Neutralitiy Of Online Platforms- A Novel Concern

Introduction

The Digital Market, which includes under its ambit, virtually all technology platforms enabled businesses, is rapidly evolving whilst touching so many other sectors of the economy. This type of market fuelled by data, extreme returns to scale and strong network externalities, is different from traditional markets. Digital platforms have the potential to increase competition, enhance consumer choice, bring about information transparency and prompt further inventions in the market. However, like any other market, digital market is also not immune to anti-competitive conducts.

Apart from the usual concerns about anti-competitive acts like predatory pricing, merger reviews, data and algorithmic dominance, there is one issue that has not been given adequate attention by the competition authorities, which is the neutrality of the online platform market. The paper focuses on the challenges in neutrality of platforms and the way forward. While there are multiple forms of online intermediary markets like software platforms, advertising platforms, the paper shall be focusing on exchange platforms which help customers to search for feasible deals and mainly comprise online retail marketplaces, food delivery applications and cab aggregator models.

One prominent feature of these intermediaries is that they integrate across various business lines in a manner that they function both as sellers of goods and services as well as a platform for selling others’ goods.¹ This unique structure enables them to pose serious anti-competitive concerns which are heightened by increasing dependence on digital platforms. The current framework is unequipped to tackle this form of structural dominance so there arises a need to adopt measures in order to ensure that the markets remain open and contestable.²

² 1 S.M. DUGGAR, GUIDE TO COMPETITION LAW AND POLICY 765 (5th ed. 2010).
**VERTICAL INTEGRATION IN THE ONLINE MARKET**

The Kerala Hotels and Restaurants Association alleged food delivery application Swiggy of abuse of dominance by driving traffic towards its own cloud kitchen and bypassing other restaurants.\(^3\) All India Online Vendors Association filed a complaint against the two e-retailers, Flipkart and Amazon, for preferential treatment to particular sellers on their platform.\(^4\) Cases like these draw attention to one of the emerging issues in the online platform market, i.e., vertical integration which arises when two or more successive stages of production or/and distribution are put under the same control. The neutrality of these platforms is being compromised as a result of such integration.

In case of online platforms, the players do not only sell goods or services of their rivals, but also their own products. They have control over the infrastructure, online content, delivery and logistics, app development, cloud space and above all, over the manner in which the business of the platform is run. In such a setting, the intermediaries’ rivals are also its customers and this integration which is a result of dual role played by the intermediaries in the market, enables them to exploit other players in the market thereby further compromising the neutrality of these online platforms.

**ANTI-COMPETITIVE PRACTICES ADOPTED BY PLATFORMS**

While the intermediaries are expected to be independent in conducting their business of connecting consumers to goods and services, the manner in which they operate, shows otherwise. The practices that such platforms engage in are:-:

*Firstly*, the intermediaries often use their **ranking algorithms** in such a manner that it favours its own products over those of other sellers on the platform. In such a setting, the consumer is led to the platform’s own brand even when other players are selling the same good at a lower price. Also, the **sponsored ads and pop ups**, appearing on the websites direct the consumer towards the platform’s own product page rather than those of its rivals. Sometimes, the platform shows itself as **default sellers of particular** goods even in cases where the other sellers are willing to sell the good at a lower price. This acts as foreclosure of consumer access to competing goods under the Competition Act.

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\(^3\) 2017 CompLR 667 (CCI).

\(^4\) All India Online Vendors Association vs. Flipkart India Private Limited and Anr, (2018) CompLR 1122(CCI).
A second strategy that is adopted is using its terms and conditions to its own advantage and in a manner that distorts competition. The intermediaries often make the third parties enter into marketplace policies in a manner that it becomes exclusive supplier of certain goods or service. This it does in exchange of providing the services of its platform above the Minimum Advertised Price. Such an example would be Swiggy, making a number of restaurants registered on its application, to sell all carrot cakes to its own kitchen directly in a manner that it can control the price and terms of sale for carrot cakes for the entire relevant market. This amounts to exclusionary conduct on part of the intermediaries as under the Competition Act. ⁵

Thirdly, the platforms are seen to be engaged in favouritism towards a particular seller or a group of sellers on its platform. This is evident from the ratings it provides or the terms and conditions which operate between the seller and the platform. Not only this, particular sellers and service providers also complain of certain subtler forms of discrimination that they face on the platforms like suspension or withholding of accounts, withholding of funds, change in page displays, blocking of favourable reviews, and sabotage of campaigns.

