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# Abuse of Dominance by the E-Commerce Sector: An Overview

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## ABSTRACT

*This article, deals with the fact how the E-commerce sector has entrenched itself in the well established physical market and has made itself a dominant portal of marketing in this era. Today everyone has at least purchased any product once from this sector. Every person has been continuously participating through this platform of marketing from their stand. This paper seeks to study the ally between the Competition Law and the E-Commerce sector keeping in view the expanded acceptance of the idea of virtual shopping. It is perceptible enough that E-Commerce has been continuously encouraging profuse sets of anti competitive issue and accordingly calling for heed of the Competition Commission of India. Thus, this makes compulsorily to analyse this working strategy of this E-Commerce sector with respect of the provisions of the Indian Competition Act, 2002. In this facet, the authors have tried to clarify and explain the concept of dominance and its abuse along with bewildering the enormous practices resulting to the abuse by the E-Commerce Sector.*

***Keywords:*** *Relevant Market; E-Commerce; Dominance; Competition Commission of India, Abuse of Dominant Position.*

## I. INTRODUCTION

### (A) Market

A market is an area, within which the demand and supply forces come together to create a single price. The term market not only refers to a place where commodities are simply bought and sold, but also the region where sellers of the same product meet together and fix a common price.

It refers to a social institution that facilitates the exchange of commodities between the buyers and the sellers.Thus in a very general term we can say that Market is place where buyers and sellers meet and interact to purchase a product or service in exchange of consideration.

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### (B) Marketing

After the World War II, a variety of products were developed by industries and sellers could no longer rely on hard selling to generate sales. Also, with the increased income sources, customers started to choose only selected products based on their changing and accessible means.

This gave a rise to a common question among the sellers such as:

1. What do customers want?
2. Can we develop the product while they still want it?
3. How can we keep our customers satisfied?

This confusion among sellers led to adopt them the concept of marketing which involves focussing on the needs of customer before the product is developed, regulating all the functions of the company to focus on customer’s needs and achieving a profit after successfully satisfying customer needs for a longer period.

The main purpose of marketing was to satisfy customer needs but no one neglect a customer issue and instead everybody started focussing their customer satisfaction.

In simple words; marketing refers to a process in which a person gets to a market with the intent to sell goods.

## II. RELEVANT MARKET

As per Competition Act, 2002, applicable market implies “the market which might be resolved to the pertinent item market or the significant geographic market or the reference to both the markets[3]”.

Subsequently fundamentally there are two kinds of significant market-Relevant Product and Relevant Geographic Market.

1. Relevant Product Market: “A market including every one of those items or administrations that are exchangeable or substitutable by the consumer[4]”.
2. Relevant Geographical Market: “A market including the territory wherein the states of rivalry for supply or interest of products or administrations are unmistakably

[3] Sec 2(r) of Competition Act, 2002
[4] Sec. 2(s) of Competition Act,2002

homogenous and can be recognized from the conditions winning in the adjoining areas[5]".

**Factors in determination of relevant product market by CCI**

- "Physical qualities or end utilization of products.
- Price of products or administrations
- Consumer inclinations
- Exclusion of in-house creation
- Existence of specific makers
- Classification of mechanical items
- Regulatory exchange obstructions
- Local particular prerequisite
- National obtainment arrangements
- Adequate appropriation offices
- Transport costs
- Language
- Consumer inclinations
- Need for secure or normal or fast supplies after deals administration"

**The 4P's of Market**

The 4P of the market alludes to those key factors that are associated with the promoting of a decent or administration. The 4P's represent: (I) Product (ii) Place (iii) Promotion and (iv) Price

This thought of promoting items and focusing on buyers was first advocated by Neil Borden. He was a publicizing educator at Harvard University. He composed an article named "The Concept of Marketing Mix", which showed the various manners by which an organization could use to focus on their clients.

**(i) Product**

By and large we as a whole know that what does an item mean; i.e., any ware or any article or the outcome which ranges to the clients through market is an item.

[5] Sec.2(t) of Competition Act, 2002

In this way, item is something actual/article or any help that is offered to a customer. It incorporates the assurance/warrantee that is related with the item.

(ii) **Place**

It means that when a product is manufactured, the company does the research process as to which geographic area should the product be launched depending upon the demographic condition of that area.

The ultimate goal of every organisation is to earn profit and make their product reach every corner of the world.

It is not necessary that this should be real market place i.e., a particular area or anything; this includes the virtual placements too. And in this contemporary world virtual placement of products has turned to be a very significant approach of marketing to attract customers.

