

# Antitrust Investigation against E-Commerce Platforms in Goods Category in India: A Review from Timeliness Perspective

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**Abstract:** With the entry of e-commerce, the traditional way in which business was conducted in a marketplace has changed considerably. Although, e-commerce offers a multitude of pro-competitive benefits, yet it is vulnerable to anti-competitive practices owing primarily to its characteristic features such as strong network effects, high innovation rates, fast-changing technologies, etc. In this paper, we review antitrust cases against e-commerce platforms in goods category, in light of the fast-moving nature of online businesses and the importance of timeliness in completion of investigation. We have adopted a doctrinal research methodology in this paper. Based on the findings, we suggest that as per the dynamic situation of markets, it is imperative that a time-bound investigation may be completed so that the true picture comes out. We recommend a holistic investigation by the Director General in such cases and the use of negotiated remedies in the form of settlements and commitments.

**Keywords:** E-commerce, platform business, fast-moving, online marketplace platform

## 1. Introduction

We live in an era in which almost all aspects of our lives have been permeated by digital technology. The technology companies are revered for their disruptive innovations and efficiencies they create. However,

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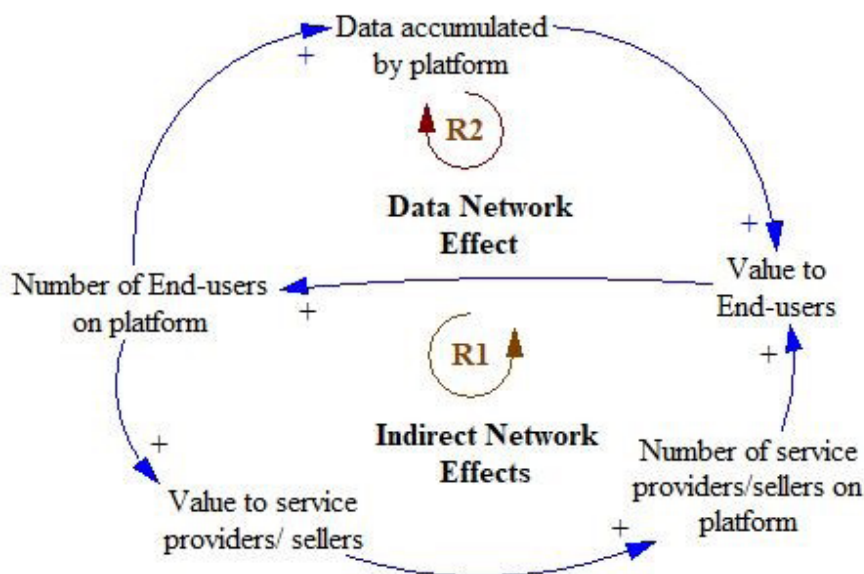
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technology-driven businesses are vulnerable to acquisition and abuse of market power (Parsheera, Shah, and Bose, 2017, p. 3). Digital markets, which are characterised by strong economies of scale and scope, network effects, and multi-sided markets, provide unique opportunities as well as pose challenges for antitrust enforcement (CLRC, 2019, p. 149). With regard to challenges, the fast-moving nature of online business and the relevance of timely investigation in antitrust cases against them have been subject matters of discussion amongst various competition law scholars. The time elapsed *between a full-fledged investigation and the determination of violation* is a matter of concern in antitrust cases against online businesses (Parsheera, Shah, and Bose, 2017, p. 6). The ultimate findings of a case may become ineffectual or irrelevant due to the *mismatch between “law time”, i.e. the time that authorities take in deciding a case and “new-economy real time”* (Posner, 2000, p. 9). Compared to other sectors, internet businesses have much faster growth and to make a difference, the opportunity lies in the time window before the setting-in of network effects. A time-bound system of investigation needs to be adopted to ensure the relevance of findings, given the changing market dynamics (Parsheera, Shah, and Bose, 2017, p. 18). In the antitrust investigation against the internet giant Google conducted by the European Commission (EC), Joaquin Almunia, the then Competition Commissioner of the EC, notes: *“fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement”* (Almunia, 2012). Margrethe Vestager, Executive Vice-President of the European Commission for a Europe Fit for the Digital Age, highlights the relatively slower pace of the European Union (EU) antitrust rules to catch up with the pace of digital and fast-moving markets and goes on to say that *“fines do not do the trick”* once the market has tipped and network externalities are strong (European Parliament, 2019, p. 28). Although, tipping is common to network industries<sup>1</sup> but the market can tip in favour of the player who does not necessarily have the most innovative product but uses anti-competitive practices to tip market in its favour (Bose and Parsheera, 2016). Fines only serve as a punishment for illegal behaviour in the past but may not restore effective competition (European Parliament, 2019, p. 28) if there are significant delays in the determination of violation.