Lastly, the ability of digital platforms collect and analyse consumer data is unrivalled. Apart from tracking consumer purchase histories and brand sales, the platforms also use the data to keep track of items that the consumer clicked to purchase, the price change that induced them not to get a good or service, the time people are spending to hover over goods and services on the platform, the manner in which consumers are reacting to product images and videos and other such information that they store which gives them an unprecedented advantage over the other sellers on their platform. This exclusive data can either be used to promote their own brand or to help preferred sellers in making their services more attractive. Amazon has been accused of making other sellers fill up forms requiring various business method details which were later on used by Amazon to boost its own brand. Due to the growing pace of the digital market, this has been creating impenetrable entry barriers in the market. ⁶

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⁵ D.P. MITTAL, COMPETITION LAW AND PRACTICE 334 (3d ed. 2011).
LONG TERM EFFECT ON THE MARKET

The impact of integration of online platforms shall be huge for the economy.

First, the control of intermediaries over the internet infrastructure which provides an essential service will lead to concentration of economic powers which is anti-thesis to the whole idea of competition law. Second, this kind of conduct where the market tilts towards internet giants like Amazon and Ola shall hamper innovation in the market. The very threat that the individual businesses and suppliers shall be appropriated by unreasonable control over them or that they shall be in direct competition with platform giants, brings about discouragement in innovating in the market. Third, the areas like e-commerce where giants like Amazon and Flipkart rule, are coming to be known as “kill zone” in terms of investment. The investors are not convinced that any individual player can compete with these giants due to the huge structural advantages that they own and have been exploiting.  

The above stated reasons further increase the relevancy of ensuring the neutrality of online platforms

INADEQUACY OF LAW IN DEALING WITH PLATFORM NEUTRALITY

As far as issues concerning neutrality is concerned, the platforms are often accused of two type of conducts- 1) Favouring their own private labels. 2) Promoting “preferred sellers” on platforms.

While promoting preferred sellers are concerned, these types of vertical restrains can be brought under Section 3 (4) of the Competition act. However, most vertical restraint cases that the CCI has so far encountered has been related to either Resale Price Maintenance or Exclusive Distribution Agreement. In this highly fluid market, the Competition act is unequipped to deal with newer types of restraints. Also, the law is also not equipped to handle other forms of discriminations that the sellers or suppliers face on a platform which do not necessarily entail any agreement as mentioned in Section 3 (4).

The Competition law is also not well-suited to deal with issue of platforms favouring their private labels. The behavioural remedies under Section 3 of the Competition law do not cover such a scenario and therefore this grey area needs to be looked into. This type of ex-

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post approach to this sector seems to be creating effective barriers to entry in this market and a near monopoly situation.\(^9\)

Lastly, there has been a lack of legal jurisprudence on the **appropriate market definition for online platforms.** The CCI has not clarified whether online platforms qualify to be distributors in a vertical distribution channel or merely an intermediary. These queries if resolved would help in curtailing abuses in the digital market in a better manner.

**THE WAY FORWARD**

The following steps can be taken to ensure that the online platforms do not render the market less competitive.\(^{10}\)

*First and foremost,* there is a need to **provide a proper definition** for online platform to bring any such player under competition law scrutiny. In the *Microsoft case*\(^{11}\), the US Competition authority defined platform as “A firm that controls a network or facility” Similarly, the CCI should define intermediaries and platforms to deal with novel concerns of these platform based markets.\(^{12}\)

*Secondly,* Section 3 (4) can be amended accordingly, to include within its **ambit newer types of vertical restraints.** In the case of *Jasper v. Kaff*\(^{13}\), the CCI took cognizance of the international jurisprudence to recognize novel vertical restraints peculiar to the online market, namely, Across Platform Parity Agreements, Non-price Restrictive Agreements and Most Favoured Nation Clause agreements. As discussed earlier, these types of agreements give unfettered advantage to the platforms over the other suppliers registered on it. To help the CCI deal with them, they should be added to Section 3 (4) of the act.

*Thirdly,* apart from behavioural remedies provided under Section 3 of the Competition Act, there is **an increasing need for structural remedies in the platform market.** Whereas behavioural remedies seek to prevent firms from engaging in certain acts, structural remedies seek to eliminate the possibility of the act itself.

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\(^9\) Comp M. 5727, Microsoft/Yahoo! Search, 18 February 2010 (European Commission Case).

\(^{10}\) 2014 SCC Online CCI 150.
Two types of structural remedies that are required to ensure neutrality of online platforms are-:

- Considering that platform’s involvement in various business lines can give rise to conflict of interest where the platform has incentives to favour its own products and services, structural separation should be resorted to by the Competition authorities. By drawing analogy from the banking sector, taking this step would mean prohibiting a dominant firm from entering any market as a seller, where it already serves as platform. Hence, no player is allowed to run both as a dominant seller as well as a dominant platform for third party sellers. Similar proposal is being considered by the European Union to separate platforms from their commercial activities. The OECD council has adopted a Recommendation on Structural Separation of regulated Industries.

