



ANTITRUST ENFORCEMENT IN DIGITAL MARKETS : CCI experience

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OUTLINE



- Importance of Digital markets for Indian Economy
- Types of issues dealt by CCI in Digital market cases
- Challenges faced
- Approach of CCI
- Major cases dealt by CCI
- Recommendations of CLRC
- Way Forward



IMPORTANCE OF DIGITAL MARKETS FOR INDIAN ECONOMY



- Technological Revolution
- Mobile and Internet Penetration
- Integration of remote unorganised sector with mainstream economy
- Emergence of new age business models
- Driver of growth, innovation



DIGITAL MARKETS : TYPES OF ISSUES



- Unfair Terms of Distribution and License Agreements
- Discriminatory/ Preferential Treatment
- Bundling and Tying in Arrangements
- Predatory Pricing
- Exclusive arrangements
- Resale price maintenance
- MFN/Price Parity clauses



DIGITAL MARKETS : KEY CHALLENGES



- Understand complex arrangements
- Understand Market Dynamics
- Defining markets and assessing market power
- Identify specific competition issues
- Access to Data
- How to balance considerations
- Application of legal and economic tools
- Crafting remedies



DIGITAL MARKETS : APPROACH OF CCI



- Cautious and Nuanced
- Not a homogenous application of law but case by case examination
- Follow best global practices with suitable modifications to account for local factors
- Pursue Advocacy along with Enforcement
- Commission market studies
- Engagement with stakeholders
- Engagement with experts
- Use technology, data tools and forensic
- Capacity building



DIGITAL MARKETS : IMPORTANT CASES DEALT BY CCI



- Matrimony.com Limited & Cuts Vs. Google LLC & Others
- Umar Javeed, Sukarma Thapar, Aaqib Javeed vs. Google LLC & Ors.
- (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT), Ibibo Group Private Limited (Ibibo) and Oravel Stays Private Limited (OYO)
- Fast-Track Call Cabs and Anr. v. Ani Technologies Pvt. Ltd
- M/s Counfreedise vs. Timex Group India Limited
- Jasper Infotech (Snapdeal) vs. Kaff Appliances
- Mohit Manglani vs. Flipkart/Snapdeal and Others (Case No. 80 of 2014)



ANTITRUST CASES INVOLVING DIGITAL MARKETS



<p>सत्यमेव जयते</p> <p>Matrimon</p> <p>y.com</p> <p>Limited</p> <p>Vs.</p> <p>Google</p> <p>LLC &</p> <p>Others</p>	<p>Allegations:</p> <p>Google abusing dominance through search bias, imposition of unfair condition on its customers and imposition of exclusive conditions through agreements entered with partners etc.</p> <p>Findings:</p> <ul style="list-style-type: none"> ▪ Google was found to be dominant in the (a) market for online general web search services in India, and (b) market for online search advertising services in India. ▪ Commission <i>inter-alia</i> noted that In the high technology markets, innovation is key and in multi-sided markets, market shares should be transient. However, Google’s market shares have been consistently high, which suggests that it has got other advantages, besides technical advantages, which insulate its market position. The structure of the market is both indicative of and conducive to Google’s dominance. ▪ Commission emphasized the special responsibilities and obligation of a dominant undertaking under anti-trust law and with a specific reference to the digital markets. ▪ Public intervention in such markets should be targeted and proportionate. Such a calibrated approach in technological markets ensures that intervention remains effective; it does not restrain innovation and helps the market to regulate itself. ▪ Any intervention in technology markets has to be carefully crafted lest it stifles innovation and denies consumers the benefits that such innovation can offer.
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ANTITRUST CASES INVOLVING DIGITAL MARKETS