**Figure 1: Feedback Mechanism related to Network Effects<sup>2</sup> in Platforms**



*Source:* Drawn by Authors.

In recent times, e-commerce, a part of the fast-moving online business ecosystem, is witnessing fast growth in India.<sup>3</sup> However, with this growth, the allegations against e-commerce platforms indulging in anti-competitive practices have also grown in number. In view of e-commerce's growing importance, the Competition Commission of India (CCI) carried out a market study to understand the functioning of e-commerce sector and the possible implications for the competition (CCI, 2020). The Competition Law Review Committee (CLRC), constituted to review and recommend changes to the Competition Act, 2002, also took up the issue of Technology and New Age Markets in its report in which it assessed the Competition Act on whether it is ready to address the issues of growing digital markets (CLRC, 2019). Hence, with this context and taking a cue from the existing literature on the importance of timely investigation, a research study aimed at reviewing and analysing the antitrust cases against e-commerce platforms in India from the perspective of time elapsed in the investigation will be a good academic contribution that will help in evolving a newer approach to competition enforcement in e-commerce space.

## 1.1. Research Objective and Questions

This research paper aims to review and analyse recent antitrust cases against e-commerce platforms in goods category<sup>4</sup> in light of the delays in investigation and come up with suggestions to speed up the process. More specifically, this research paper attempts to answer the following two broad questions:

- What are the current trends of antitrust cases pertaining to e-commerce platforms in India, in light of time elapsed in determination of violation? In answering this question, researchers summarise each case, and discuss the timelines with a focus on delays. The delays for the purpose of the study mean overall delays which may be due to delay by the CCI or any other judicial authorities.
- How, in light of recent judicial pronouncements, a holistic investigation by Director General (DG) becomes important in these cases? In answering this question, the researchers discuss various judgements of Courts which provide ground for the DG to investigate a matter referred to it by the CCI in a holistic manner.

## 1.2. Methodology

A doctrinal research methodology has been adopted by the researchers for answering the above research questions. The data comes from secondary sources such as various judgements of Honourable Supreme Court of India (SC), High Courts (HC), and the Competition Commission of India. In addition to this, various journal papers and articles have also been referred to.

## 2. A Brief Overview of Competition Law in India and Background to E-Commerce Sector

Before going ahead, it is worthwhile to understand the contextual background. In this section, researchers attempt to provide an overview of competition law framework in India followed by a brief discussion on the concept of e-commerce and underlying possible competition issues.

### 2.1. Competition Law Framework in India

The competition law landscape in India is governed by *the Competition Act, 2002*, henceforth called as “The Act”. This Act is the successor of Monopoly

and Restrictive Trade Practices Act, 1969 (“MRTP Act”) which was the operational law that regulated some competition aspects, prior to the time when the Competition Act got operationalised in 2009. The essence and objective of the Act can be captured in its preamble. To quote:

*“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto”* (The Competition Act, 2002, p. 1).

Based on the preamble, it can be inferred that the broad thrust of the Act is on ‘economic development’ of the country. It envisages a Commission with four major aims, namely:

- prevention of practices that adversely affect competition in the market,
- protection of consumer interest,
- promotion and sustenance of competition in the market, and
- ensuring ‘freedom of trade’.

