Page 2137 - 2146 **DOI:** *https://doij.org/10.10000/IJLMH.116015*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 5

2023

Competition Law in Digital Market: Need of Hour

NISHTHA DHURIA[1]

ABSTRACT

The article discusses the sufficiency of existing competition law amid growing digital economy. The digital economy is growing at very fast pace. There are certain areas that are not covered under existing competition law with regard to digital market. In order to remedy the existing deficiencies, the Competition Amendment Act of 2022 was passed. The following article discusses the components and recommendations of Amendment Act and also discusses the "Report on Anti-competitive Practices by Big Tech Companies", the necessity of ex-ante regulations and introduction of Digital Competition Act.

Keywords: *Competition law, digital market, technology.*

I. INTRODUCTION

In order to prevent the concentration of economic power, it is necessary that there is free and fair competition in the market There needs to certain agencies that regulate and promote competition in the market. The second industrial revolution brought great improvement in communication, technology, transportation etc. Another byproduct of this revolution was establishment of large business enterprises. As a result there was concentration of economic power. In order to avoid and protect the economy from such situation ' Anti trust law' was introduced.[2] "The Sherman Act" was the first ever organised law that contained the general law principles of competition law .[3]In India also the Competition Act 2002 ,herein referred as Act was introduced to prevent any anti-competitive practices that adversely affects the free and fair competition, to preserve the rights of consumers and to promote trade free from all the restraints in the market. The Act embodies the philosophy of modern competition law . It contains the provisions for anti-competitive agreements, abuse of dominant position by enterprises, regulation of mergers and combinations and prohibits the practices that are likely to have an appreciable adverse affect on competition with in India.

The digital market has brought about complete change in the economy. The digital economy

[1] Author is a Research scholar at Department of law, University of Rajasthan, India.

[2] Sherman Anti trust Act 1890 and clayton Act 1914 were formed. It provided the guidelines to prevent that entities from monopolistic behaviour.

[3] Vinod Dhall, "Overview key concepts in Competition law today: Concepts, issues, and law in practice,(Vinod Dhall,ed,2007)

 [ISSN 2581-5369]

can be referred as the third industrial revolution. It has become difficult to handle the current situation of digital market under the Act of 2002. The Act only governs the traditional Indian market within its ambit and there has been no mention of digital market. Digital market has its own challenges and opportunities. The current competition law has to be modified to bring it in line with digital market. After 20 years of enactment of the Act, there has been lot of technological advancement. The Act has gone through several substantive, procedural, institutional changes. Initially, the Competition Commission of India, herein referred as CCI, was known for its ferocious nature, multiple investigations, high penalties and an emerging jurisprudence. The decisions of CCI were even lauded by other competition agencies in the world and it was a fierce competition to the competition department of European Commission.

But in recent years, it has become increasingly difficult for the CCI to manage big tech companies under its current traditional market jurisprudence. Although the CCI has been quiet effective in conducting enquiries , imposing hefty penalties, and corrective remedies in the large number of cases under the current competition jurisprudence . But even then there are certain inefficiencies in regulating market, consumer welfare, and in timely implementing the solution.[4]A sound competition law should achieve these objectives. Since there is great operational difference between the working of traditional market and digital market so it has become difficult to regulate the latter under the already existing competition jurisprudence. So either there is need for reforms in the existing competition law or separate legislation should be introduced to deal with the digital market and specially big players in the market.

II. EUROPEAN UNION MODEL OF COMPETITION LAW IN DIGITAL MARKET

There has been massive growth in digital economy of India between 2014 to 2019. There are few big tech companies that hold the largest of the concentrated structure of digital economy.[5]So there is definitely a need to regulate the conduct of these big tech companies with some clear defined law. India should follow the European Union for enacting a Digital Competition Act in which there are multiple obligations and prohibitions on big tech companies in order to maintain healthy competition and fairness in the market. There have been multiple discussions on possible overlapping between competition law, digital space, and data protection laws. Keeping this in mind the European Union has enacted Digital Market Act (DMA) and Digital Services

[4] Google Android Case (CCI case no 39 0f 2018), Google Playstor Case (CCI case no. 7of 2020), FHRAI & anr . v. MMT-GO-OYO (CCI case no 14 of 2019 and case no 01 of 2020), ongoing ,enquiries against Apple (CCI case no 24 of 2021), Whatsapp Privacy policy (suo moto case no 01 of 2021) , Amazon and Flipkart (CCI case no 40 of 2019) Zomato and Swiggy (CCI case no 16 of 2021) Bookmyshow (CCI case no 46 of 2022) etc.