This paper will wholly be discussing about the virtual platforms of market and their abuse of dominance.

(iii) **Promotion:**

It is the process of reaching, communicating and thus selling the final products to the potential customers. Generally, marketers tend to build a bridge between the promotion and placement elements so that by bringing these two together, they can simply and easily target their core customers. Promotion decisions involve advertising, public relations. Media types etc whether be virtual or real.

(iv) **Price:**

The final and the most important factor of marketing is the pricing strategy. It refers to the amount which the customer pays for the product. Pricing decisions is the more important aspect when it comes to target customers.

It should be made keeping in mind the class of targeted people which the company has made the product, the company's marginal profit, pricing response of the competitors etc.

The different type pricing strategies are:

- **Penetration Pricing/ Predatory Pricing**: In this type of pricing, the company first sets a very low price to increase sales and market share and once the market gets captured, it increases the product price. This method of pricing is just to wipe out the existing competition from the market and establish its dominance and at last leads to the abuse of its dominant position.

Ex: Tata Sky- it initially set a very low price to get its subscribers and after capturing the market it gradually increased its price.

Another vital example we can take is of JIO.

JIO launched itself in the year 2016 and was free of cost available to the customers. In order to capture the mobile industry this was the strategy adopted by Reliance group of industry. Once it wiped out all the competition from the market, it increased its tariff.

- **Skimming Profit:** In this type of pricing strategy, the company at the first instance sets a high price and then slowly lowers down the price to make the product availability at a wider market. In this type of pricing strategy, the organisation's aim is to skim profits of the market layer by layer.

- **Premium Pricing:** This type of pricing strategy is adopted by the organisation to show the peculiarity or the exclusiveness of their products. Examples of organisation who adopted this pricing strategy are: Harrods, First Class Airlines Services, Porsche etc.

- **Cost Plus Pricing:** This kind of pricing the product is generally and widely adopted by the organisation. In this, they add a profit margin to their product and with that final pricing the product are made available for sale in the markets for the customers.

## III. E COMMERCE SECTOR: A BASIC INTRODUCTION

The electronic commerce or widely known as e-commerce means the sales and purchase of any product (be it goods or service) through an electronic medium such as internet. It is a virtual market established for the sale and purchase of goods.

The modern E-commerce uses the (www) World Wide Web portal for its transaction cycle along with other communicating media such as e mails, direct messages, whatsapp etc.

E-commerce has brought a very convenient lifestyle for the people following their hectic schedule in this era of 21$^{st}$ Century. They need not to run to and fro from one place to another to purchase their required commodity. This E-Commerce platform has turned a boon in this frenetic lifestyle.

Now, coming to the E-Commerce of 2020: There has been recorded a tremendous change in this platform of marketing in the last few decades may be last 10-15 years.

The growth of E- Commerce has been shifted more towards retailing, workforce. As per the U.S. Bureau of Labour Statistics (BLS), it was demonstrated that form 1997 to 2016, the employment in the e-commerce sector has been escalated by 80% and it has been anticipated that by 2026, the employment would be growing rapidly and would reach around 450,000 in the U.S. market[6].

Presently going to the extent of E-Commerce in India: India's E-trade market is thought about to develop at a CGAR of 30% and it will reach $200 Million constantly 2026. This is the report by Investment Bank Morgan Stanley. Likewise, according to the insights, India had around 224 Million computerized purchasers in 2018, which rose to 329 Million by 2020.

**Types of E- Commerce Business**

There are various ways to categorize the E- commerce business. So, it would be easier if we classify them according to the parties involved in the platform for the detailed analysis of this paper. Its types are:

1. **Business to Consumer (B2C):** It is the most common E- commerce model which involves the businessman and the consumer directly. It is a transaction between businesses and individual. Example of such E-commerce model are- Hotstar, Netflix, Nike etc.

2. **Business to Business (B2B):** In this type of E-commerce model both the parties involved are their businesses. Running a B2B e-commerce channel is a bit complex than the traditional B2C e-commerce which led many B2B brands to put their E-commerce channel on hold. Examples can be: Clean Air, Berlin Packaging, Bulk Book Store

3. **Consumer to Business (C2B):** It refers to those affairs in which individual create value for businesses. Unlike the long established B2C model. Here, the customers provide organisation with the product or services and help the organisation to increase their profits. Example is Freelancers.