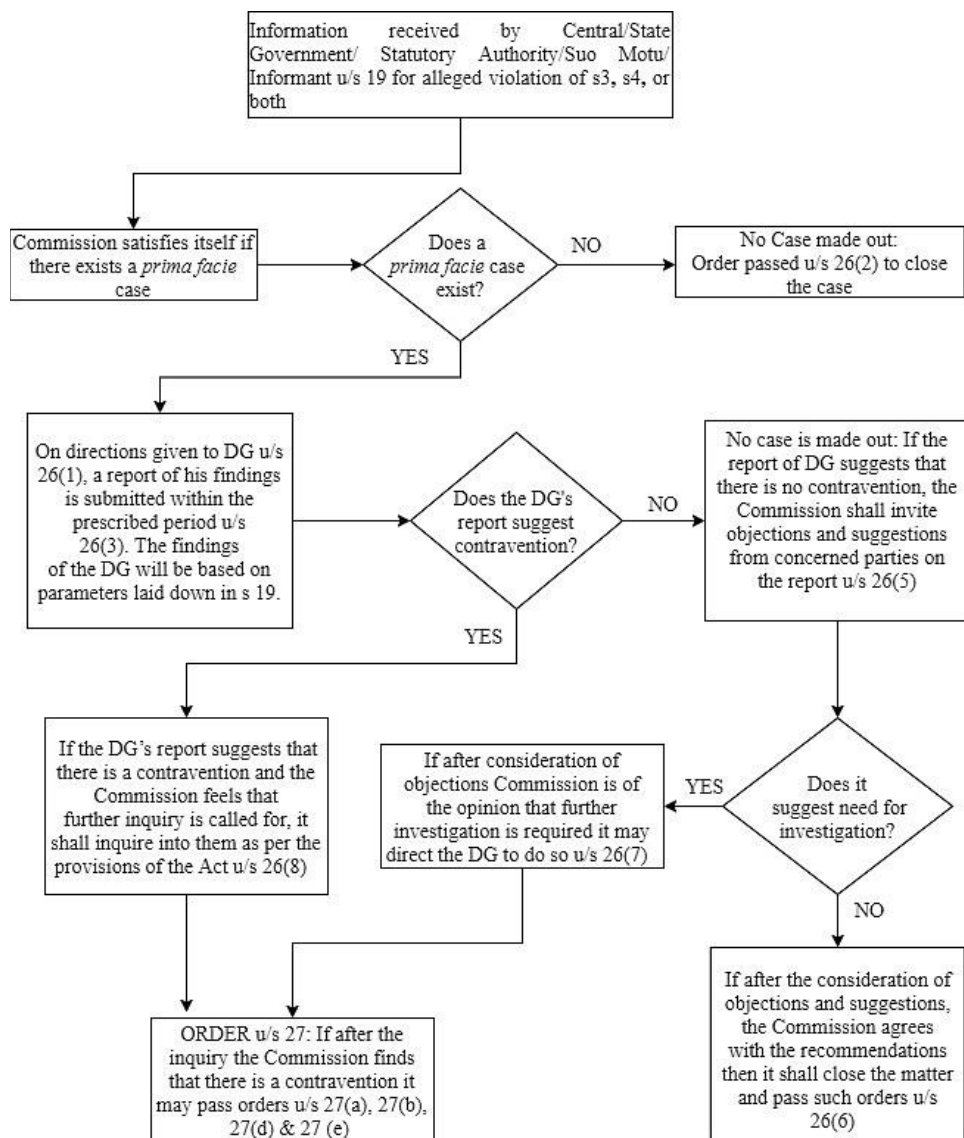
In pursuance of these aims, the Act prohibits the agreements that are anti-competitive in nature under Section 3 of the Act, whereas abuse of dominant position is prohibited under Section 4 of the Act. The Act also regulates Combinations under Section 5 and Section 6.

## **2.2. E-Commerce Sector in India and underlying Competition Issues**

Furthermore, trends of the e-commerce sector in India including some key statistics, features, and underlying competition issues need to be discussed. This section attempts to do the same with a special emphasis upon the CCI’s market study on e-commerce, recently concluded, in its quest for better understanding this sector and prevalent practices.

To explain in brief, e-commerce or electronic commerce is a “*business occurring over networks using non-proprietary protocols established through an*

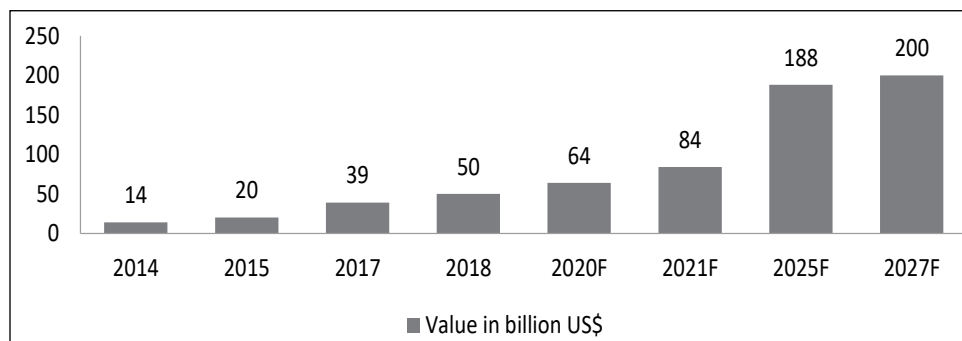
**Figure 2: Procedural Flowchart for Section 3 and Section 4 Cases**