The new FDI rules released recently bars online entities with foreign investments to sell products of companies in which they have a stake. While this move is a welcome one and somewhat tackles the issue of platforms favouring private labels, these rules are vague and arbitrary because it applies only to companies with FDI. The issue of “preferred sellers” is still not solved and the platforms do have an option to sell under the “Global Market” category where they are exempted from compliance. Also, placing such a blanket rule in the competitive market shall affect economy in its budding stage and prove to be counterproductive. What can be done is a clear threshold limit is to be laid down by the CCI for the applicability of this rule of absolute separation of the platform from its own business activity or private labels, limiting such a strict approach only to the potentially dominant platforms.\(^{14}\) This decision of setting threshold limit can either be a general limit or a sector- specific rule, to be based on the number of purchases, number of customers, rating of customers, annual turnover, data owned, number of firms registered and ability to dominate in the market. This way, even neutrality is ensured and online platforms are also not overburdened.\(^{15}\)

- In addition to structural separation of dominant firms, there should be a non-discriminatory policy enacted by the CCI requiring mandatory compliance from all

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platform markets.\textsuperscript{16} This policy is to contain prohibitions against anti-competitive activities adopted by platforms like ad-blocking, misuse of algorithm, non-transparency of advertisements, blocking of consumer reviews, high ranking for preferred sellers, non-transparency in services, prohibition against self-referencing and neutral advertisements and pop-ups. Relating to complaints regarding discriminatory policy, the burden of proof should be shifted to the Platforms to prove that their act was competitive. In drafting such a policy, reference can be drawn from Article 5 of E-Commerce Directives in European Union which deals with additional transparency requirements of online platforms. In France, the National Digital Council proposed a law imposing an obligation on platforms to provide fair, transparent and clear information, which has been adopted by the government.\textsuperscript{17}

\textit{Fourthly}, for ensuring better and quicker adjudication of disputes concerning online platform market, \textbf{data collection about individual platforms} and about the changing dynamics of online market should be done on a \textbf{continuous basis}. This would help in establishing an empirical base for quicker assessment of competition issues. So if any formal complaint is brought in front of the CCI, reliance can be placed on information provided by informant as well as on up-to-date information, which would in turn ensure that dispute resolution is not lengthy and ineffective in the rapidly growing market.\textsuperscript{18}

\textit{Lastly}, In order to capture these competition issues in online platforms more accurately, we should \textbf{replace our consumer welfare framework of Competition law}, with an approach oriented around preserving a competitive process and market structure. Consumer welfare based approach places most emphasis on price of goods and services and it is an undeniable fact that the online platforms offer better goods to consumers at lower cost.\textsuperscript{19} Also, if the online markets are scrutinised and restrained, there is possibility of increase in prices. We need to understand that kind of price-centric approach does not allow Competition authorities to keep check on online platforms with a defence that customers are being benefitted by low


\textsuperscript{17} Christian Ahlborn & David S. Evans, \textit{The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe}; David J. Gerber, “\textit{Competition Law and International Trade}: 4 PRM PJ, 43-44. 26 (1995).


prices and greater variety. However, there multiple other stakeholders in the markets apart from consumers like suppliers, distributors, sellers, investors, creative contributors and workers. The law should equally focus on serving their interests as well. Therefore, the focus should move from ensuring low prices to ensuring that markets remain competitive.\textsuperscript{20}

**CONCLUSION**

Based on the above discussion, it can be concluded that keeping in mind the fast-moving pace of the digital market, there is a need to understand that the dynamics with relation to Neutrality of Platforms is changing.\textsuperscript{21} A structural separation of the platform market along with appropriate policy changes is necessary to ensure that they remain neutral and the entire process is to be approached as a part of an economic policy rather than mere competition regulation.

With increasing complexities in the market, various changes need to be brought about in the structure of the market so that it is does not turn redundant. The nature of trade is changing and so should the market structure.\textsuperscript{22}

Keeping in mind that the Parliament enacted the Competition Act in 2002 with a view to protect the competitiveness in the economy, the laws ensuring this competitiveness should be updated to ensure the primary object of the Act is sustained amidst such puzzling changes in the market.\textsuperscript{23}

*Only then can a fair competition exist in the market where every player is free to compete in the manner that the Commissions deems fit for benefit of the Competitive spirit of the country’s market.*\textsuperscript{24}

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\textsuperscript{23} S.M. DUGGAR, GUIDE TO COMPETITION LAW AND POLICY 1080 (5th ed. 2010).

LIST OF REFERENCES

BOOKS

1. S.M. DUGGAR, GUIDE TO COMPETITION LAW AND POLICY 765 (5th ed. 2010).

ARTICLES