article22497956.ece> accessed 21 April 2023

2) Acquisition of TaxiforSure by Ola for approximately USD 200 million;[26]
3) Acquisition of Myntra by Flipkart for USD 300 million;[27]
4) Acquisition of WhatsApp by Facebook for USD 19 billion (approximately INR 1.2 lakh crore);
5) Acquisition of Uber eats by Zomato for approximately USD 350 million.[28]
6) Acquisition of INOX by PVR.[29]

Therefore, even though the acquisition of such companies may cause an adverse effect on the market and may have an anti-competitive effect on the relevant market, they escape the scrutiny of CCI by not meeting the prescribed threshold. The spark in the powder keg was Facebook's acquisition of WhatsApp. WhatsApp turnover was less than the asset/turnover thresholds as prescribed under the Competition Act, and therefore the said merger escaped the CCI's scrutiny even though it had the potential of having an adverse effect on competition within the concerned marketplace.[30]

All these entities are tech aggregators and are dominant in the e-commerce sector in their specific industries. In 2019, the CCI's report on a study launched on the market study on e-commerce in India[31] noted that areas such as consumer goods, accommodation services, and food services are concentrated by a few big players such as MakeMyTrip in accommodation; Amazon and Flipkart

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[26] BS Reporter, 'Ola acquires TaxiForSure in $200-mn deal' *Business Standard* (New Delhi, 3 March 2015) <www.business-standard.com/article/companies/ola-cabs-acquires-taxiforsure-in-200-mn-deal-business-standard-news-115030200354_1.html> accessed 21 April 2023

[27] 'Flipkart Acquires Myntra in India's Biggest E-Commerce Deal' *NDTV* (22 May, 2014) <www.ndtv.com/business/flipkart-acquires-myntra-in-indias-biggest-e-commerce-deal-389119#:~:text=Flipkart,%20India's%20largest%20online%20retailer,founder%20of%20Bangalore-based%20Flipkart.> accessed 21 April 2023

[28] CCI had reportedly later on sent a notice to the concerned parties examining if Zomato's acquisition of Uber Eats is anti-competitive and whether the two companies should have notified it about the transaction. See, <https://www.moneycontrol.com/news/business/exclusive-i-competition-regulator-launches-probe-into-zomato-uber-eats-deal-5302501.html> and <https://www.news18.com/news/tech/trouble-for-zomato-cciprobes-possibly-anti-competitive-uber-eats-acquisition-2632713.html> accessed 20 April 2023

[29] 'PVR and INOX Leisure announce merger' *Business Insider* (22 March 2022) <www.businessinsider.in/business/news/pvr-and-inox-leisure-announce-merger/articleshow/90476756.cms> accessed 20 April 2023

[30] Avirup Bose, 'Why India's antitrust body should scrutinise the WhatsApp buy' *Business Standard* (India, 2 March 2014) <https://www.business-standard.com/article/opinion/avirup-bose-why-india-s-antitrust-body-should-scrutinise-the-whatsapp-buy-114030200719_1.html> accessed 21 April 2023

[31]Competition Commission of India 'Market Study on E-Commerce in India' (CCI, 8 January 2020) <https://www.cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-and-observations1653547672.pdf> accessed 20 April 2023

in consumer goods; and Zomato and Swiggy and in food services.[32] A combination in any of these industries could lead to a lessening of the competition in the concerned market without it coming under the scrutiny of CCI and in India unless the notification thresholds are met, CCI has no power to assess the transactions even if their potential competitive harm is evident.[33]

One view as advanced by the Federation of Indian Chambers of Commerce and Industry was that the transactional value is not a determinative factor of whether a transaction will have any effect on market competition.[34] Therefore, if such a threshold is applied unanimously across all industries, then it would become unreasonably burdensome not only for the concerned parties but as well as the regulators. For example, if a party to a combination enters a new relevant product market by way of an acquisition, then it would have to notify the CCI if the transactional value exceeds the prescribed limit even though there might not be any chances of such a combination having any adverse effect on the competition. However, the Ministry of Corporate Affairs has clarified that DVT is primarily meant for digital and new age markets, where the target entities may have minimal turnover and assets, but may possess significant potential in terms of data, technology, innovation, etc.[35]

DEAL VALUE THRESHOLDS IN OTHER COUNTRIES

Germany and Austria are amongst the few countries that have introduced the new transaction value and from where the Indian Legislature derives its inspiration to implement such a regime in India as well.

	Austria ***(in Million EUR)***	**Germany** ***(in Million EUR)***
Transaction Value	200	400
Combined Aggregate Turnover ***(Worldwide)***	300	500

[32]Competition Commission of India 'Market Study on E-Commerce in India' (CCI, 8 January 2020) <https://www.cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-and-observations1653547672.pdf> accessed 20 April 2023
[33] n13
[34] Standing Committee on Finance, The Competition (Amendment) Bill, 2022, (LS 2022-23, 17), 3.2
[35] Avaantika Kakkar, Kirthi Srinivas, '2023 Amendments to Indian Competition Law: Implications for M&A (Part 1)' (*Kluwer Competition Law Blog*, 18 April, 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/04/18/2023-amendments-to-indian-competition-law-implications-for-ma-part-1/> accessed 21 April 2023

Combined Aggregate Turnover *(Nationwide)*	15	25
	The Target Company should have significant domestic activities	

*Source[36]

The UK merger control regime is governed by the Enterprise Act 2002. There are two alternative thresholds:[37]

1) ***TURNOVER TEST*** – If the UK turnover of the target company exceeds GBP 70 million (approx. 85.4 million EUR). This test is also applicable if the purchaser has no presence or sales in the UK.
2) ***SHARE OF SUPPLY TEST*** – Where a transaction leads to the formation or increase of a 25% or more combined market share of sales or purchases, within the UK or a significant part of it, for a specific category of goods or services.[38] This test applies where both the concerned enterprises supply or acquire goods or services of a similar kind in the UK (i.e., a horizontal merger)

In modern markets, key elements for achieving a significant market position are factors such as users, data, growth, and network effects. Therefore, businesses that are successful in implementing a business model in the modern economy can attain significant valuations despite having minimal assets and turnover. Therefore, with the help of these thresholds, the entities that have a transactional value can be scrutinized even if they have minimal assets or turnover.

COMPUTATION OF DEAL VALUE THRESHOLD

[36] German Federal Cartel Office and Austrian Federal Competition Authority, New Transaction Value Thresholds introduced in Germany and Austria in 2017' *Competition Newsletter* (Germany, 22 August 2018) <https://www.ashurst.com/en/news-and-insights/legal-updates/german-and-austrian-competition-authorities-publish-joint-guidelines/> accessed 21 April 2023

[37] Timothy McIver and Anne-Mette Heemsoth, 'Merger Control in the United Kingdom: Overview' (*Thomson Reuters Practical Law*) <https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=(sc.Default)> accessed 20 April 2023

[38] Clifford Chance LLP, *United Kingdom: Merger Control* (Legal 500 & The In-House Lawyer) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/04/merger-control-comparative-legal-guide-united-kingdom.pdf> 5 accessed 20 April 2023

The term "value of transaction" has been broadly defined to encompass any valuable consideration, whether direct or indirect, or deferred, for any acquisition, merger, or amalgamation.[39] The definition is meant to be extensive and all-encompassing, as indicated by the use of the term "includes" within the definition, signifying that it is not meant to be exhaustive. [40] All monetary benefits and assets that the seller may receive from the buyer related to the merger in question must be accounted for in the value of the transaction. However as highlighted by many, difficulties may arise while calculating the value of the transaction. The value of the consideration for a company in a merger may be higher than its standalone value because it is influenced by the buyer's subjective assessments of the company's potential growth and development after being integrated into the buyer's company or group. Valuation of such a transaction just like the valuation of the share price of a company is partly art and partly science and is highly subjective. To accurately predict the future of a company, it requires both i.e.,

1) analysing other similar companies and drawing upon that knowledge to make informed predictions, and;
2) using theoretical concepts and empirical data from finance researchers to support those predictions.[41]

Determining the value of a transaction is therefore challenging and involves the consideration of various factors such as differences in the purchase prices between industries, changes in stock prices from the time the transaction is announced to the time it is completed, varying methods of valuation, and delayed payments. In the context of the Facebook/WhatsApp deal, as a result of the rise in the value of Facebook's shares, the valuation increased from USD 19 billion in 2014 to USD 22 billion.[42] In this scenario, there is a fluctuation in the share prices between the concerned dates and now we must look as to what would be the relevant date for value assessment. A dilemma

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[39] The Competition (Amendment) Bill, LS Bill (2022-2023) [185]

[40] Adity Chaudhury, 'Changes to The Merger Control Regime in India' (*ArgusPartners*, 7 April 2023) <https://www.argus-p.com/papers-publications/thought-paper/changes-to-the-merger-control-regime-in-india-competition-law-update/> accessed on 21 April 2023

[41] 'The Art and Science of Corporate Valuation' (*Wharton@Work*, May 2020) <https://executiveeducation.wharton.upenn.edu/thought-leadership/wharton-at-work/2022/05/art-and-science-of-corporate-valuation/#:~:text=VG%3A%20Definitely.-,Even%20though%20it%20is%20based%20on%20principles%20of%20finance%20and,is%20part%20art%2C%20part%20science.> accessed 21 April 2023

[42] Alexei Oreskovic, 'Facebook Closes WhatsApp Acquisition at New Price Tag of USD 22 Billion' *Business Today* (San Francisco, 7 October 2014) <https://www.businesstoday.in/latest/deals/story/facebook-acquires-whatsapp-for-usd-22-billion-141173-2014-10-07> accessed on 20 April 2023

therefore arises in cases where a merger has been notified, but at the time of completion, the value of the transaction falls below the prescribed threshold. On the other hand, it is possible that a merger which was initially not required to be reported, subsequently becomes reportable if certain conditions are met. For instance, if the price of the shares or the foreign currency that is being offered as compensation increases significantly and exceeds the thresholds, then the merger may become subject to notification. With respect to the statutory provisions in place in Germany and Austria, the determining factor for whether a merger project must be notified is the date on which the merger is completed.[43]

It is considered that the Deal Value Threshold is considerably low and could increase the burden on CCI and block its resources and valuable time if not addressed carefully, ultimately increasing the cost of such compliances for the companies as well.[44]

SUBSTANTIAL BUSINESS OPERATIONS

The interpretation of the phrase "value of the transaction" is indeed wide and the scope of companies usually coming under the ambit of scrutiny would have been marginally enlarged. In order to establish clear and objectively quantifiable standards for determining local nexus criteria, the new criteria are designed only to require reporting of transactions that have a significant economic connection to India. This is intended to avoid placing unnecessary burdens on both, the parties involved as well as the CCI. The Amendment provides that the enterprise which is being acquired, taken control of, merged, or amalgamated must have *"substantial business operations"* in India.[45] The scope and definition of the term "substantial business operation" have not yet been described and will be notified by future regulations. The regulations may define the term or determine whether the parties have sufficient nexus or operations in India based on

1) market-facing factors such as the number of users or contracts etc., that they have in India.