**Source:** Adapted by Authors from Prakhar et al. (2015).

*open standard setting process*” (OECD, 2000, p. 7). Simply put, e-commerce implies sale and purchase of goods and services over an electronic medium such as the internet. In Draft National E-Commerce Policy, released by the Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, Government of India, the term e-commerce has been described as follows: “*e-commerce includes buying, selling, marketing or distribution of (i) goods, including digital products and (ii) services through electronic network. Delivery of goods, including digital products, and services may be online or through traditional mode of physical delivery. Similarly, payments against such goods and services may be made online or through traditional banking channels, i.e. cheques, demand drafts or through cash*” (DPIIT, 2019, p. 9). The major categories in e-commerce are goods, online travel agencies (OTAs), food, tech, etc. The market size of e-commerce in India for the years 2014 to 2018, with a projection till 2027, is provided in below chart (Figure 3).

**Figure 3: E-Commerce Market Size in India\***

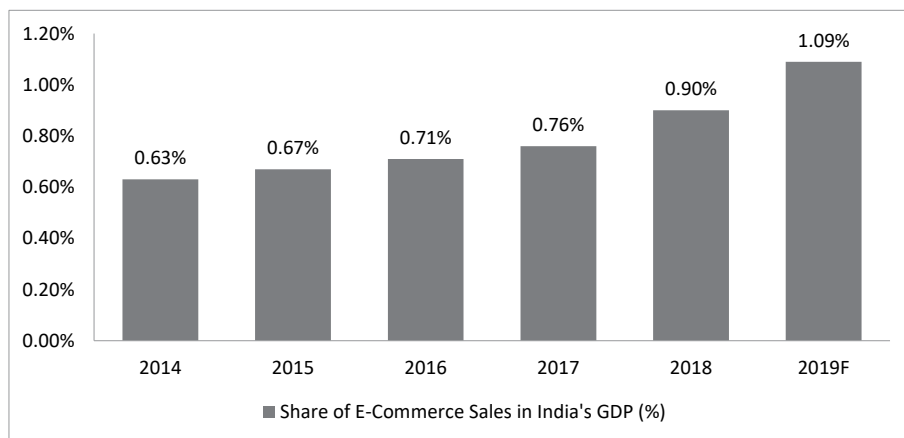


**Note:** \*Estimated values. F after year means forecasted value. This forecast does not estimate the impact of COVID. The current trends emerging after COVID indicate that e-commerce may reach US\$ 200 billion sooner than 2027 (Unicommerce, 2020).

**Source:** IBEF (2019).

The importance of e-commerce for India’s economy can be understood by its growing share in Gross Domestic Product (GDP). Figure 4 provides share of GDP made up by e-commerce sales for the years 2014-2018, along with a projection for the year 2019.

**Figure 4: Share of E-commerce in India's GDP**

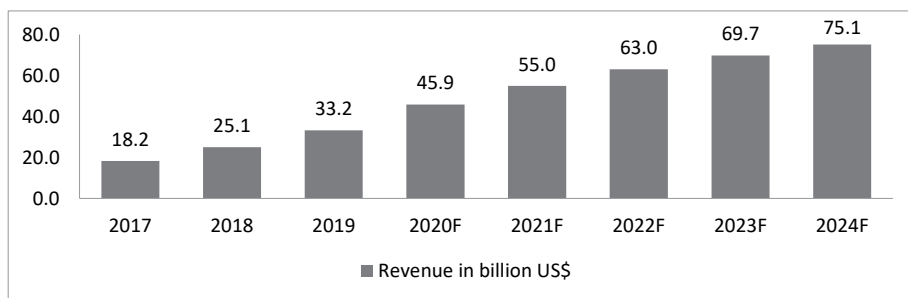


**Note:** F after year means forecasted value.

**Source:** SAP; ECommerce Foundation (2019, p. 11).

Figure 5 provides revenue of retail e-commerce market in India for the years 2017 to 2019 with a forecast till 2024. According to this forecast, the revenue of e-commerce can be expected to grow to US\$ 75.1 billion by 2024 with a CAGR of 22.42 per cent.