[5] S.Prado , T (2020)," Assessing the market power of Digital Platforms ". SSRN Electronic Journal ,(http:// papers. Ssrn. Com / S013/ papers. Cfm ? abstract id = 3747793).

Act (DSA). DMA was formed under Regulation (EU) 2022/1925, the object of which is to make digital economy more competitive and fairer. The Regulation was proposed by the European Commission in December 2020[6]and was signed as law by the European Parliament and the Council of European Union in September 2022.[7] It came into force on 1November 2022 and became applicable for the most part , on 2 May 2023.[8] The Regulation aims to ensure a higher degree of competition in digital markets by preventing large companies from abusing their market power and by allowing new players to enter the market .[9] The rules under DMA and DSA are clearly specified. DSA is mainly associated with online intermediaries and platforms which may include in itself online shopping apps, content creating platforms, social networking sites, travel and accommodation platforms and other app stores.

DMA lays down rules for gatekeeper online platforms that play a systematic role in the internal market that function as bottlenecks between businesses and consumers for important digital services. There are certain areas of intersection between the DMA and DSA, but the objective is clear to ensure a level playing field for all digital companies and preventing them from imposing unfair conditions on businesses and consumers. Following are the guidelines that have been laid for the gatekeepers under the European Competition Law. They are required to follow these obligations. The obligations are directed to both users and businesses.

1) There should not be any restriction on the uninstallation of any pre- installed app or any other software on consumers.
2) Freedom to third parties to interoperate with gatekeeper's own services in certain situations.
3) Giving the users access to data that they generate while using gatekeepers platform for business.
4) They should not diminish the choice of consumers i.e. they should have access to all other platforms also.
5) There should not be any discrimination between similar products and services offered by gatekeeper and other parties.

[6] "Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act)".
[7] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828(Digital Markets Act)".
[8] Liberatore, Francesco(13 October 2022). "DMA: EU publishes The New Digital Markets Act. Consumer Privacy World . Squire Patton Boggs.
[9] Amaro, Silvia (15 December 2020). " EU announces sweeping new rules that could force break ups and hefty fines for Big Tech CNBC.

 [ISSN 2581-5369]

6) Business users should have complete freedom to conclude contracts even outside the platform of gatekeeper.
7) Businesses should be able to innovate and compete against the gatekeepers own services in equal terms.
8) Also, the businesses should have access to information about the performance of products and services on other platforms.
9) Prohibition of unfair business practices and giving consumers better choice of products and innovative services.
10) Consumers shall have freedom to switch the services of platforms that are alternative to that of gatekeeper.[10]
11) So European Union has been well ahead of time to regulate competition in digital market. India also needs to follow the same approach.

III. THE COMPETITION AMENDMENT BILL OF 2022

Since the inception of Competition Act 2002, there has been massive change in the functioning of market.[11]Alongwith the traditional market structure there are now lot of internet based economies. There are no express provisions for the regulation of digital market. Moreover, the functioning if digital market is different from the traditional market so there is a need to alter the existing law. There are certain loopholes in the current competition framework that needs to be addressed. Like under the present law if any combination meets the particular criteria it has to obtain the approval from CCI. Acquisitions done in digital market are value based on data or certain business innovations of the company that is acquired. Such kinds od acquisitions may not fall under the traditional method of evaluating combinations based on assets or turnover. The company to be acquired in such transaction may not have a large asset base and may be in a line where products are given for free. It can be illustrated by the acquisition of whatsapp by facebook. It was acquired by Facebook for approximately USD 19 billion.[12]Even though India is a major market for whatsapp the acquisition required no clearance from CCI due to its low asset base. So CCI had no power to regulate such kind of acquisitions as there is no legal framework currently available.