- ***FACEBOOK/WHATSAPP***

[43] *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)* (Bundeskartellamt, July 2018) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> 11 accessed 21 April 2023

[44] Ram Kumar Poornachandran, 'The Amended Competition Act a Game Changer, But There Are Practical Issues To Be Mindful Of'(AZB Partners, 18 April 2023) <https://www.azbpartners.com/bank/the-amended-competition-act-a-game-changer-but-there-are-practical-issues-to-be-mindful-of/> accessed on 20 April 2023

45 The Competition (Amendment) Bill, LS Bill (2022-2023) [185]

At the time of the Facebook/WhatsApp Combination, one of the factors that was looked at with respect to the impact that the Combination would have on the concerned market was the user base that both the companies had in India. During the time, India had nearly 40 million WhatsApp user and the number of people using Facebook was around 93 million.[46]

2) One other way could be to look at the scale of business operations in a particular region.

- ***ETIHAD/JET AIRWAYS***

  In the case involving the combination of Etihad and Jet Airways, it was highlighted that Jet Airways' entire business operations between India and London were based on three landing/take-off slots at LHR Airport, even though they represented only a fraction of Jet Airways' global assets. The CCI did not accept the argument that these three slots did not represent Jet Airways' substantial business operations in/from London, as they were integral to Jet Airways' landing rights at LHR Airport. Although Jet Airways' actual revenue and business operations were derived from ticket sales from its flights to/from London, it relied solely on the use of these three landing/take-off slots at LHR Airport for its India-London services and did not possess any other slots or offer services to/from other airports in London. Consequently, in the absence of these slots, Jet Airways would have no business operation or revenue in the said sector.[47] Therefore, it is considered that the subject matter of acquisition effectively represented the entire operations of Jet Airways between India and London.

SUGGESTIONS BASED ON GLOBAL PRACTICES

When assessing whether a target company has substantial domestic operations, the criteria used in Germany and Austria can be taken into consideration which include measuring domestic activity, determining the geographical allocation of domestic activity (local nexus), market orientation, and its significance.[48] By observing the methodology used in these countries it can be said that the

[46] 'Facebook-WhatsApp Deal May Face Detailed CCI Scrutiny, *The Economic Times* (New Delhi, 9 March 2014) <https://economictimes.indiatimes.com/tech/software/facebook-whatsapp-deal-may-face-detailed-cci-scrutiny/articleshow/31723833.cms?from=mdr> accessed on 21 April 2023

[47] Abhir Joy, *Competition Law in India: A Practical Guide* (Kluwer Law International 2016) 279

[48] *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)* (Bundeskartellamt, July 2018) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed on 21 April 2023

measuring of domestic activity requires using an appropriate indicator to determine the extent of the operation of the target company in the domestic markets and the local nexus. The digital sector can, as highlighted by the explanatory memoranda in Germany and Austria, take into consideration the frequency of visitors on a website or the number of daily or monthly active users as possible indicators.[49] To assess the local nexus of the activity, the specific form of the indicator of a local nexus in the respective jurisdiction has to be established. This must be done in a way that attributes the activity of a company to the place of intended use, usually the place where the customer is located or where the services are provided, or where the products are delivered.[50] As a result, domestic activity is presumed to exist if a company's products and services are taken up to a significant extent by domestic users, even if it is free of charge.

Under the United Kingdom Merger Control Regime, different jurisdictional thresholds are applicable in:

1) newspaper publishers or broadcasters (either of the parties involved in the transaction must supply or provide at least 25% of their goods or services of a particular type in the UK or a substantial part of the UK), and;
2) government defence contractors.[51]

Hence, it may be advantageous to create distinct indicators and criteria to evaluate domestic activities in different sectors. As mentioned above with the help of various case studies, there is no single method that is ideal for all sectors. Therefore, to identify the target company's domestic operations and local nexus in a practical and legally feasible way, an effective and straightforward approach must be created without making the process overly complicated. These are simply a few methods by which a determination can be made as to whether the target company has "substantial business operations" in India. It is necessary to establish a more informed and formal approach by the lawmakers to promptly address the relevant issues in an adequate way.

CONCLUSION

[49] 'Working Paper – Market Power of Platforms and Networks' (Bundeskartellamt 2016), 70
[50] Cf. Bundestag Printed Paper 18/10207 75
[51] Clifford Chance LLP, *United Kingdom: Merger Control* (Legal 500 & The In-House Lawyer) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/04/merger-control-comparative-legal-guide-united-kingdom.pdf> 6

The introduction of any new regulation normally not only adds uncertainty but also additional administrative burdens. In 2017, at the time of the introduction of the transaction value threshold various similar queries from practitioners and industry experts were raised in Germany and Austria as well. However, it is observed that the new test did not significantly increase the number of submissions in either of the countries. 15 notifications were received in Austria out of a total of 400 transactions[52] and the number was 18 in Germany out of approximately 2686 transactions.[53]

As specified above, due consideration must be given to a considerable number of factors such as the proper definition of the phrase "substantial business operations" and the relevant indicators for the concerned industries and the method for calculating the "value of the transaction." The Competition (Amendment) Bill, 2022, *as of now*, contains a degree of vagueness and ambiguity, which may reduce the effectiveness and legal certainty of the merger review process in India. If the procedural thresholds lack clarity, it could result in authorities unnecessarily reviewing multiple false-positive cases, leading to a burden on their workload. The introduction and implementation of the deal-value threshold may also result in longer regulatory processes for competitive approval of start-ups, potentially causing them to lose their competitive advantage. The CCI has itself noted in the Flipkart case that digital marketplaces in India are still in their early stages, and that "any intervention in such markets needs to be carefully crafted lest it stifles innovation."[54] Making the process more complicated could discourage investors and have a chilling effect on both innovation and competition.

One of the reasons there is so much speculation around the prescribed threshold is the fact that CCI lacks the residuary power to examine the transactions that fall below the prescribed thresholds. In the UK, the transactions can be subject to an investigation even if the valuation falls below the market share and turnover thresholds.[55] Therefore, a great deal of emphasis is placed on these regulations so as to ensure that the transactions that have the potential to have an adverse effect on the competition in the concerned markets do not escape the scrutiny of the regulatory bodies. The

[52] Martin Glasser, 'Why the introduction of a new transaction value jurisdictional threshold for the EUMR has been postponed, at least for now' (28 June 2019) <https://oxcat.ouplaw.com/page/775#11> accessed 22 April 2023

[53] Directorate for Financial and Enterprise Affairs, *Start-ups, Killer Acquisitions and Merger Control* (OECD, 2020) < https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf > 94 accessed 21 April 2023

[54] *All India Online Vendors Association v Flipkart India Private Limited & Ors*, Case No. 20 of 2018, para 34

[55] Clifford Chance LLP, *United Kingdom: Merger Control* (Legal 500 & The In-House Lawyer) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/04/merger-control-comparative-legal-guide-united-kingdom.pdf> 6 accessed 21 April 2023

point of these regulations is to look at the conduct and address foreseeable issues prior in time rather than react to complaints subsequently. Harmony between Indian Competition and Merger Regime in the context of the merger control regulations in India could potentially showcase India as a healthy, competitive, and all-inclusive economic market for foreign companies. The present amendments enable the CCI to assess those transactions that are significant but non-notifiable under the present Competition Law Regime and undertake the review process, therefore if proper regulations are drafted it could ultimately lead to a growth in the Merger and Acquisition environment in India.

Proposed Self-Regulation of Online Gaming in India – Preserving Competition

~Ranak Banerjee[1]

Abstract

The Ministry of Electronics and Information Technology ('MeitY') has proposed draft amendments to the Information Technology (Intermediary Guidelines & Digital Media Ethics Code) Rules, 2021 ('the Rules'). This amendment brings with it a system of self-regulation for the expanding world of online gaming, intending to boost this expansion. Online gaming, as defined under the amended rules, has its public policy concerns, while any self-regulatory mechanism has anti-trust concerns. India has tried its hand at self-regulation of industries before, producing inconsistent results. The proposed self-regulatory mechanism leaves a lot unanswered due to its lack of nuance. This lack of nuance is, however, not the primary focus of this paper. A self-regulatory organisation ('SRO') in a nascent anti-trust law regime can lead to anti-competitive behaviour. This paper is concerned with and limited to the possible anti-competitive effect of the proposed SROs on the online gaming market. And how this could affect its growth. This paper aims to judge the self-regulatory mechanism using the history of such bodies in India, the intricacies of the online gaming industry, and similar organisations in other jurisdictions. The paper will also suggest remedial measures to the raised concerns and an alternative mechanism to self-regulation.