**Figure 5: Retail E-Commerce Revenue Forecast for India**



**Note:** All monetary figures refer to the annual gross revenue and do not factor in shipping costs. Forecast adjusted for expected impact of COVID.

**Source:** Statista (2020).

The COVID pandemic, which hit us in 2020, has also provided a significant boost to e-commerce in India. The e-commerce saw growth by 17 per cent as compared to pre-lockdown order volume (Unicommerce, 2020). If we

consider the share of online retail in overall retail, it was around 1.5 per cent in 2016, 3 per cent by 2019, and 4.5 per cent after six months in 2020. The journey from 1.5 to 3 per cent took three years, however, it grew to 4.5 per cent in just six months due to the pandemic effect (Redseer, 2020).

### **2.3. Competition Issues in E-Commerce: A Discussion Based upon CCI's Market Study on E-commerce in India**

In this section, the researchers discuss the key findings from the "Market Study on e-commerce in India" conducted by the CCI. However, the discussion is limited to e-commerce in goods category, in line with the theme of the paper.

Starting with preliminaries, the CCI (2020) in its study has found that there is a variation in the relative importance of online channel for distribution of goods as compared to offline channel based on the type of goods. For some goods such as mobile phones, online mode is preferred and for some other goods, offline mode is preferred. According to the study, price competition has increased in this space. The retailers change price very frequently and sometimes even multiple times in a day.

The study highlights the key competition issues pertaining to e-commerce platforms. "*Platform Neutrality*" is first major issue that has been brought out in the study. There are broadly two issues which stem the concerns with regard to platform neutrality. First issue is related to the "*own private label*" products which are nothing but the products manufactured by the third party and sold by the platforms with their brand name. Second issue is related to "*preferred sellers*" who allegedly enjoy preferential treatment from the platform. Simply put, this issue arises when e-commerce platforms serve both as a platform and a competitor on the same platform. In this way, they are in a position to leverage their platform control to the disadvantage of other sellers. Also, the intermediary role of e-commerce platform is such that it allows the platform to gather a large amount of data related to demand, price, etc. With this much data available, platforms can use it to deliver more targeted recommendations for product on the consumers' side, whereas, on the sellers' side, it can boost their own label products or preferred sellers. Apart from Platform Neutrality, second major issue suggested by the findings of the study is of "*unfair contract*

terms". The study finds the absence of standard contract terms available to all sellers. The sellers have alleged that commission rates are changed unilaterally by the platform owner. Under the unfair contract terms, "deep discounting" is also found to be a key issue. The sellers have claimed that they have to sometimes participate in the deep discount sales at rates that are unviable to them; otherwise, their visibility becomes lower on the platform. The third major issue, which the findings of the study suggest, is related to the "Platform Price Parity Clause". Through this clause, the sellers of goods are restricted to sell their goods on other platforms at lower rates. This is imposed through a contract by the platform. The fourth major issue is related to "Exclusive Agreements". As per the study, stakeholders claim that there is a presence of exclusive agreements between some brands and the platform. There are two kinds of such exclusive agreements: under first kind of agreements a certain product offering is launched exclusively on a single online platform and under second kind of agreements a platform lists only one brand in certain product category. This issue is more pronounced in the case of smartphones. Some smartphone brands launch their product only through preferred sellers of the platform concerned, and these preferred sellers most of the time do not have multi-homing<sup>5</sup> and operate exclusively on the concerned platform. The perception of retailers about preferred sellers is that it is an extended arm of the platform.

### **3. Analysis of Antitrust Cases against E-Commerce Platforms in Goods Category in Recent Times**

In this section, the researchers present a review, along with an analysis, of the competition law cases pertaining to e-commerce platforms in goods category. Although, there are multiple cases but two specific cases, namely *All India Online Vendors Association ("AIOVA") v. Flipkart India Private Limited and another ("Flipkart")* and *Delhi Vyapar Mahasangh v. Flipkart and Amazon* have been analysed in detail due to their relevance in answering the research questions.