The year 2022 saw some major regulatory developments in competition law in India. The

[10] Digital competition law of European Union.
[11] Report of Competition Law Review Committee , Ministry of Corporate Affairs, July 2019.
[12] http:// www.forbes.com/sites/parmyolson /2014/10/06/facebook - closes-19-billion-whatsapp-deal/ ? Sh=34cb98ae5c66).

 [ISSN 2581-5369]

existing law is ready to undergo major changes in order to ensure that provisions are in line with current market realities and international best practices. In 2018 a new committee was set up by the Ministry of Corporate Affairs named as Competition Law Review Committee to ensure that the competition law is in consonance with the economic fundamentals.[13]The committee noticed certain areas that are not covered under the current act.[14]. The report was released in 2019 and recommended several amendments in the Act and its regulatory framework.

Keeping in mind the suggestions given by the Competition Law Review Committee the Amendment Bill of 2022 was introduced. The Bill adds various new features like enlarging the definition of anticompetitive agreements , new method of deal value threshold for assessment of combinations , provisions of settlement and commitment, conversion of criminal penalties into civil ones etc.

IV. MAJOR FEATURES OF THE COMPETITION AMENDMENT BILL 2022

The main objective of the Act was to advance free and fair competition in the market, safeguarding the rights of consumers and also secure freedom of trade for all market players.[15]The Act does not allow to enter into anti-competitive agreements, abuse the dominant position, or to enter into any merger or combination that is likely to have an appreciable adverse effect on competition. There is a shift in the trend of market from physical to online one. There are lot of internet based companies that involve new technologies.[16]. In order to accommodate such new concepts, following recommendations have been made under the Amendment Bill of 2022:-

1) **Time period for approval of Combinations:** Generally any combination requires approval from CCI for its formation. The CCI is supposed to give its decision on combination within a period of 210 days. The Bill proposes to reduce the time period from 210 days to 150 days.[17] The time period for devising a prima facie opinion for a combination is 30 days. The combination shall be deemed to have been approved if the opinion is not formed in that time period.[18]The amendment brings about clarity and also speeds up the process.

2) **Modification in the definition of Control with respect to combination:** Control

[13] Government constitutes the Competition Law Review Committee to review the Competition Act .” Press Information Bureau , Ministry of Corporate Affairs, September 30,2018.
[14] Report of Competition Law Review Committee, Ministry of corporate Affairs 2019.
[15] Preamble ,The Competition Act ,2002.
[16]“ Report of Competition Law Review Committee”, Ministry of Corporate Affairs 2019.
[17] Section 6(b) of the Act, as amended through the Amendment Act.
[18] Section 29 (1B) of the Act as amended through the Amendment Act.

in general means the power to command over day to day affairs of one undertaking or group by another undertaking or group.[19] Control can be defined as capacity to have substantial or major impact over the administration, routine affairs or other business related tactical decisions.[20]Control is only a matter of degree. The control can be in any form it may be analysed through extent of shareholding or from contractual rights or consultation rights or right to participate in management and affairs or it can be also assessed from the competence of enterprise or person or from the organisational and monetary positioning of an enterprise.[21]

3) **Enlarging the ambit of Anti-competitive Agreements**: These include an agreement to production, supply, storage or control of goods or services between enterprises engaged in identical goods or businesses.[22]The Bill widens the horizon of anti-competitive agreements by including even those agreements that are entered into by enterprises engaged in dissimilar or different businesses.

4) **Provision of settlement and commitment in Anti-competitive proceedings:** The Bill allows CCI to consider the options of settlement and commitment to close enquiries if the enterprises offers it so. The enterprise may either settle the proceedings on payment of certain amount or it may also be some non monetary settlement which may be in the form of some physiological or behavioural changes. The CCI shall examine the application for settlement and commitment keeping in mind the character, seriousness and effect of the contraventions. It is the complete discretion of the CCI to either accept the offer of settlement or to reject it, there can also be certain terms and conditions attached to the proposal of settlement. All the decisions of settlement and commitment are non appealable. There is also a provision of compensation in cases of settlement that would prove as an incentive to choose settlement option. The provision of settlement and commitment helps in solving cases at faster pace and also reduces legal trouble.