INTRODUCTION

Online gaming, as defined, involves only those games that are accessible via the Internet and require the player to make a deposit, in cash or kind, with an expectation of winning earnings.[2] This mainly involves online card games such as rummy, poker, fantasy sports, etc.[3] The definition of such online games is a fine line between legal "games of skill" and illegal "games of chance".[4] Such a distinction is crucial as it differentiates a legitimate business from an illegal

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[2] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (Draft Amendment) 2023 r 2(qa)

[3] Varsha Meghani, 'Playing by the Rules: Can the Self-Regulation Model Work for the Online Gaming Industry?' (*Forbes India*, 9 January 2023) <https://www.forbesindia.com/article/take-one-big-story-of-the-day/playing-by-the-rules-can-the-selfregulation-model-work-for-the-online-gaming-industry/82397/1> accessed 16 October 2023

[4] 'Online Gaming Platforms Treated as Illegal when Game of Chance is Involved: MoS IT' (*The Hindu*, 3 August 2022) <https://www.thehindu.com/sci-tech/technology/online-gaming-platforms-treated-as-illegal-when-game-of-chance-is-involved-mos-it/article65721365.ece> accessed 18 October 2023

activity. The current unregulated online-gaming industry is expected to grow to INR 25,000 crore by FY 2025.[5] This figure will become important when we look deeper into the possible impact of a self-regulatory body on an expanding industry of sizeable magnitude.

An SRO is essentially a private body formed of participants in the particular industry with the power to set standards, rules and regulations for that industry or profession.[6] It has many advantages over traditional governmental regulation as it simplifies laws, makes them more adaptive, reduces the legislative burden, and induces a share of shared responsibility among its member companies.[7] India has chosen to implement self-regulatory bodies before to regulate other industries. It has done so in the case of Media,[8] Microfinance,[9] and OTT Platforms (grievance redressal only),[10] among others. Such bodies have had some intended effects and some unintended ones.[11] The scope of this paper is not to evaluate the self-regulatory bodies in other industries but to draw from their experience and consequences to support the arguments made and conclusions drawn in the following sections.

Any self-regulatory body, due to the profit motive of its members and lack of concrete governmental intervention, can turn into an anti-competitive conglomerate.[12] It can engage in cartel-like activities, seriously dampen competition, corner essential information, and even bully or exclude competing firms.[13] The various freedoms of a competitive market which anti-trust laws aim to protect, might be gravely affected by a wayward SRO.[14] Thus, there has to be a careful consideration of the extent of freedom given to SROs to balance the benefits of self-regulation with its potential harms.

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[5] Anuraag Saxena, 'Online Gaming: Looking Beyond Self-Regulation' (*BusinessLine*, 29 August 2022) <https://www.thehindubusinessline.com/opinion/online-gaming-looking-beyond-self-regulation/article65827308.ece> accessed 16 October 2023

[6] Adam Hayes, 'Self-Regulatory Organization (SRO): Definition and Examples' (*Investopedia*, 30 June 2021) <https://www.investopedia.com/terms/s/sro.asp> accessed 16 October 2023

[7] Jorge Pedago Liz, 'Opinion of the European Economic and Social Committee on Self-regulation and Co-regulation in the Community Legislative Framework' [2015] OJ C291/29

[8] Harsimran Kalra 'How Media in India is Regulated' (*PRS India*, 11 December 2011) <https://prsindia.org/articles-by-prs-team/how-media-in-india-is-regulated> accessed 17 October 2023

[9] 'MFIN as an SRO' (*Microfinance Institutions Network*) <https://mfinindia.org/about/sro> accessed 16 October 2023

[10] 'Self-Regulatory Bodies' (*Ministry of Information and Broadcasting*) <https://mib.gov.in/self-regulatory-bodies> accessed 18 October 2023.

[11] Meera Mathew, 'Media Self-Regulation in India: A Critical Analysis' [2016] 3 ILI LAW REVIEW 25

[12] Israel Herzlia, 'Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship' (*Federal Trade Commission*, 24 May 1998) <https://www.ftc.gov/news-events/news/speeches/industry-self-regulation-antitrust-enforcement-evolving-relationship> accessed 17 October 2023

[13] ibid

[14] Sih Yuliana Wahyuningtyas, 'Self-regulation of online platform and competition policy challenges: A case study on Go-Jek' [2019] 20(1) CRNI 33

Part II of this paper will generally look at the confluence of self-regulatory systems and competition in the market using an international perspective. Part III will juxtapose these global concerns with India's specific environment of online gaming, SROs, and competition jurisprudence. Part IV will suggest possible solutions to the issues highlighted in the previous part. Part V will provide a concluding analysis while looking towards the future.

SELF-REGULATION AND COMPETITION

Multiple jurisdictions have a well-developed anti-trust regime and have introduced self-regulatory mechanisms. Numerous other jurisdictions have a nascent anti-trust regime and have introduced self-regulatory mechanisms. This part shall take an example from each jurisdiction to analyse the competition concerns caused by SROs.

The United States ('US') has one of the oldest competition law regimes in the world, with the first statute being the Sherman Antitrust Act of 1890.[15] Some of the biggest SROs find a place in the US.[16] There also exists jurisprudence on the anti-competitive practices of SROs.[17] These cases will now be analysed to determine the anti-trust threats posed by completely unregulated SROs.

First, let's look at *Allied Tube & Conduit Corp. v Indian Head*, *Inc*. ('Allied Tube'), where the US Supreme Court ('SC') entered into a discussion of the powers of a "standard-setting body", and how this power could be abused.[18] In this case, a self-regulated body in charge of setting standards and declaring products as safe to include them in the National Electricity Code resisted the inclusion of plastic-based conduit.[19] Such resistance came from a dedicated lobbying effort by the steel conduit manufacturers to scuttle any potential competition the plastic conduit manufacturers could have produced.[20] The US SC recognised that such private bodies have incentives to suppress competition.[21] It also recognised that bodies like SROs having the power to set "industry standards", have to do so in a fair, unbiased manner.[22] This means that an SRO with any rule-making power that can influence the market can use it to

[15] Tom Romanoff, 'Comparison of Competition Law and Policy in the US, EU, UK, China, and Canada', (*Bipartisan Policy Centre*, 16 December 2021) <https://bipartisanpolicy.org/blog/comparison-of-competition-law-and-policy-in-the-us-eu-uk-china-and-canada/> accessed 18 October 2023

[16] n5

[17] n9

[18] *Allied Tube & Conduit Corp. v Indian Head Inc.* [1998] 486 U.S. 492 (1988)

[19] *Allied Tube & Conduit Corp. v Indian Head Inc.* [1998] 486 U.S. 492 (1988) [486]

[20] ibid

[21] *Allied Tube & Conduit Corp. v Indian Head Inc*. [1998] 486 U.S. 492 (1988) [500]-[501]

[22] *Allied Tube & Conduit Corp. v Indian Head Inc.* [1998] 486 U.S. 492 (1988) [507]

produce anti-competitive effects for their gain. It also shows that an SRO can restrict market access to potential competitors by creating rules or setting standards.

Second, the case of *F.T.C.* v. *Indiana Federation of Dentists* ('Indiana Dentists') provides an example of a self-regulatory body creating rules that restrict the transfer of information by its members.[23] The member dentists of the Federation were not allowed to share specific X-rays with insurance companies, which raised the prices for dental surgeries for the consumers.[24] This was held to be an unreasonable restraint of trade by the US SC.[25] Moreover, the US SC laid down three questions when adjudicating the anti-competitive effect of an SRO. First, are the economic and other interests of the members aligned or divergent?[26] Second, are the measures in question mandatory?[27] Third, do the members of the body collectively have any market power?[28] These questions will be asked of the online gaming industry in India in the following section.

Next, let us look at Indonesia's competition law regime and its effect on SROs. Indonesia established its competition regulator, the *Komisi Pengawas Persaingan Usaha* ('KPPU'), in 1999.[29] India established the Competition Commission of India ('CCI') at almost the same time in 2002.[30] The KPPU formulated guidelines and a checklist-based test to judge whether a particular regulation or policy has any anti-competitive effects.[31] The scope of the term "regulation" extends to private bodies and thus covers SROs.[32] The mentioned guidelines recognise reducing incentives to compete and impairing innovation by SROs as anti-competitive behaviour.[33] The KPPU recommends analysing the policies of SROs carefully as they might lead to exclusionary behaviour and abuse of dominance while also promoting innovation and benefitting the market.[34] The presence of a KPPU member or someone

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[23] *F.T.C. v Indiana Federation of Dentists* [1986] 476 U.S. 447 (1986)
[24] *F.T.C. v Indiana Federation of Dentists* [1986] 476 U.S. 447 (1986) [457]-[466]
[25] *F.T.C. v Indiana Federation of Dentist*s [1986] 476 U.S. 447 (1986) [476]
[26] Israel Herzlia, 'Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship' (*Federal Trade Commission*, 24 May 1998) <https://www.ftc.gov/news-events/news/speeches/industry-self-regulation-antitrust-enforcement-evolving-relationship> accessed 17 October 2023
[27] ibid
[28] ibid
[29] Prohibition of Monopolistic Practices and Unfair Competition 1999 (Indonesia)
[30] The Competition Act 2002, s 7
[31] KPPU Guidelines for the Use of the Checklist of Competition Policy October 2016
[32] KPPU Guidelines for the Use of the Checklist of Competition Policy October 2016 [7]
[33] n11, [41]-[42]
[34] KPPU Policy Guidelines 2016, Regulation 4

associated with the body on the board of the SRO or some other form of oversight is also recommended.[35]

From the US cases and Indonesian guidelines, the view is clear that SROs can have and have had severe anti-competitive effects on the market. The impact of such anti-competitive behaviour may be irreversible and non-remediable by the post-facto actions of the competition regulator or courts. This is so as innovation and ideas of smaller firms, once repressed, might not be able to re-emerge. This would mean that preventive measures must be preferred over remedial measures to address the effects anti-competitive behaviour. Before implementing such measures, we must look deeper into the online gaming industry and the history of SROs and competition law in India. This is done in the following section.

ONLINE GAMING, SELF-REGULATION AND COMPETITION IN INDIA

The online gaming industry in India is of substantial size and is projected to keep expanding and reach 50 crore users by the end of 2023.[36] Fantasy sports form a significant part of this online gaming industry to be regulated by the previously mentioned provisions. India has the biggest fantasy sports market in the world, with thirteen crore users.[37] A cursory glance at these figures would imply that a self-regulatory model would be beneficial to boost its growth further and allow innovation in the industry. But a deeper market analysis is required before we draw any such conclusions.