4. **Consumers to Consumers (C2C):** Here both the parties involved are the consumers. They trade with each other virtually. Examples of C2C business model can be: EBay, OLX, Quikkr, Coutlook etc

5. **Government to Consumers (G2C):** When the Government provides businesses with goods and services, it comes under this kind of portals. Examples are: Swayam, Arogya Setu etc.

6. **Businesses to Government (B2G):** It is just opposite of the G2B. In this the businesses provides goods and services to the government. Ex: Open Gov.

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[6] Ecommerce Guide. 2021. What is Ecommerce? Ecommerce Definition Explained with Examples. [online] Available at: <https://ecommerceguide.com/guides/what-is-ecommerce/> [Accessed 16 July 2021].

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7. **Consumer to Government (C2G):** Every time a customer pays taxes, health insurances or electronic bills, they get engaged in the C2G business portal. Examples are: ITR E-Filing, SBPDCL, NBPDCL etc.

## IV. IDEA OF ABUSE OF DOMINANCE

Sec. 4 of the Indian Competition Act, forbids and rebuffs maltreatment of predominant position[7]. It doesn't object strength inherently. A firm is exonerating to develop as gigantic in light of the fact that it satisfies, or accomplish as colossal a piece of the pie as it can.

The issue emerges just when there is presence of Abuse of strength. Maltreatment of predominance is one in the each principal troublesome spaces of rivalry law since organizations can achieve prevailing position licitly through development, unrivaled creation or greater pioneering exertion, and a lot of practices that show up on a superficial level to be against cutthroat will serve genuine favorable to serious expectation. Along these lines, in an outstanding case, totally unique rivalry specialists will arrive at various resolutions.

Prevailing Position might be characterized as a position delighted in by a venture or a partner whereby it to empower:

- operate autonomously of cutthroat powers winning in the significant market; or
- affect its rivals or buyers or the applicable market in support of its

In India, the assurance of predominance is set up on a subjective evaluation of the overall market elements and furthermore the general situation of solidarity appreciated by the market member. While in choosing the harmful direct of a predominant venture or gathering, a three-venture investigation is should have been attempted including:

1. The assurance of the applicable market during which partner endeavor is suspected to be mishandled,
2. Degree of important market/appraisal of strength and
3. The explicit exercises dispensed and furthermore the appraisal of harmful direct.

The pertinent market comprises of the 'significant item market' and furthermore the 'important geographic market'. The 'important item market' contains items/benefits that are considered as tradable, or substitutable, by the purchaser. The 'pertinent geographic market' contains the territory any place the states of the opposition are particularly homogeneous.

The subsequent stage decides the level of important market. Once more the demonstration

[7] [The Competition Act, 2002]

offers a not insignificant rundown of variables which the commission should think about in choosing predominance. In the Competition Act, piece of the pie stay a crucial issue anyway various factors also must be considered to be pondered like passage boundaries, size, assets, monetary force and mechanical advantages of the firm, size and significance of the contenders and afterward on. Notwithstanding, if there aren't any section obstructions and furthermore the firm faces possible rivalry from new contestants, strength could likewise be difficult to accomplish. Section boundaries can resemble regulative obstructions, high capital expenses, non-accessibility of innovation and afterward on.

The third stage decides the appraisal of oppressive direct. The Competition Act records explicit practices as misuse: baseless or biased expenses or conditions, restricting creation or specialized or logical turn of events, denying market access, forcing advantageous legally binding commitments detached to the subject of the agreement and utilizing predominance in one market to enter/secure another market.

Henceforth, assurance of predominant position is set up upon two principle factors-piece of the pie and passage conditions. The Competition Commission of India has likewise perceived certain conditions while choosing the prevailing remaining of arrangements according to Sections 19 of the Competition Act. On account of ***Eastman Kodak Co. v. Picture Specialized Service Inc***[8] it had been found out that prevailing implies that market power, which is the ability to compress a purchaser to attempt to do one thing that he would not do in a cutthroat market. Anyway in larger part of the cases the market power is looked based on the practical qualities of the items and on the personal conduct standard of the buyer.

Some of the time, the portions of the overall industry of particular surges of Internet-based organizations are unprocurable and consequently oneself itemized data released by the market will not be dependable and strong, in such a case pieces of the pie could likewise be should have been resolved on the foundation of the extraordinarily charged market reports, anyway such a report ought to follow a consistent method of data get-together, assessment and examination..