5) **Deal Value Threshold:** The Amendment has devised a new method of assessing combination which states that every acquisition in which the transactional value exceeds INR 2000 crores and if such enterprise has major area of business in India should be sanctioned by CCI .[23]Even if the de minimus exemption is available , the

[19] Explanation (a) to sec 5 of the Act as amended through the Amendment Act.
[20] Explanation (a) to section 5 of the Act as amended through the amendment Act.
[21] http://www.cci.gov.in/ combination /faqs.
[22] Section 3 of the competition Act.
[23] Section 5(d) of the Act as amended through the Amendment Act.

 [ISSN 2581-5369]

transaction shall be approved by CCI if the deal value thresholds are met. The transactional value includes in it every kind of consideration direct, indirect and deferred consideration. The amendment is equally applicable to all sections digital and physical market.

6) **Decriminalisation of certain offences:** It means replacement of fines/punishments with civil penalties. It is an exercise undertaken by Government to bring about an ease in convenience and doing business. It serves a dual purpose as financial penalties can be demotivating and unwanted and hence can act as an deterrent and also converting criminal into civil punishments can be really helpful.

7) **Increased powers of Director General**: The Amendment Act proposes to increase the powers of Director General . He shall have the following powers:

   a) To acquire any document, books , information or paper from any party.

   b) To demand any information, documents, books, records, paper that may be required for the purpose of investigation initially for the period of 180 days which may be further extended by period of 180 days more.

   c) Examine on oath any of the officers, employees, agents of a party being investigated or any other person.

   d) Powers of search and seizure of any document, record, information.

These are some of the provisions that were recommended in the Competition Bill of 2022.

V. REPORT ON ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES

Even though there were lot of recommendations made in the Amendment Bill of 2022, but still they were considered insufficient with respect to the digital market. The biggest drawback was the ex-post approach of the Act, by the time measures are taken to regulate the conduct, the harm is already done. To overcome this, the idea of ex -ante approach is advocated. Ex-ante approach at pre-emptively preventing large platforms from engaging in certain types of conduct that could result in preventing competition. It is suggested that India should follow the approach of European Union where both acts Digital Market Act Digital Services Act are examples of ex-ante regulations. So there was another report released by the Parliamentary Standing Committee on Finance known as " Anti-competitive Practices by Big Tech Companies" which focussed on ex-ante regulations of anti-competitive practices by big tech companies in India .[24]

[24] 53rd Report of the Parliamentary Standing Committee on Finance on " Anti Competitive Practices by Big Tech Companies ,available at http:// lok sabha docs.mic.in /iss committee / Finance/L7-Finance.

The key recommendations in the report are as stated:-

1) The major players in the digital market should be designated as " Systematically Important Digital Intermediaries" here after referred as SIDI . They should be identified on the basis of revenue, market capitalisation, and active business and end users.
2) Introduction of full fledged, sui generis law, to be named as " Digital Competition Act" to ex-ante regulate anti-competitive conduct .
3) A separate digital unit should be set up within CCI, this unit should analyse the performance of prominent online companies. The unit shall consist of highly skilled persons with full fledged knowledge of technology.