**Matrimony
.com
Limited Vs.
Google LLC
& Others**

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

- Ranking of Universal Results prior to 2010 which was not strictly determined by relevance. Rather the rankings were pre-determined to trigger at the 1st, 4th or 10th position on the SERP. Such practice of Google was unfair to the users and was in contravention of the provisions of Section 4(2)(a)(i) of the Act. (Universal Results are groups of results for a specific type of information, such as news, images, local businesses etc.)
- Prominent display and placement of Commercial Flight Unit with link to Google’s specialised search options/ services (Flight) amounts to an unfair imposition upon users of search services as it deprives them of additional choices and thereby such conduct is in contravention of the provisions of Section 4(2)(a)(i) of the Act.
- The prohibitions imposed under the negotiated search intermediation agreements upon the publishers were found to be unfair as they restrict the choice of these partners and prevent them from using the search services provided by competing search engines. Imposing of unfair conditions on such publishers by Google ; using its dominance in the market for online general web search to strengthen its position in the market for online syndicate search services and denial of access to competitors to the online search syndication services market, were in contravention of Section 4(2)(a), (e) and (c) of the Act.
- Accordingly, the Commission ordered Google to not enforce the restrictive clauses with immediate effect in its negotiated direct search intermediation agreements with Indian partners. Further, the Commission directed Google to display a disclaimer in the commercial flight unit box indicating clearly that the “search flights” link placed at the bottom leads to Google’s Flights page, and not the results aggregated by any other third party service provider. In addition to that, monetary penalty of 1.35 billion rupees was also levied on Google.



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



<p>Umar Javeed, Sukarm a Thapar, Aaqib Javeed vs. Google LLC & Ors.</p>	<p>The case relates to the conditions imposed by Google on the OEMs using Android Operating System (OS) for installing GMS.</p> <p>Allegations:</p> <ul style="list-style-type: none"> • Google mandates smartphome and tablet manufacturers to exclusively pre-install Google’s own applications or services in order to get any part of GMS in smartphones manufactured in/ sold in/ exported to/ marketed in India. • Google ties or bundles certain Google applications and services (Such as Google Chrome, YouTube, Google Search <i>etc.</i>) distributed on Android devices in India with other Google applications, services and/ or application programming interfaces of Google. • Google prevents smartphone and tablet manufacturers in India from developing and marketing modified and potentially competing versions of Android (so-called “Android forks”) on other devices.
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ANTITRUST CASES INVOLVING DIGITAL MARKETS



<p>Umar Javeed, Sukarma Thapar, Aaqib Javeed vs. Google LLC & Ors.</p>	<p><i>Prima facie</i> Order</p> <ul style="list-style-type: none"> • The primary relevant product market appears to be the market for licensable smart mobile operating systems in India with Android accounting for 80% of market. • Commission was of the <i>prima facie</i> opinion that since Google Play Store is a ‘must have’ app and users expect it to be preinstalled on their devices, marketability of Android devices may get restricted if these agreements are not signed, making these agreement <i>de facto</i> compulsory. • Google’s contention that Android users have considerable freedom to customise their phones and to install apps that compete with Google’s besides the ability to quickly and easily move or disable preinstalled apps, including Google’s apps require a detailed empirical validation particularly from consumers. • Similarly the plea of Google that the stipulations in the ACC are necessary to serve the legitimate purpose of preventing ‘fragmentation’, can be appropriately examined during the investigative stage through empirical validation from device manufacturers, application developers and independent experts.
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ANTITRUST CASES INVOLVING DIGITAL MARKETS



Fair Competition
For Greater Good

Umar

***Prima facie* Order**

**Javeed,
Sukarma**

- Thus the Commission was of the *prima facie* opinion that mandatory pre-installation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and thereby in contravention of Section 4(2)(a)(i) of the Act.

Thapar,

Aaqib

- It also amounts to *prima facie* leveraging of Google's dominance in Play Store to protect the relevant markets such as online general search in contravention of Section 4(2)(e) of the Act.

Javeed

vs.

Google

- The impugned conduct of Google may help perpetuate its dominance in the online search market while resulting in denial of market access for competing search apps in contravention of Section 4(2)(c) of the Act.

LLC &

Ors.

- Matter is under investigation.