Albeit the CCI recognizes that portions of the overall industry are 'the most fundamental rule/measuring stick inside the evaluation of predominance', there's no splendid line piece of the pie check and accordingly the CCI has regularly received a comprehensive methodology in wrapping up strength. Reaffirming this view, in ***Mr Ramakant Kini v Dr L H Hiranandani Hospital, Powai, Mumbai*** while surveying the predominance of Hiranandani Hospital in the

[8] [504 US 451]

pertinent market for the arrangement of maternity administrations by super claim to fame and top of the line emergency clinics inside a distance of 12km from the Hiranandani Hospital, the CCI explained that the piece of the pie of an element is just one of the variables that decides if an undertaking or a partner is prevailing or not, anyway that issue alone can't be conclusive verification of strength.

Anyway it will be noticed that predominance itself can't be established as maltreatment and thusly it isn't denied by the demonstration. Just if there is maltreatment of prevailing position especially the demonstration disallows such maltreatment.

## V. Competition by E-commerce sector and establishing its dominance

To cope up with the subsisting market competition, e-commerce sector adopts various innovative steps in order to gain customer base. This raise competition concerns among the others. E-commerce sector generally provide a very high discounts and many other gift vouchers to attract customers.

The main aim of the E-commerce is just to catch customers and for that they even ignore their profit margins. This kind of business approach used by the E-commerce sector has established their dominance in the market. As a result of this, all the business market has to compulsorily adjust their pricing strategy in order to remain in the market.

To understand this in a better way, the authors referred to the recent case of Flipkart India Pvt. Ltd V. Assistant Commission of Income Tax[9].

The parties involved in this case were:

AIOVA- All India Online Vendors Association who was the Informant against Flipkart India Pvt. Ltd. Who was the Opposite Party. The Authority involved was CCI- Competition Commission of India

Current realities and conditions of this case were: The CCI got data from AIOVA U/s 19(1) (a)[10] of the Competition Act, 2002, claiming infringement of area 4 of the Act[11].

As per the information provided by the Informant, it was stated that Flipkart, used to sell products to companies such as WS Retail at a very low price and huge discounts were given and the product so required by the WS Retail were sold on platform operated by Flipkart

[9]ITA No.693 /Bang/2018

[10]The Commission may ask into any supposed contradiction of the arrangements contained in sub-segment (1) of segment 3 or sub-area (1) of segment 4 either on its own movement or on— (a) receipt of an objection, joined by such expense as might be dictated by guidelines, from any individual, purchaser or their affiliation or exchange association

[11]Abuse of predominant position

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Internet Service Ltd. Further, it was said that such applications resulted into preferential treatments to certain sellers.

In this case, it was observed that how E- commerce companies like Flipkart, operate its businesses. The following conclusions were drawn from this case:

- The A.O (Assessing Officer) found that, Flipkart, buys goods (taking hypothetically) @ 100/- and sells the goods to retailer such as WS Retail Pvt. Ltd for Rs. 80/- and those retailers further sell goods on the internet platforms at a very low price by offering huge discounts.
- Thus after excluding closing stocks of finished goods, purchases and sales, it resulted into approx 2.52% loss on the purchase cost.
- The senior Vice President (V.P.) of Flipkart told the A.O that this blueprint was endorsed by the company in order to capture larger market share and earn profit at a long run.

  Also, the A.O. concluded that the approach was to manifest customer goodwill and brand value for a long run.

AIOVA purported that the way of escorting operations by Flipkart is violative of Sec. 4(2) (a)[12] of the Act[13].

Also, the companies like Flipkart has a powerful backing of huge number of investors and they have access to venture capital funds and this is the reason why, they are able to sell products at a high discounted rate.

Flipkart was also alleged for leveraging their dominant position to enter into new market which violates Sec. 4 (2) (a).[14]

## VI. ONLINE SALES AND DISCOUNTS

Electronic shopping stages very likely gives most limit number of arrangements and cutoff points, for instance, Big Billion Day and Diwali Bumper offers to attract customers and meanwhile increase the buyer base. Meanwhile such exhibits of the online players have also invited the anger of the typical offline retailers who are

[12] There shall be an abuse of dominant position under sub-section (1), if an enterprise,—
(a) directly or indirectly, imposes unfair or discriminatory—
(i) condition in purchase or sale of goods or services; or
(ii) price in purchase or sale (including predatory price) of goods or service
[13] The Competition Act, 2002
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lamented by way of reducing sales as the clients visit the market simply to have a physical appear of the merchandise lowering the retail outlets to basic presentation regions for customer show and solicitation while, the actual purchase is normally made through online platforms considering the truth that they provide anti-vicious more affordable expenses.