The committee focussed on ten areas of anti-competitive practices that needs to be addressed. Following are those major concerns;-

1) **Anti Steering Provisions**: Steering means to guide and control the movement of another. It is a practice in which SIDI puts restriction on the access to purchase of products or services offered by other platforms that are not intrinsic part of platform. So SIDI restricts the use of other services that may be comparatively cheaper and potentially attractive than other platforms.[25]
2) **Platform Neutrality /Self Preferencing**: It means when a platform favours its own product or services directly or indirectly in situations when it has a dual role of providing the platform and competing on the same platform.[26]
3) **Bundling and Tying:** It means forcing business users or end users to buy certain other unwanted products as conditions of sale for registering with platform's core service and thus preventing free competition in the market.[27]
4) **Data Usage**: It means using the personal data of end users for their personal advantage and putting consumer preference data to their own use or combining the personal data from relevant core services of platform with other personal data from any further core services or from any other services provided by the platform or with personal data from third party service. So the data is being transferred from one place to another. The privileged data is used

[25] Baglekar Akash Kumar v. Google LLC and others ,CCI case no 39 of 2020 (29 January 2021).
[26] Kluwer Competition Law Blog," The Digital Markets Act- We gonna catch'em all ?
http:// competition law blog. Kluwer competition law .com /2022/OC/ 13/ the-digital -markets-act-we -gonna-catch-em -all).
[27] Report paragraph 1.16.

from one platform to gain competitive advantage in another market.

5) **Pricing/Deep Discounting:** There should not be any restriction on implantation of market conditions on its platform, on business users from selling their goods and services on other platforms or directly at varying prices. Discounting means bogus sale which eventually results in losing control over final price of the product.[28]

6) **Exclusive tie up:** It means sale of products exclusively on the platform and not on any other platform .[29]Such practices should not be adopted.

7) **Search and Ranking Preferences**: There should not be any search bias in favour of sponsored products or orders fulfilled by platform itself.[30]The terms and conditions regarding search engine actions should be open, reasonable and non discriminatory.

8) **Third Party Applications:** There should not be any restriction on third parties from downloading any software application or using or inter operating with its own operating system.[31]

9) **Advertising Policies**: The personal data of the users shall not be used for any kind of promotional and advertising services with the aid of third party services.

10) **Acquisition and Mergers:** CCI should be informed of any kind of potential mergers concerning services or collection of data . All such information should be provided prior to its implantation or after the conclusion of the agreement.

VI. CONCLUSION

The digital market is a definitely a positive sign for the growth of economy. There is manifold growth in economy after the growth of internet based companies. This Bill strengthens India's anti-competitive regime and is a much required move in the light of changing market circumstances . There are some really welcoming steps in the Amendment Bill like provisions of settlement, commitment, identification of combinations on deal value threshold, more stress on civic and financial penalties , establishment of digital market unit. But in the race of

[28] Report paragraph 1.22.
[29] Report paragraph 1.22.
[30] Report paragraph 1.26.
[31] Report Paragraph 1.28.

 [ISSN 2581-5369]

regulating the market there should not be any over regulation of the market. The ex-ante regulations may sometimes lead to false positives. These regulations are based on rule based restrictions and not on effect based restrictions. The rule based restrictions leads to less consumer welfare and less innovation. As happened in the case of Harshita Chawla v. Whats app and other.[32]It was alleged that an integrated Whatsapp pay feature within the whatsapp amounted to anti-competitive practice of bundling with messaging services. However CCI observed that Whatsapp pay was an optional feature and it required users to sign in separately for messaging and payment services so there is no imposition or coercion. The CCI in this case adopted a positive approach and concluded that no investigation was required into whatsapp conduct.

Moreover the process of identifying market winners on the basis of revenue, market capitalisation and number of users is a step backwards to the times of "Monopolies and Restrictive Trade Practices Act 1969" and contradicts present day jurisprudence. If the big players are condemned only on the basis of size that will eventually harm consumers and chill innovation. Size as such should not be considered an offence.

The ex-ante approach is also criticised internationally and there is lack of local and global consensus on the merits of such legislation. Moreover, the regulations are also in conflict with and many other ex-ante legislations that clearly overlap with the competition. So there both pros and cons of the Competition Amendment Bill 2022. There are certain features that are not suited to the framework of the digital market. So the best way out is to retain the positive features of the Amendment Bill and amend and modify the existing Act to suit the changing needs and circumstances.

*****

[32] Harshita Chawla v. whats app Inc and another ,CCI, Case no 15 of 2020 (18 August 2020).

 [ISSN 2581-5369]