A unicorn is a privately owned start-up that has reached a valuation of over USD one billion.[38] They are named so because of their statistical improbability.[39] A combination of factors, including the increase in the consumption of online services due to Covid-19, has spawned three such unicorns in the online-gaming sector in India.[40] These unicorns are Dream 11, Mobile Premier League ('MPL'), and Games24x7.[41] The mentioned statistical improbability,

[35] n12, [45]

[36] Pooja Yadav, 'Explained: How Rapidly Is The Gaming Industry Growing In India' (*India* Times, 1 January 2023) <https://www.indiatimes.com/explainers/news/how-rapidly-is-the-gaming-industry-growing-in-india-589059.html> accessed 18 October 2023

[37] Maryam Farooqui, 'India Becomes World's Biggest Fantasy Sports Market with 13 Crore Users: Report' (*MoneyControl*, 15 March 2022) <https://www.moneycontrol.com/news/trends/sports-trends/india-becomes-worlds-biggest-fantasy-sports-market-with-13-crore-users-report-8236021.html> accessed 17 October 2023

[38] James Chen, 'Unicorn: What it Means in Investing, with Examples' (*Investopedia*, 31 May 2022) <https://www.investopedia.com/terms/u/unicorn.asp> accessed 16 October 2023

[39] ibid

[40] Varsha Meghani, 'Playing by the Rules: Can the Self-Regulation Model Work for the Online Gaming Industry?' (*Forbes India*, 9 January 2023) <https://www.forbesindia.com/article/take-one-big-story-of-the-day/playing-by-the-rules-can-the-selfregulation-model-work-for-the-online-gaming-industry/82397/1> accessed 16 October 2023

[41] ibid

along with the fact that they are privately owned, are essential to keep in mind as we go forward in this discussion.

India has put in place self-regulatory mechanisms before. One such instance is for regulating traditional media.[42] This self-regulatory body has been criticised due to its lack of efficiency or its lack of impartiality.[43] Most of its inefficiencies, such as sensationalism, privacy violation, and publicity stunts, among others, arise from the profit motive of the participating firms and various market pressures on them.[44] These issues are not specific to traditional media as they have been identified even for digital platforms.[45] Then, any SRO in the online gaming industry would be susceptible to each firm's profit-motive and general market pressures.

As highlighted above, Dream11, MPL, and Games24x7 are outliers in the industry regarding their valuation. Additionally, they are all private, unlisted companies.[46] This means they do not need to share the same amount of financial data as publicly listed companies.[47] Firms in the digital economy collect humungous piles of data due to their trackers and transactions on their websites. The bigger the firm, the more data is collected. Being outliers, Dream 11, MPL, and Games24x7 have more data at their disposal than their competitors. There is, thus, a massive discrepancy in market influence and data between the three unicorns and their competitors. This would allow the unicorns to form rules as a member of an SRO, which, on the face of it, seem unbiased but might be beneficial for them or harmful for their competitors. The cases of Allied Tube and Indiana Dentists are evidence that SROs in charge of rule formation and possessing valuable information can have anti-competitive effects. An SRO in the online gaming industry involving the three unicorns fulfils both these requirements.

Next, we come to the issue of defining SROs under the Competition Act. They may be considered as a single enterprise under the Competition Act.[48] However, the jurisprudence

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[42] n6
[43] n9, [33]-[34]
[44] n9, [34]
[45] Micheal Cusumano, Anabelle Gawer, David Yoffie, 'Can Self-Regulation Save Digital Platforms?' [2021] 30 Industrial and Corporate Change 5
[46] 'Play Games24x7 Private Limited' (*The Economic Times*) <https://economictimes.indiatimes.com/company/play-games24x7-private-limited/U92490MH2006PTC162586> accessed 17 October 2023; 'Dream11 Fantasy Private Limited' (*The Economic Times*) <https://economictimes.indiatimes.com/company/dream11-fantasy-private-limited/U72900MH2007PTC171875> accessed 28 February 2023; 'Mobile Premier League' (*Crunchbase*) <https://www.crunchbase.com/organization/mobile-premier-league-mpl> accessed 28 February 2023
[47] Madhuri Thakur, 'Public Company vs Private Company' (*EDUCBA*, 5 July 2023) <https://www.educba.com/public-company-vs-private-company/> accessed 18 October 2023
[48] The Competition Act 2002, s 2(h)

developed on what constitutes a Single Economic Entity suggests otherwise.[49] An Agreement is defined widely under the Competition Act,[50] and could, by extension, cover SROs. If SROs are recognised as an Agreement, then it would be a horizontal one, as the firms are on the same level in the supply chain.[51] Any agreement hindering technical development is recognised to be anti-competitive.[52] A horizontal agreement like this could be exempt from being considered anti-competitive if they are an efficiency-enhancing joint venture.[53] SROs cannot be considered joint ventures but could increase the efficiency of the market. Additionally, in India, there are no cartel-specific regulations for specific sectors.[54] There is, thus, a lack of decisions and legislative clarity as to the status of SROs *vis-à-vis* the Competition Act. Without such clarity, it would not be possible to apply the law with certainty. This lack of clarity needs to be specifically addressed. It, however, does not restrict the discussion of this paper.

An additional anti-trust problem to the proposed SRO system is posed by gambling being a subject in the State List.[55] This means that each State can define the legality of online gaming by altering the line drawn between a game of chance and a game of skill. Despite the Madras High Court striking down its previous ban, Tamil Nadu has passed an Ordinance to ban online gaming platforms.[56] Other States have differing laws for online gaming.[57] An SRO system for the online gaming industry would have to implement rules and regulations keeping in mind these various State laws. This might lead to allocating markets based on state lines between the member firms. A geographic allocation of markets is anti-competitive under the Competition

[49] *Exclusive Motors (P) Ltd. v Automobili Lamborghini SPA Via Modena* [2014] SCC OnLine Comp AT 1
[50] The Competition Act 2002, s 2(b)
[51] Tanisha Kohli, '*Horizontal Agreements under the Competition Act, 2002*' (*iPleaders*, 4 July 2021) <https://blog.ipleaders.in/horizontal-agreements-under-the-competition-act-2002/> accessed 18 October 2023
[52] The Competition Act 2002, s 3(3)(b)
[53] Ram Kumar Poornachandran, 'India: Cartels' (*Global Competition Review*, 25 March 2022) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-cartels> accessed 17 October 2023
[54] Shweta Dubey, 'India: Cartels Comparative Guide' (*Mondaq*, 6 December 2022) <https://www.mondaq.com/india/antitrustcompetition-law/1213070/cartels-comparative-guide?login=true&debug-domain=.mondaq.com> accessed 16 October 2023.
[55] The Constitution of India 1950, Schedule VII, List II, Item 34
[56] The Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Ordinance 2022; Akshit Chawla, 'Tamil Nadu Passes Ordinance to Ban Online 'Gambling' Games Despite HC Striking Down Previous Ban' (*Medianama*, 28 September 2022) <https://www.medianama.com/2022/09/223-tamil-nadu-ordinance-ban-online-gambling-games/> accessed 17 October 2023
[57] 'The Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Ordinance, 2022' (*PRS India*) <https://prsindia.org/bills/states/the-tamil-nadu-prohibition-of-online-gambling-and-regulation-of-online-games-ordinance-2022#:~:text=The%20Madras%20High%20Court%20struck,and%20excessive%20in%20its%20scope> accessed 18 October 2023

Act.[58] It has also been recognised generally as an anti-competitive effect of SROs.[59] Therefore, any SRO in the online gaming industry in India can and will have anti-competitive effects. The following section will suggest solutions to this.

THE WAY AHEAD

Even though technology-based platforms find it easier to indulge in anti-competitive behaviour,[60] there are preventive steps that can be taken for the same. The first is introducing CCI oversight. Such oversight is recommended by the KPPU too. This could take the shape of placing a member or representative of the CCI on the board of the SRO. Currently, there are five mandated persons on the Board of Directors of the SRO,[61] and the above addition should be made to this. In November, the CCI opened a new wing to deal with anti-profiteering cases under the CGST Act.[62] A similar wing could be opened to deal with the anti-competitive activities of an SRO specifically or the digital economy broadly. The Parliament is looking to table a draft bill to regulate digital competition.[63] CCI oversight over SROs in the online gaming industry could be specifically addressed by it.

Next, the Centre could introduce legislative clarity. The current amendment to the Rules does not address any potential anti-competitive effects. This can be addressed by the Rules themselves or the draft digital competition bill mentioned above. There is also no clarity about how an SRO would be defined under the current Competition Act. Ideally, it should be defined as an agreement, but it needs to be specifically stated. There is also confusion regarding the confluence of State gambling laws and an SRO formed by firms operating on a national or global level. The Centre should unionise laws governing online gaming, if not gambling, to prevent any possible market allocation by SROs.

[58] The Competition Act 2002, s 3(3)(c)
[59] n12, [42]
[60] n4
[61] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (Draft Amendment) 2023 r 4B(d)
[62] Avimukt Dar, 'An Overview of 2022 - A Landmark Year for Competition Law in India' (*Lexology*, 20 February 2023) <https://www.lexology.com/library/detail.aspx?g=eb459d83-e032-4b2d-952a-0349c2806edb> accessed 17 October 2023
[63] Soumyarendra Barik, 'Centre Sets up Committee to Prepare Draft Digital Competition Law' (*The Indian Express*, 7 February 2023) <https://indianexpress.com/article/technology/centre-sets-up-committee-to-prepare-draft-digital-competition-law-8428005/> accessed 18 October 2023

To facilitate all this, the Centre needs to increase the strength of the CCI. They are currently understaffed by their admission.[64] The CCI only consists of six members and a chairperson.[65] To regulate a fluid digital economy adequately and, by extension, an expanding online-gaming industry, the strength of the CCI must be increased. As a whole, the CCI can take these highlighted steps to regulate the growing online-gaming industry and prevent any harmful effects which it might have on competition.

CONCLUSION

The growing world of online gaming can provide the impetus for the Indian digital economy to become one of the biggest in the world. A self-regulatory mechanism can further boost this growth. But, as pointed out, an SRO could have the opposite effect of promoting growth by stifling competition in the market. This is a serious issue and a real possibility which needs to be addressed explicitly by the government. If not addressed, it could cause irreparable harm to the online-gaming industry specifically and the digital market generally. The government can do so by introducing oversight, clarity and sufficiently staffing our competition regulator. The specifics of these measures should be discussed and debated by the Parliament. The technical solution would require an intensive data collection exercise to understand the nuances of the private firms currently dominating the online gaming market. Such measures would go a long way in ensuring a healthy and efficient digital market and not stifling India's growth.