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



<p>(FHRAI)</p> <p>vs.</p> <p>MMT,</p> <p>Ibibo</p> <p>and</p> <p>OYO</p>	<p>Allegations:</p> <ul style="list-style-type: none">• MMT & Ibibo allegedly impose price parity, room parity conditions in their agreement/contract with hotel partners and indulged in predatory pricing, charging of exorbitant commissions from hotels, registering and providing on its platform illegal and unlicensed bed & breakfast and misrepresentation.• MMT and OYO entered into confidential commercial agreements wherein MMT has agreed to give preferential treatment to OYO on its platform, further leading to a denial of market access to Treebo and Fab Hotels
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ANTITRUST CASES INVOLVING DIGITAL MARKETS



(FHRAI)
vs.
MMT,
Ibibo
and
OYO

Prima Facie Findings :

- RM for MMT-Go: *‘market for online intermediation services for booking of hotels in India’.*
- RM for OYO *‘market for franchising services for budget hotels in India’.*
- MMT-Go prima facie appears to be dominant.
- OYO does not appear to be dominant but has significant presence



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



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<p>(FHRAI) vs. MMT, Ibibo and OYO</p>	<p><i>Prima Facie order</i></p> <ul style="list-style-type: none">• The Commission observed that broadly defined APPAs (where an OTA restrict a supplier from charging lower prices or providing better terms on their website, as well as through any other sales channel, including other OTAs.) may result in removal of the incentive for platforms to compete on the commission they charge to hoteliers, may inflate the commissions and the final prices paid by consumers and may also prevent entry from new low cost platforms.• OYO as a budget hotel chain is in a vertical relationship with MMT, which is essentially a distribution platform for hotels. Both have considerable presence in their respective market segments and any restrictive agreement which may lead to refusal to deal with some players or exclusive arrangement with some players, may potentially have adverse effect on competition.• The matter is under investigation
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ANTITRUST CASES INVOLVING DIGITAL MARKETS



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Fast-Track

**Call Cabs and
Anr. v. Ani
Technologies
Pvt. Ltd**

This case concerned abuse of dominant position by a domestic cab aggregator (namely, 'OLA') in the relevant market of Bengaluru (a city in Karnataka) through predatory pricing and incentive schemes, was sent for investigation.

- The DG, after detailed investigation, was of the view that OLA does not hold a dominant position in the relevant market because of the presence of competitive constraints posed by UBER (a global cab aggregator).
- While assessing the dominance of OLA, CCI applied a nuanced approach considering the challenges posed by traditional antitrust tools and approaches. CCI noted that market share is but one of the indicators for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding.



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



Fast-Track Call Cabs and Anr. v. Ani Technologies Pvt. Ltd

The Commission analysed if OLA and UBER can be considered as part of the same 'group' pursuant to common shareholding.

- Though CCI observed that there are apprehensions that existence of common investors having overlapping shareholdings in competing firms may lead to a reduction in firms' incentives to compete, compared to a situation in which competing firms are controlled by separate sets of investors, and may thus give rise to antitrust risks.
- No case for abuse of dominant position under the Act could be made out as there was no allegation of any abusive conduct.



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



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For Greater Good

Meru Travels Pvt. Ltd. vs Uber

- Allegations of predatory pricing and entering into exclusive agreements with drivers etc.
- The Commission closed the said matter at the *prima facie* stage as there was insufficient evidence to establish dominance.
- The appellate authority (i.e. erstwhile COMPAT) differed with the delineation of the Relevant Geographic market and referred the matter to Director General for investigation.
- Hon'ble Supreme Court : upheld appellate Authorities order and observed that the test for dominance is the ability to operate independently of market forces or affect the relevant market or the competitors.
- The matter is under investigation



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



**Samir Agarwal vs ANI
, Uber**

Allegations:

- Algorithmic pricing adopted by the OPs takes away the liberty of individual drivers to compete with each other and thus amounts to fixing of prices.

Findings

- Commission observed that for a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place . In the instant case though drivers may have acceded to the algorithmically determined prices by the platform, this cannot be said to be amounting to collusion between the drivers.
- Similarly the pricing algorithm was not found to be amounting to resale price maintenance.
- The matter was closed



ANTITRUST CASES INVOLVING DIGITAL MARKETS



**Mohit
Manglani vs.
Flipkart/Snapdeal and
Others**

Allegations:

- The e-commerce entities and product seller enter into 'exclusive agreements' to sell the selected product exclusively on the selected portal to the exclusion of other e-portals or physical channels and accordingly cause an appreciable adverse effect on competition (AAEC).

Findings:

- The CCI found it unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products which are sold through exclusive e-partners face competitive constraints. No AAEC could have been caused.
- Further, with regard to the abuse of dominance allegations, CCI held that none of the e-portals were dominant individually in the relevant market/s (irrespective of whether the e-portal market was considered as a separate market or as a sub-segment of the market for distribution).