Against such adversary of vicious practices different cases have been recorded sooner than the CCI in opposition to various online players, for instance, Flipkart, Snapdeal, Amazon, Jabong and Myntra affirming heartless assessing. Regardless, because of ***Mohit Manglani v. Flipkart India Private Limited***[15] the CCI at the by all appearances stage excused the contention since none of the players liked strength in the retail market and to exhibit savage assessing it is critical for show that the organization has an overall circumstance watching out. The affirmation of solidarity is associated with the refusal made through the CCI to allocate e-market as a substitute space of product/ organizations.

In any case because of ***Fast Track Call Cab v. ANI Technologies***[16] it was stated that OLA was offering inspirations, discounts, loyalties and merciless cutoff points. The CCI communicated that OLA giving considerable cutoff points to its buyers and compensation to its laborers at the skirt of bearing setback is apparently all around expected the association to eliminate various players from the significant market and stand firm on by its dominating circumstance. Also ANI Technologies has reliably kept up its high slices of the pie and in this manner likes the dominating circumstance in the huge market.

To choose the savage esteeming against this online entryways one should similarly research the intelligence of the assessing methods and the financing of the cutoff points concerning long stretch. These online sections offer cutoff points for confined proportion of time. Surely, even this genuine shop offers limits, arrangements to the buyers during occasions to help themselves keeping watch and this is the piece of trade. In any case, for sensibility of these online doors one need to offer such remarkable cutoff points and game plans.

## VII. AD SCHEMES IN E-COMMERCE SECTORS

Web based business extraordinarily work at online stages subsequently, their appearance of their image name and advancement is a lot of vital with the end goal of their development, and thusly Competition Law gives them such instruments for their appearance. In the present situation numerous internet business undertaking like yippee, Microsoft, yatra, facebook and so on has asked the Director General to give their perception in regards to the examination of

[15] [2015] 131 SCL 18 (CCI)]
[16] [2015]131 SCL 240 (CCI)]

the maltreatment of predominance against Google. Google is quite possibly the most web crawlers has been professed to mishandle its predominance by giving its own guides, places, and so forth the DG has set down different articulations on premise of which Google is said to manhandle its prevailing position. These are as per the following:

1. The unreasonable burden of specifications on the retailers to whom Google is selling its administrations;

2. Decreasing and restricting specialized and logical improvement with respect to labor and products to the bias of the purchasers;

3. Compelling prevailing associations from including into works on driving in the disavowal of the market access in any way;

4. Obliging a prevailing organization from using its situation of predominance in one applicable market so as to go into, or monitor, other important markets[17].

## VIII. Punishments and sanction

If there should arise an occurrence of contradiction of sec 4 of the Act, the CCI has the ability to force the most elevated punishments in India. Anyway if there should arise an occurrence of repudiation the CCI is enabled to impose punishment of around 10% of the normal turnover of the undertaking or the partner for the last going before 3 years. The CCI additionally coordinates to alter the arrangement or cease such agreement[18]. Therefore numerous components will be thought about to choose the size of the punishment. There is a two–venture approach to decide the size of the punishment. They are:

- Should be set up during settling the issue of significant turnover;
- Should be resolved in the wake of contemplating the disturbing and moderating conditions applicable to each case.

## IX. Conclusion

The association of Competition Law has met numerous reasons in the web based business area. It attempts to peer out equity for the online business undertakings just as conventional blocks and mortar organizations and vendors. Anyway it is interesting that the CCI should mull over the extraordinary highlights of the internet business areas like quick innovation progression, expansion in returns, information gathered while dissecting the situation of maltreatment of

[17] [Editorial, "For what reason did CCI compose Google an awful report card?" Live Mint, September 2, 2015]
[18] [Section 27 of the Competition Act, 2000]

predominance.

The CCI ought to likewise utilize the fundamental offices regulation for commanding similarity between a prevailing player and thusly the other market administrators. It likewise can be said that point has come for evaluating and correcting the Competition system to remain pace with the quickly changing new economy. Anyway the interest of the customary blocks and mortar organizations and vendors are shielded from the destructive impacts transmitted by the internet business areas by the Competition Law system. The Competition Law additionally limits the online business undertakings from rehearsing unreasonable valuing and ensures it kept a reasonable rivalry on the lookout. Disregarding having countless intricacy with respect to the opposition yet the Indian Competition law gives abundant freedom to novel and innovative association to enter on the lookout and give more alternatives to the clients.

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