[64] John Samuel, 'Can Understaffed Competition Commission of India Deliver Prudent Judgements?' (*The Economic Times*, 15 August 2021) <https://ecoti.in/3lIsrb> accessed 17 October 2023

[65] 'Institutional Framework' (*The Competition Commission of India*) <https://www.cci.gov.in/contents/institutional-framework> accessed 18 October 2023

Surviving the Duopoly: Threat of Predatory Pricing to Fair Competition in the Marketplace

~Siddharth Deoras and Shruti Tejawani[1]

Abstract

The Indian market has witnessed a growing trend of emerging duopolies, where there have been several instances of dominant companies engaging in anti-competitive practices like predatory pricing to eliminate competition which has become a threat to free competition and consumer welfare. This paper aims to analyse this issue by providing an overview of the current state of duopoly in different sectors in India, highlighting the consolidation of market power among a small number of dominant companies. The paper also delves into predatory pricing, where these dominant companies offer their products and services below cost to eliminate competition from the market.

Next, the paper discusses collective dominance, which refers to a situation where multiple firms collectively have a significant influence in the market and abuse their position. The paper argues that the Competition Act 2002 needs to recognise the issue of collective dominance citing several instances where appropriate action could not be taken against the perpetrators due to the existing limitations in the regulatory framework. Thus, the paper recommends including and recognising collective dominance in the Indian Competition Act as a crucial step towards addressing the issue of predatory pricing by dominant companies and promoting competition in emerging duopolies.

Keywords: Predatory Pricing, Duopoly, Abuse of Dominant Position, Collective Dominance, Anti-Competitive Practices

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Introduction

A flat discount of 60% on their preferred products appeals to everyone. Companies use the strategy of offering lower prices to entice customers. While reducing costs has become an essential aspect of competition, predatory conduct by companies aimed at eliminating rivals remains a conundrum that has baffled antitrust experts for many years. Giant corporations, to dominate the market, offer their products at low prices, even below their cost of production, only to shoot up the prices later. Such cutthroat pricing eliminates rivals from the market, and these big fishes of the pond take advantage by discontinuing the giveaways and overcharging the customers. Other companies in the market experience significant losses and are eventually forced out. As a result, consumers are left with limited options, often only one or two dominant firms in the market who have established their position through such price dumping tactics. Ultimately, consumers bear the brunt of these price wars, which lead to the creation of duopolies in the market.

In a fair and competitive market, the prices of products are established by the natural interplay of demand and supply. The free entry of new players into the market ensures healthy competition, which ensures consumer welfare by providing them with more options and lower prices. The Competition Act[2] (hereinafter, the 'Act') was implemented to regulate anti-competitive behaviour to ensure market freedom and safeguard the interests of consumers. It prohibits predatory pricing as it is intended to impede competition. Although competition regulations aim to prevent corporate consolidation, there is a growing concern about duopolies in our nation's fair markets. Many sectors have limited consumer choices, such as the telecom industry, where only Jio and Airtel dominate or social media, where WhatsApp and Telegram have established dominance. These firms engage in anti-competitive collusions to manipulate the market and maximise profits, often at the expense of consumer welfare.

Although the Competition Act endeavours to uphold market freedom and curb anti-competitive practices, it has failed to address the problem of emerging duopolies engaged in anti-competitive practices like predatory pricing threatening free competition and consumer welfare.

[2] The Competition Act, 2002

The Concept of Predatory Pricing

Predatory pricing is a business strategy dominant market players employ to temporarily lower the price of their products or services below their production cost. This is done to impede competition and increase long-term profits by gaining a first-mover advantage, capturing and influencing market conditions, and eliminating rivals. The primary objective of predatory pricing is to either eliminate a market competitor or hinder the entry of a new player. However, this approach involves high risk, and the predator may have to sacrifice its profits, with uncertain chances of recoupment initially. Predatory pricing is used to increase market power. It is viewed as an abuse of dominance, as the predator can determine the cost without considering its fixed price, resulting in an unfair allocation of efficiency. Furthermore, this strategy can create barriers for new participants or drive them out of the market. Hence, it results in reduced competition, which is harmful to the overall market.

The concept of predatory pricing has been incorporated into the competition law of many countries belonging to the Organization for Economic Co-operation and Development (OECD). However, a common challenge with such legislation is the need for a clear standard to determine whether a market is facing predation.[3] This raises the question of whether selling a product below its cost of production is sufficient to qualify as predatory pricing or whether other criteria should be considered to determine predation in a market.

Prerequisites of Predatory Pricing

Under the Indian Competition Law, predatory pricing is prohibited. It is defined as[4] selling goods or providing services below the cost to eliminate or reduce competition. To establish predatory pricing, it is enough to show that the enterprise holds a dominant position and has been engaged in the practices outlined under Section 4 of the Act. Section 4 of the Competition Act provides list of practices that would per se be abuse of dominant position. Such practices are -

- Imposing unfair or discriminatory prices or conditions during purchase and sale of goods and services which also includes predatory pricing as defined in Section 4 Explanation (b). Section 4 Explanation (b) defines predatory pricing as sale of goods

[3] 'Predatory Pricing' (*OECD*) <https://www.oecd.org/competition/abuse/2375661.pdf>> accessed 17 October 2023*

[4] The Competition Act 2002, s 4(b)

and services at price below cost of production with an intent to reduce competitors in the market.

- Control or limit production of goods and services in the market.
- Control or limit technical or scientific development relating to goods and services to the prejudice of consumers.
- Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- Indulging in a conduct which results in market denial.
- Using dominance in one relevant market to enter into other relevant marketing.

Explanation (a) of section 4 defines dominant position. According to Explanation (a) of section 4, an enterprise enjoys dominant position when its position of strength in the relevant market makes it possible to –

1. Operate independently of its competitors in relevant markets.
2. Affects its competitors or consumers in its favour in the relevant market.

Predatory pricing, or predation, typically occurs in two phases. The first phase involves the firm setting prices for its products or services below the cost of production, resulting in losses. The second phase entails the firm recovering those losses in some manner. However, adding to the list, Mark Isaac and Vernon. L. Smith have given an experiment that determines the prerequisites of predatory pricing[5].

a. **Dominant Position in the relevant market[6]**

Dominant position refers to the level of power and influence an enterprise holds in a specific market, allowing it to operate independently from the competitive pressure in the market. This can have favourable effects on the enterprise, such as influencing consumers or competitors in its favour[7]. However, abusive use of dominant position occurs when the enterprise engages in practices denying access to the market or restricting the production of goods and services in a way detrimental to competition.[8] For example, Google was accused of giving preferential treatment to its own vertical

[5] Sidak J, 'Debunking Predatory Innovation' (1983) 83 Columbia Law Review 1121
[6] Competition Act 2000, s 4
[7] Avtar Singh, *Competition Law* (Eastern Book Company, 2012)
[8] n6

search services in its search results, potentially disadvantaging competing services.[9] Therefore, an enterprise is considered to have gained a dominant position in the market when it has acquired a significant market share that enables it to operate freely without significant competition from rivals, suppliers, or consumers.

b. Deep Pockets that can help during the time of Predation

Predatory pricing, as defined by the Act,[10] refers to selling goods or providing services at a price below the cost. This strategy requires a company to consistently sell its products at prices lower than the standard cost until its competitors are eliminated, resulting in sustained losses. Consequently, only market players with substantial financial resources and capital reserves can withstand such situations, making predatory pricing a tactic effectively utilised by dominant market players. Therefore, when a company intentionally incurs losses to eliminate existing competitors and prevent new entrants from entering the market, it is considered to have engaged in predatory pricing instead of maximising its profits.

c. Excess Production Capacity

When a company engages in predatory pricing, it deliberately sets low prices for its products or services, which leads to an increase in demand. This not only attracts new customers but also entices customers from other companies. As a result, the predatory company must have the excess production capacity to meet this heightened demand. If it fails to do so, the order may surpass the predator's output, creating an opportunity for competitors to re-enter the market.

d. A certain level of entry barrier or restriction in the market

When a firm deliberately operates at a loss for some time to capture the market, it allows the dominant firm to maintain its presence and withstand the competition. This puts pressure on its competitors, who may need more funds to sustain their businesses, ultimately leading them to exit the market. The difference in available resources between the dominant firm and its competitors plays a crucial role in the predatory firm's ability to gain an advantage in the market. The predatory pricing strategy threatens competition as the low prices set by the dominant firm make it difficult for new entrants or similar firms to compete in terms of capacity, given the resources and

[9] 'Google v European Commission Row: What's the Issue over "Vertical Search"?' (*The Guardian*, 19 November 2013) <https://www.theguardian.com/technology/2013/nov/19/google-european-commission-row-vertical-search>> accessed 17 October 2023

[10] The Competition Act 2000, s4

costs involved. The dominant firm's advantage in terms of price and resources puts potential competitors at a disadvantage and may discourage them from entering or continuing in the market.

Rules for Assessing Predatory Pricing

Assessing predatory pricing can be challenging due to the ambiguity surrounding the intent behind a firm's lower prices. It is still being determined whether the lower prices aim to eliminate competitors, maintain market share, or clear dead stock through hefty discounts. As a result, nations have developed various tests to monitor and identify instances of predatory pricing, as having standardised criteria can aid in identifying and penalising firms engaged in such schemes.

The First Rule: No Rule

Frank H. Easterbrook has elucidated the "no rule" concept in predatory pricing.[11] The author argues that it becomes challenging to differentiate between predatory behaviour and legitimate competition in the market, as low-cost products can also benefit consumers. Anti-trust laws are designed to prioritise consumer welfare, and if a firm offers products at competitive prices that maximise consumer welfare, it may not be considered predatory pricing. Setting prices below the average cost may indicate market manipulation by the firm. Still, it also depends on various market factors, such as changes in demand, supply, and production costs. In some cases, firms may sell products below cost due to reduced production costs resulting from increased market demand.