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



Jasper Infotech (Snapdeal) vs. Kaff Appliances

Allegations:

- This case involved alleged imposition of resale price maintenance by a kitchen appliance manufacturer (Kaff) on an e-portal (Snapdeal). Kaff Appliances was allegedly aggrieved by the displaying of its products on Snapdeal’s web portal at a discounted price and displayed a ‘caution notice’ on its website stating that the products sold by Snapdeal are counterfeit and not authorized by it.

Finding:

- The survey conducted by DG did not bring out the existence of any agreement/understanding/arrangement between the OP and its dealers.
- Commission found merit in the clarification given by the OPs for caution notice.
- Commission observed that a right of the manufacturer to choose the most efficient distribution channel ought not to be interfered with, unless the said choice leads to anti-competitive effects .
- Evidence on record does not demonstrate that the conduct/practice of the OP led to any AAEC .
- The case was closed after investigation.



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ANTITRUST CASES INVOLVING DIGITAL MARKETS



<p>M/s</p> <p>Counfreedis</p> <p>e vs. Timex</p> <p>Group India</p> <p>Limited</p>	<p>Allegations:</p> <ul style="list-style-type: none"> The Informant, an e-commerce seller, alleged that Timex Group (an innovative timepieces and jewellery globally manufacturer), alleged that Timex Group is insisting the Informant to control discount (via email), denying after sale service to customers of the Informant who purchased watches of Timex Group on the pretext of being unauthorized seller and filing of frivolous case against the Informant alleging that it is involved in manufacture and sale of counterfeited watches of Timex. <p>Findings:</p> <ul style="list-style-type: none"> With regard to alleged RPM, the Commission noted that mere mention of the term ‘control discount’ in a single isolated email to a single seller, without any adverse consequence to the other online sellers including the Informant, is not sufficient to infer any anti-competitive conduct on the part of the Timex Group. The Commission noted that for RPM to be effective in the form of discount control, it has to be imposed on all the online retailers and not just the Informant. The Commission observed that Timex Group was just one of the many players in the wrist watch market in the organised sector and players like Titan etc. are way ahead of it.
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<p>M/s Counfreedi se vs. Timex Group India Limited</p>	<ul style="list-style-type: none">• Moreover, the Informant is only one of the intermediaries of Timex Group in the online space, and online sales account for less than one-seventh of the total sales of Timex Group. The Commission noted that the Informant has failed to place on record any evidence to establish that Timex Group enforced RPM across the distribution channel so as to be able to cause an AAEC in the relevant market.• Further, the Commission agreed with the submission of the Timex Group that its mandate is to service genuine watches only and it cannot offer warranty or after-sale services for a counterfeit product or a product without a document/invoice as proof of it being an original product. The Commission also noted that Timex Group was facing the menace of counterfeit products, especially on account of online retailers. Since Timex Group suspected the Informant of indulging in counterfeiting of its products, any refusal to deal on this account cannot be termed as anti-competitive.
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DIGITAL MARKETS : KEY OBSERVATIONS AND RECOMMENDATIONS OF CLRC



- Definition of price broad enough to cover non monetary considerations like data.
- Section on assessment of dominance has enough flexibility to consider factors such as advantage of data, network effects.
- Expanding the scope of factors for determining the Relevant Geographic Market by incorporation of “characteristic of goods and services and switching costs as factors and allowing incorporation of any other factor that may be determined by Regulations.
- Expanding the scope of factors for determining the Relevant Product Market by incorporation of “switching costs and categories of customers as factors and allowing incorporation of any other factor that may be determined by Regulations.



DIGITAL MARKETS : KEY OBSERVATIONS AND RECOMMENDATIONS OF CLRC



- Expanding the scope of factors to assess AAEC by widening the scope of Section 19(3) to make it inclusive with a view to allowing newer considerations and factors for assessing AAEC through Regulations.
- Expressly widening the net of anti competitive agreements by including 'hub and spoke' as well as agreements that do not fit within horizontal and vertical agreements.
- Introduction of Settlement and Commitment Mechanism.



WAY FORWARD



- Develop digital tools for proactive detection of bid rigging
- Advanced Forensic Lab
- Regular Commissioning of Market Studies
- Focussed Advocacy
- International Cooperation



THANK YOU!!!