Easterbrook suggests that predatory pricing may not concern competition policy officials, as they must consider whether it harms consumers or leads to monopolistic practices. The author argues that predators may not achieve their goals through predatory pricing, as it would take years to recoup losses, and consumers may only demand products at low prices compared to rivals.[12] Predators can only recoup losses by achieving a monopoly, and their strategy may fail if a rival firm can sustain the market and offer competitive prices. Predators can only succeed if they create entry barriers that competitors cannot overcome.[13] It is further argued that if a firm incurs losses and does not acquire market power after providing low-cost products, there may be no need for government intervention to check predatory pricing. This concept is known

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[11] 475 U.S. 1 (1985)

[12] Kaplow L, 'Recoupment and Predatory Pricing Analysis' (2018) 10 Journal of Legal Analysis 46

[13] Charles F. Wilkinson, 'The Public Trust Doctrine' (1980-81) 14. U.C. Davis L. Rev.

as the "no rule", as it depends on factors that may not be achieved by the predatory firm and may not necessarily concern competition or consumer welfare but rather the losses incurred due to such a strategy.

The Second Rule: Short-Run Cost-Based Rule

The second rule of the short-run cost-based test, also known as the "Areeda-Turner test", suggests that a price will be considered predatory if the dominant firm's price falls below the Average Variable Cost (AVC) divided by all its variable costs by its output[14].

They prioritise short-run costs over long-run efficiency, believing that long-run efficiency is too speculative.[15] They target firms that are at least close in efficiency to the predator firms. They argue that these firms can sustain price limiting in the short run but create competition for other firms in the long run, which may need to be able to compete and support like the predator firm. This indicates that the firm has engaged in a predatory pricing strategy. They further argue that if a predator firm does not hold market power due to predation, it cannot achieve desired profits.[16] They also suggest a "per se" rule of pricing, which states that prices that maximise the firm's profit or minimise loss are considered legal. This rule applies to prices above the average production cost, even if they do not maximise profits in the short run. In this case, even if there is no gain, only less efficient firms that cannot switch will be prevented from entering the market.

Areeda and Turner classify prices below the marginal cost as predatory, while prices above the marginal cost but below the average cost are considered legal. In 1975, they extended this cost test to the average variable cost, stating that prices above or at the anticipated average variable cost would be permitted per se, while prices below this threshold would be considered illegal. This rule also prevents firms from adding additional charges, such as advertising, from meeting competitors' promotions or new entrants to meet the average variable costs. Areeda and Hovencamp argue that the "meeting competition defence" by the predatory firm would be illegal.[17]

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[14] Areeda P and Turner DF, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697

[15] ibid

[16] Dugar SM, Pasayat A and Kumar S, *Guide to Competition Law: Containing Commentary on Competition Act, 2002, MRTP Act, 1969 and the Consumer Protection Act, 1986* (LexisNexis 2016)

[17] Areeda P and Hovenkamp H, *Antitrust Law: Ban Analysis of Antitrust Principles and Their Application* (Wolters Kluwer Law & Business 2013)

Subsequently, the authors revised the "per se rule" by replacing the standard of per se legality with a presumption of legitimacy.[18] Under this new rule, prices above the total cost would still be considered legal, but any price below the average cost would be considered illegal per se. However, there is some ambiguity as predatory firms could argue that price changes were due to market forces such as changes in demand or decreases in production costs or as a response to competition. Areeda and Turner would permit multi-market firms to use this defence, arguing that the firm was not dominant in a particular market.[19]

Critics of this test argue that it is overly stringent and relies heavily on "cost-price analysis," making it challenging to establish whether predation has occurred. Proving that a predatory firm will be able to recoup its losses in the distant future and attain a dominant position in the market is difficult, especially considering the various strategies and defences that predatory firms can use, such as claiming to be "meeting the competition" or adjusting prices based on product demand, as costs are often inversely related to the market.

The Third Rule: Long-Term Cost-Based Rule

Richard Posner proposed an alternative approach to test predatory pricing by examining the firm's long-term viability. He argued that short-term costs might not be reliable indicators, as predatory firms can drive equally competent or more efficient firms out of the market by setting prices that result in unsustainable losses in the short run.[20] To overcome the challenge of determining marginal costs, predatory firms could substitute average costs from their balance sheets,[21] as suggested by Posner. Joskow and Klevorick proposed a "two-tier" rule, which considers the market structure as a determining factor in assessing predation to clarify this approach further.[22]

Joskow and Klevorick propose a two-step approach to evaluate predatory pricing. The first step involves assessing the predatory behaviour. This assessment considers three key components: the short-run monopoly power, conditions of entry, and the dynamic effects of competitors and new entrants.[23] To determine whether a firm possesses short-run monopoly power, factors such as price elasticity of demand and the market share of the firm must be examined. High market

[18] Phillip Areeda, Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Little, Brown 1986)
[19] n16
[20] Siegfried JJ and Posner RA, 'Antitrust Law: An Economic Perspective' (1978) 44 Southern Economic Journal 691
[21] ibid
[22] n16
[23] ibid

share and inelastic demand can indicate that a firm has the ability to temporarily raise prices above competitive levels. The conditions of entry or the ease or difficulty with which new competitors can enter the market is another crucial factor. Entry conditions are determined by various elements including capital requirements, consumer preferences, sequence of entry, and information about market risks.[24] High barriers to entry can discourage potential competitors. The third component considers the dynamic effects of competitors and new entrants. If predatory pricing discourages potential entrants and leads to exit by existing competitors, it may suggest anticompetitive behaviour. In this step, the authors suggest considering a "no-pricing rule" and all price cuts. This means that antitrust authorities should monitor and investigate all price cuts made by alleged predatory firm. This rule emphasizes vigilance in scrutinizing any and all instances of price reductions that could harm competition. The second tier of Joskow and Klevorick's rule states that any price below the average cost or between the average variable cost would be considered prima facie predatory pricing. However, any price above the marginal cost would be deemed legal only if the price cut is not due to new entrants in the market.[25]

By adopting this two-tier approach, antitrust authorities can better evaluate predatory pricing by taking into account not only cost-related factors but also broader market context.

Zero Pricing

The zero pricing strategy is when a business offers its products or services at no cost to customers, absorbing the expenses. Firms often use this approach to establish a presence in the market and build a customer base by providing free products or services. Although customers may perceive this as a beneficial offer, as they get something for free, the business may eventually start charging higher prices than the usual market price once it has acquired a significant customer base. Using the zero pricing strategy, the company aims to establish itself in the market and reduce competition, even though it may incur losses initially. This strategy makes it challenging for new entrants to compete with customers' expectations of free products or services. This raises the question of whether zero pricing can be considered predatory.

In the case of the *MCX Stock Exchange,*[26] the tribunal found that the National Stock Exchange (NSE) had waived the market price to gain an advantage in the Currency Derivatives market

[24] ibid
[25] ibid
[26] *The National Stock Exchange of India v CCI* 2014 Comp LR 304

by offering it at zero pricing. The tribunal further stated that for NSE to sell its Currency Derivatives below the average variable cost, its total variable cost must be zero. This case drew upon the European point of *R v Hoffman,*[27] which stated that prices could be considered abusive if they are below the average total cost but above average variable costs. It was also noted that NSE could not justify offering its services for free when expenses such as workforce and resources need to be incurred.

In the case of *WhatsApp,*[28] it was alleged that the company had acquired a dominant position in the market due to its free services and could engage in predatory pricing. However, the Commission determined that expanding competitors' businesses meant that entry barriers could not be alleged. Additionally, although WhatsApp held a dominant position, there was no substantial evidence of predatory pricing. Consumers also had the option to switch to other competitors due to price differences.

Non-Price Predation Method

This method is contrary to the predatory pricing method. In this method, the predator firm imposesincreased costs on the rivals. Here, the general cost rises disproportionately with the decrease in output. Another way a predator firm raises the price of competitors is by sham court cases or the misuse of governmental power, and the firm starts to pay more on the cost. Ultimately, it increasesthe prices that benefit the predator by imposing predatory pricing on the rivals. Two conditions are required to identify non-price predation, i.e., the increase in the costs of the rival firms and the decrease in the output that the rival firm finds challenging to sustain in the market.

In the noted case of *JCB India Ltd,.*[29] the Commission assessed the topic, which was made by an informant before the High Court of Delhi. The Court held that the case by JCB was sham litigation alleging its right on the design was filed to harass and prevent the launch of its mark "BULL SMART", which would have been competing with backhoe loaders of JCB in the relevant market. It was further held that JCB is using its dominant position in the relevant market to stifle the competition in contravention of Section 4 of the Act.

The Concept of Duopoly

[27] *R v Hoffman La Roche v Cipla Ltd.* (Delhi High Court, 1981)
[28] *Re Vinod Kumar Gupta and Whatsapp Inc.* (Competition Commission of India, 2017)
[29] *Bull Machines Pvt. Ltd. v JCB India Ltd.* (Competition Commission of India, 2013)

A duopoly is a market structure characterized by two equally competent firms competing to provide products and services to a large number of buyers. It falls under the category of oligopoly, but with only two dominant sellers who have the power to set prices and determine production levels. In a duopoly, the actions of both firms are interdependent and impact each other's business strategies. They influence each other's product offerings and services, as an upgrade or change by one firm can affect the other's operations.[30] This mutual dependence leads to heightened competition between the two firms, prompting them to constantly monitor and respond to each other's policies to sustain their market position. For instance, if one firm reduces its prices, the other firm may need to adjust its costs as well to retain its customer base, as consumers may be more drawn towards lower-priced goods and services.

Characteristics of Duopoly

1. **Two Sellers:** The seller or producers in a duopoly market are two in number. This gives higher bargaining power to the producers as the consumers are plenty in number depending on these two producers.
2. **Interdependence of producers:** One notable characteristic of a duopoly market is that the producers mutually depend on each other. This means that the actions taken by one firm will significantly impact the decisions and strategies of the other firm.
3. **Collusive behavior of firms:** As only two firms are in the market, they often engage in collusion, meaning they cooperate to raise profits by manipulating market conditions.
4. **Fierce competition:** Despite the limited number of firms in a duopoly, they fiercely compete with each other in various aspects to maintain their market share and protect their customer base.
5. **Substantial monopoly power:** Due to the market being divided between the two firms, one firm may have a monopoly-like situation with loyal customers for its differentiated product.
6. **Entry barriers:** The dominant firms in a duopoly market create barriers to entry for new competitors, making it challenging for them to enter and compete in the market.
7. **Economies of scale:** Since the duopoly firms produce at a larger scale and have a significant customer base, they enjoy economies of scale, resulting in cost advantages compared to smaller competitors.

[30] 'What is Duopoly' (*SendPulse*, 22 March 2023) <https://sendpulse.com/support/glossary/duopoly>> accessed 18 October 2023*

Emerging Duopolies in India

Monopolistic practices at an international level can take various forms, but in India, it manifests as a duopoly, where only two companies dominate the market. This creates challenges as these firms appear to be competing, but in reality, they collude to fix prices or control output to the market.[31] This was evident in the case of Coca-Cola and PepsiCo a decade ago, when smaller soft drink companies struggled to survive in India against these global giants. The situation persists today, with Pepsi and Coke constantly vying for market dominance. Similar scenarios had arisen with Myntra, Jabong, and Snapdeal when Amazon captured a significant share in the market, resulting in lower prices for products available on Amazon compared to these sites.[32] With Zomato acquiring Uber Eats,[33] the only two players in the market are Swiggy and Zomato. Duopoly has been a recurring pattern in the market, where companies with substantial financial resources tend to offer discounted services initially to penetrate the market but quickly shift their focus towards profitability to streamline costs and assert market dominance. These companies often create a façade of competition, but in reality, they collaborate, coordinating price strategies and working together to gain prominence in the market, "two giants control the narrative and essentially play ping pong."[34]

1. **Telecom Sector (Jio v. Airtel)**

India has a large population and a significant telecom sector which once had twelve operating companies. However, there has been a drastic decline in the last decade, resulting in only four major players. This decline was further exacerbated by the merger of Vodafone and Idea, resulting in the rise of a duopoly in the Indian telecom sector, with Airtel and Jio holding the prominent market share.35

In 2016, when Jio made its entry into the Indian telecom sector with its policy of offering free SIM cards and data, it had a significant adverse impact on competition. Established players like BSNL and Vodafone faced challenges and are grappling with significant financial crises. This shift in pricing policies has led to a duopoly in the market, with Airtel

[31] 'Dissecting India's Age of Duopolies' (*Forbes India*) <https://www.forbesindia.com/article/leaderboard/dissecting-india039s-age-of-duopolies/57403/1> accessed 18 October 2023*

[32] ibid

[33] 'Zomato Acquires Uber Eats in an All-Stock Transaction' (*The Economic Times*) <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/zomato-acquires-uber-eats-in-an-all-stock-transaction/articleshow/73465982.cms> accessed 18 October 2023*

[34] n29

[35] 'Virtual Duopoly in Telecom Sector' (*Finology*) <https://blog.finology.in/recent-updates/virtual-duopoly-telecom-sector> accessed 18 October 2023

and Jio holding the majority of the market share and more than 80% of users preferring these network providers over others.

With the decline of several network providers, India is now facing a duopoly with several implications for market competition, as these firms have the power to set prices. As a result, new entrants may face challenges in entering the market and making significant investments to sustain their operations. This can lead to limited technological upgrades and lower-quality services at higher prices for customers.

The Competition Commission of India has expressed concerns about the potential duopoly in the Indian telecom sector. Telecom service providers have been engaging in non-price competition agreements with Over the Top (OTT) platforms that offer broadcasting and other services to consumers. The Competition Commission has determined that these agreements violate the provisions of Section 3 and Section 4 of the Act, which prohibit anti-competitive agreements and predatory pricing by firms that have attained a dominant position in the market. As a result, the Competition Commission of India has formulated frameworks for OTT and telecom service providers to align with the objectives of the Act.[36]

2. Online Food Delivery Platforms (Swiggy v. Zomato)

In the past five to six years, India has witnessed a rapid change in the food consumption habits of its citizens. Whether it's a house party or late-night work at the office, people now prefer ordering meals rather than searching for a place that offers their desired cuisine. On New Year's Eve of 2022, both Swiggy and Zomato, the giants in the food delivery market, crossed 2 million orders each, marking the highest number of orders on a single day to date.

Recently, in the case of *National Restaurant Association of India (NRAI) v Zomato Limited and Others,*[37] NRAI has argued that Swiggy and Zomato combined hold over 90% of the market share in the food delivery market (the relevant market after Zomato's Acquisition of UberEats). This has enabled them to create appreciable adverse effects on competition through their agreements. It has been further contended that these firms have established a dominant position in the market, as evidenced by a lack of significant entry by new players in the past three years. These firms' access to funding has also created an entry barrier in the market. Additionally, their collection of customer data from past orders through emails, texts, and social media websites and the unilateral agreement with restaurant partners with termination clauses that provide sole termination rights to Zomato and Swiggy without cause

[36] ibid

[37] National Restaurant Association of India v Zomato Ltd. and Ors. (Competition Commission of India, 2021)

at any time further solidifies their position of strength in the market.[38]

The Competition Commission of India issued an order stating that the submissions made by both parties do not constitute prima facie indicate any adverse effects on competition. However, the Competition Commission of India has directed the Director General to conduct further investigation to determine whether the actions of the food delivery giants are in contravention of the Provisions of the Act under Section 3 and Section 4, which relate to anti-competitive agreements and abuse of dominant position, respectively.

3. Online Retail Market (Flipkart v. Amazon)

Be it an academic book or small daily-use equipment, we prefer to order online in our comfortable space. Now and then, there is a solution if it is not available on Amazon, it must be on Flipkart or vice-versa.

Competition Commission of India conducted a market study on e-commerce in India, revealing a widespread consensus among sellers and service providers across all categories that online discounts are the primary factor influencing competition. A significant majority of sellers and service providers indicated that metrics of price and discounts increasingly shape consumer preference. While lower prices may benefit consumers in the short term, the growing emphasis on discounts poses a potential risk to competition in non-price aspects such as quality and innovation, which could negatively affect consumer interests in the medium to long term[39]. The study[40] also revealed the platform price parity clause as a major issue with e-commerce platforms. A platform enforces a price parity clause prohibiting sellers or service providers from offering their goods or services at lower prices on other platforms. The platform contractually imposes this clause on sellers or service providers to ensure that the platform itself offers the lowest price.[41]

In *Re: Delhi Vyapar Mahasangh and Flipkart Internet Pvt. Ltd and Ors*.[42], Delhi Vyapar Mahasangh (hereinafter, 'DVM'), a union of micro, small and medium enterprises, alleged that both Flipkart and Amazon had been involved in vertical agreements with selected sellers, resulting in the exclusion of other non-preferred sellers or traders from these online marketplaces. Such conduct is in direct contravention of Section 3(1) and Section 3(4) of the

[38] ibid
[39] 'Competition Commission of India, Government of India' (*Competition Commission of India*) <https://www.cci.gov.in/economics-research/market-studies/details/18/6>> accessed 18 October 2023*
[40] *National Restaurant Association of India v Zomato Ltd. and Ors,* (Competition Commission of India, 2021)
[41] Ibid
[42] *Re: Delhi Vyapar Mahasangh and Flipkart Internet Pvt. Ltd and Ors*, (Competition Commission of India, 2019)

Act. These platforms were also accused of offering deep discounts and inventory advantages and collecting consumer data. They are able to allow pricing below cost due to substantial funding received from investors creating high entry barriers and capital costs for a new entrant in the market. Flipkart and Amazon comprise the bulk of the online retail market in India, holding 53% and 36% of the market share, respectively. Hence, jointly dominate and abuse their dominant position in the market.

The Competition Commission of India, concerning the above contentions, directed the Director General to investigate the matter to determine whether the conduct of these online platforms is in contravention of the provisions of the Act.

4. **Cab Services (Uber v. Ola)**

With their affordable and convenient taxi services via online app-based platforms, the emergence of Ola and Uber has led to a substantial migration of passengers from traditional transportation methods to these innovative services. Through attractive discounts for passengers and driver incentives, Ola and Uber now collectively dominate nearly 95% of the cab-hailing market in metropolitan areas.[43]

5. In *Uber v Competition Commission of India*,[44] it was alleged that Uber provides high discounts to consumers and unreasonably high incentives to their drivers to squeeze competition. The Supreme Court held that the amount of incentive Uber provides to its driver exceeds its charges from the customers. Uber is losing Rs. 204/- per trip, which only makes economic sense as believing that Uber intends to reduce competition. It is a *prima facie* case contravention of Section 26(1) and Section 4 of the Act. It is clearly a case of predatory pricing and abuse of dominant position.**Stock Market (MCX Stock Exchange Ltd. and Ors. v National Stock Exchange of India)**[45]

The Competition Commission of India conducted a thorough examination of various concepts such as "dominant position," "relevant market," predatory pricing, and "abuse of dominant position" in the context of stock market services, specifically concerning the National Stock Exchange (NSE). The MCX Stock Exchange Ltd. (MCX-SX), which operates as a currency

[43] 'Do Smaller Cab Aggregators Have a Shot against Ola-Uber Duopoly?' (*VCCircle*) <https://www.vccircle.com/do-smaller-cab-aggregators-have-a-shot-against-ola-uber-duopoly>> *accessed 18 October 2023**

[44] *Uber v Competition Commission of India*, (Supreme Court of India, 2021)

[45] *MCX Stock Exchange Ltd. And Ors. v National Stock Exchange of India* (Competition Commission of India, 2009)

derivatives trading platform, accused NSE of engaging in anticompetitive conduct that violated the Competition Act of 2002. MCX-SX alleged that NSE eliminated competition from the currency derivative segment (CD Segment), discouraged potential entrants through leveraging and waiver of fees, and used exclusionary devices to hinder competition.

The background of the case involves MCX-SX being approved by the Securities Exchange Board of India (SEBI) under Section 4 of the Securities Contract (Regulation) Act of 1956 (SCR Act of 1956) as a publicly-traded company operating an exchange platform for currency derivatives traders. MCX-SX is promoted by Financial Technologies of India Ltd. (FTIL) and MCX-SX. FTIL specializes in creating and selling software for the financial and securities markets, with its flagship product marketed under the brand name 'oDIN' being widely used by NSE, BSE, and IP companies.

NSE, established in November 1992 and recognised as a stock exchange in April 1993 under the SCR Act of 1956, operates in various segments, including the CD segment. NSE partially owns Omnesys, a software developer for the financial and security industries, through its wholly-owned subsidiary DotEx, and introduced a new software called 'NoW' to replace FTIL's 'oDIN.' After acquiring a stake in Omnesys, DotEx offered NSE members 'NoW' free of charge for the subsequent year through individual communication.

MCX-SX alleged that NSE violated sections 3 and 4 of the Competition Act of 2002 by engaging in anti-competitive agreements and abusing its market dominance to eliminate competitors. The fee waiver for one year and the requirement of a low deposit level in the CD segment were cited as examples of NSE's anti-competitive behavior. Additionally, FTIL was denied access to the CD Segment APIC (Application Programming Interface and Communication) by NSE, preventing users of 'oDIN' from connecting to NSE's CD Segment. Notably, NSE did not levy any admission fees for CD Segment membership.

The issues involved in the case include determining the relevant market in the context of the Competition Act of 2002, whether NSE holds a dominant position in the relevant market, whether NSE is abusing its dominant position, and whether there is a leveraging of monopoly. The Competition Commission of India conducted its analysis as follow.

The Competition Commission of India referenced the report of the internal working group of the RBI,[46] which recommended the clear separation of the CD segment from other segments in any stock exchange. Drawing on this report, the Competition Commission of India concluded

[46] Reserve Bank of India, *Report of the Internal Working Group to Review the Liquidity Management Framework* <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=944> accessed 17 October 2023

that stock exchange services for the CD segment constitute a separate and distinct relevant market. This determination considered the fundamental differences in the underlying assets, such as equities and currencies, and that the trading platforms for these two types of products are not interchangeable or substitutable.

The Competition Commission of India investigated NSE’s market share and activities in multiple areas. It noted that NSE exhibits a high degree of vertical integration, encompassing its trading platform, front-end information technology, index services, and other aspects. Considering the provisions of Section 4 and Section 19(4) of the Act, the Competition Commission of India concluded that NSE holds a dominant position in the relevant market and possesses significant market power.

The Competition Commission of India reviewed the previous circulars issued by the National Stock Exchange (NSE) and found that the informant had been exempted from transaction costs from the outset. In contrast, the NSE's conduct in this regard was inconsistent. Although the Competition Commission of India did not find conclusive evidence to establish that the NSE consistently pursued a fee waiver policy in the nascent market, it concluded that the NSE's practice of offering zero pricing in the relevant market was unfair and constituted destructive pricing.

According to the Competition Commission of India, the NSE's strategy of not imposing transaction fees in the CD segment, which is open to competition, was a form of subsidisation that used monopoly earnings to strengthen its position. The Competition Commission of India also noted that the NSE's refusal to provide access to its Automated Price Improvement (APIC) feature in its 'NOW' program imposed restrictions on consumers of DIN software. Furthermore, the Competition Commission of India observed that IBM, the NSE's parent company, was leveraging its dominance in the non-CD segment to protect its position in the CD segment.

The Competition Appellate Tribunal provided its analysis by stating that the competition commission had outlined key concepts of competition, including relevant market, dominance, abuse of dominance, SSNIP test, predatory pricing, and monopolistic leveraging, in its order. However, it noted that the Competition Commission of India's investigation in this complex situation could have been more comprehensive and rigorous. The Competition Commission of India showed hesitation in addressing the issue of predatory pricing, as raised by MCX. It is essential for the Competition Commission of India to provide detailed guidelines on how penalties are to be computed and under what circumstances penalties may be increased or decreased.

Once the relevant market and dominance boundaries have been established, the subsequent

crucial inquiry is whether the alleged activities constitute an abuse of dominance or a violation of Section 4. According to MCX, NSE's actions can be classified as predatory pricing, an exploitative practice that firms with a dominant position in the relevant market can only undertake.

The first goal of predatory pricing is to acquire and dominate market terms. NSE argued that since it does not incur any "variable cost" for running the CD Segment, the notion of pricing below cost, i.e., predatory pricing, does not apply, and the cost should be considered as an average variable cost. However, the Director General Report, in this case, examined the variables considered by other jurisdictions, legal precedents from various sources, and diverse studies to assess the concept of predatory pricing.

NSE's defense of the embryonic market was entirely dismissed, and the act of waiving transaction costs, entrance fees, and data fees expenses were found to be a breach of Section 4 of the Act. The Competition Commission of India concluded that NSE's practice of offering zero pricing was a blatant form of leveraging that aimed to impede potential rivals from accessing the market and hinder current competition, which was deemed unfair from a competition perspective. The argument of penetrative pricing falls apart as it may be understandable for the initial months but not for three years, indicating a possible strategy to capture the market. Hence, the above-mentioned case studies highlight the widespread existence of duopoly in different sectors of the Indian economy. Although a duopoly can benefit firms by allowing them to maximize profits with limited competition, it can pose risks to consumers with no other options but to depend on these firms and comply with their terms and conditions. Moreover, duopolies can create trade barriers and restrict consumer choices, further amplifying the potential drawbacks of this market structure.

As exemplified by the *Uber Case,*[47] where the company was accused of engaging in predatory pricing by Competition Commission of India, it is evident that the prices set were unreasonably low, with no valid economic justification other than driving competitors out of the market. In such duopoly scenarios, customers may compare prices, but their choices are limited to these two dominant firms; these firms have the ability to dictate prices that can impact the entry of any potential competitor into the market. If other sellers do not align their prices with those set by these dominant firms, they risk losing customers and the worst case, being forced to exit the market.

Hence, it can be inferred that predatory pricing arises in the context of a dominant relevant

[47] *Hemant Sharma v Union of India* (Supreme Court, 2012)

market. Firms may first establish a dominant position and then engage in predatory pricing, or in some cases, they may resort to predatory pricing even before attaining a dominant market position.

Recommendations and Way Forward

The major obstacle Competition Commission of India encounters pertains to accurately predicting instances of predatory pricing and abuse of dominant market position. As Per the Act, informants are empowered to lodge complaints against enterprises that engage in such practices. However, suppose an informant falsely alleges such misconduct. In that case, it can adversely impact the reputation of the accused firm and result in frivolous litigation and court proceedings, causing a waste of time and resources for both, courts and the business.
During his keynote speech,[48] the chairman of Competition Commission of India highlighted the issue of duopolies in the Indian digital economy, where a few players control a significant market share. These digital giants exercise exclusive control over search engines, retail markets, social media applications, and network marketing infrastructure while providing direct-to-consumer services that compete with independent retailers. As a result, consumer demand and supply are now reliant on these platforms. "Apart from these, significant conundrums are associated with Big Data. Tech giants like Google and Amazon have so much customer data that they always have an advantage over competitors, which can lead to barriers for new entrants in the markets. Due to huge chunks of customer data, they can always track a customer's need and work accordingly. Further, the rise of artificial intelligence will increase the economy's dependency on data. Algorithms can be used in a complex manner, making it hard to track data regarding the competition rules. The EU also considers "big data" as a structural barrier to entry into the market."[49]

An approach to addressing the issue of duopoly could be the inclusion of collective dominance in the legal framework. Currently, the Act only acknowledges dominance by a single entity and does not recognize the possibility of multiple entities jointly holding and abusing dominant market positions.

[48] Basu Chandola, 'Supreme Court of India Upholds Investigation against Uber' (*Kluwer Competition Law Blog*, 18 September 2019) <https://competitionlawblog.kluwercompetitionlaw.com/2019/09/18/supreme-court-of-india-upholds-investigation-against-uber/>> accessed 18 October 2023*
[49] Forum AIL, 'Gmail and Google Meet: Lacunae in Section 4 of the Competition Act,2002' (*ALL INDIA LEGAL FORUM*, 29 April 2021) <https://allindialegalforum.com/2021/04/25/gmail-and-google-meet-lacunae-in-section-4-of-the-competition-act2002/>> accessed 18 October 2023*

Collective dominance refers to a situation wherein two or more enterprises jointly hold the position of dominance in the recognized market. Abuse of such collective dominance is observed when such multiple undertakings, who may individually hold minimal market share, from such common conduct or relationships that they act together in a way that there is no effective competition between them, at the expense of other competitors.[50] Article 102 of the Treaty on the Functioning of the European Union encompasses the concept of abuse of dominance by “one or more undertakings”[51]. In *Italian Flat Glass Case*[52] the Court ruled that “*there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators in the same market.*”

The Competition (Amendment) Bill of 2012[53] proposed the concept of collective dominance by expanding the scope of Section 4 of the Act. However, it could not become an Act. This gap in the Act has had severe consequences, as there have been several instances where action could not be taken against entities abusing their dominant position. In the DVM Case,[54] Competition Commission of India noted that the Act does not recognize the concept of collective dominance. Similarly, in *Neeraj Malhotra v. Deutsche Post Bank Home Finance,*[55] the Competition Commission of India observed no contravention of Section 3 or Section 4 of the Act since none of the banks or financial institutions single-handedly dominated the market. From the above cases, it becomes apparent that the existing loophole in the legal framework allows these dominant firms to evade liability with ease. Despite the fact that these firms may not hold a dominant position in the market individually, they engage in collusive practices to jointly establish and maintain their dominance. This collusion enables them to manipulate the market, resulting in anti-competitive behavior that may harm consumers and hinder fair competition.

[50] Srishti Kaushal and Diya Vig, ‘Abuse of Collective Dominance: Need for Recognising the Concept in India’ (*RFMLR*, 30 May 2022) < https://www.rfmlr.com/post/abuse-of-collective-dominance-need-for-recognising-the-concept-in-india> accessed 18 October 2023

[51] Ibid

[52] Italian Flat Glass [1992] European Court Reports 1992 II - 01403

[53] ‘The Competition (Amendment) Bill, 2012’ (*PRS Legislative Research*, 18 October 2023) <https://prsindia.org/billtrack/the-competition-amendment-bill-2012>> accessed 18 October 2023

[54] n41

[55] *Neeraj Malhotra v Deustche Bank* (Competition Commission of India, 2010)

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