#### **3.1. Delineation of Relevant Market: Changing Stance of the CCI**

The first and perhaps the most crucial part of any competition law case is the delineation of the relevant market which includes delineating both relevant geographic market and relevant product market. In the cases



pertaining to e-commerce, the CCI's stance on defining relevant market has not been uniform. In *Ashish Ahuja v. Snapdeal and SanDisk*, the CCI asserted that the online and offline markets are merely different channels of distribution of the same product, not different relevant markets. Quoting CCI,

*"...these two markets are different channels of distribution of the same product and are not two different relevant markets."*<sup>6</sup>

However, the CCI changed its stance in *AIOVA v. Flipkart*, where it acknowledged the difference between online markets and offline markets. The reasoning provided for this distinction is, mainly, the convenience which the online markets provides to both buyers and sellers as compared to their offline counterparts. The relevant market in *AIOVA v. Flipkart* is defined by the CCI as *"Services provided by online marketplace platforms for selling goods in India."*<sup>7</sup> Further, the CCI also made a distinction between *"online marketplace platform"* and *"online retail store"*. While making this distinction, the CCI also acknowledged the presence of network effects in the case of online marketplace platforms which is almost absent in online retail store.

### **3.2. Case No. 20 of 2018 All India Online Vendors Association Ltd. v. Flipkart India Private Limited and another**

All India Online Vendors Association (AIOVA) filed the Information in this case alleging that Flipkart India has contravened the provisions of Section 4 of the Act.

In this case, the CCI ruled that the party in question is not even dominant in the relevant market, let alone abuse of dominant position by it.<sup>8</sup> The reasons given for this are mainly the presence of multiple players in the market, a close competitor with significant valuation and global presence, new entrants as an indicator of low-entry barriers, etc. However, the CCI acknowledged that network effects may provide a certain advantage to incumbent players as compared to the newer players. A noticeable proceeding in this case was that the CCI held preliminary conferences with the parties, and also invited Amazon, not a party in this case, to understand *nuances of the online retail sector*.<sup>9</sup>

Finally, the CCI closed the case under Section 26(2) of the Act in its order dated 06.11.2018. However, the informant, AIOVA, challenged this order

in Appellate in *Competition Appeal (AT) No. 16 of 2019*, which subsequently overturned the judgement of the CCI and directed the CCI to direct the DG to carry out an investigation into the matter. This order has been discussed in detail in Section 3.5.

### **3.3. Case No. 40 of 2019 *Delhi Vyapar Mahasangh v. Flipkart and Amazon: First Investigation Ordered by the CCI***

Delhi Vyapar Mahasangh filed the Information in this case on 25.10.2019 against Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities for an alleged contravention of Section 3 and Section 4 of the Act.

Broadly, the allegation was against the vertical arrangements between Flipkart/Amazon with their 'preferred sellers' on the platform. More specifically, four practices of the marketplaces were alleged to be in contravention to Section 3(1) of the Act. These were exclusive launch of mobile phones, preferred sellers on the marketplaces, deep discounting, and preferential listing/promotion of private labels.<sup>10</sup>

The CCI, in this case, *prima facie* observed that there is a possibility of an exclusive arrangement between e-commerce platforms and manufacturers of smartphones which can lead to an appreciable adverse effect on competition. Quoting CCI,

*"...Thus, exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition."*<sup>11</sup>

In this case, the CCI passed an order dated 13.01.2020 under Section 26(1) directing the DG to investigate for the alleged contravention of Section 3(1) read with Section 3(4). However, with regard to Section 4, the CCI stated that the Act does not allow for the inquiry into the cases of collective/joint dominance.

However, Amazon challenged the order of the CCI in *Delhi Vyapar Mahasangh v. Flipkart and Amazon* in Honourable High Court of Karnataka in a Writ Petition (WP) 3363/2020. HC has stayed the 26(1) order passed by the CCI dated 13.01.2020. This order is discussed in detail in the following sub-Section 3.4

### 3.4. WP 3363/2020 *Amazon v. Competition Commission of India*

The Petitioner, Amazon, challenged the order dated 13.01.2020 passed by the CCI in Case No. 40/2019 directing the DG to undertake an investigation under Section 26(1) of the Act in Honourable High Court of Karnataka. Justice P.S. Dinesh Kumar in his Daily Order dated 14.02.2020 in WP 3363/2020 has ordered that the CCI Order shall remain stayed and the Respondents shall file their statement of objections in 8 weeks.<sup>12</sup>

The basis of the stay order was the CCI's inference in the impugned order that there 'appears' to exist an agreement between smartphone manufactures and e-commerce platform, without there being any material on record. The Judge took notice but did not comment on the *Star India Pvt. Ltd. v. CCI* judgement of the Bombay High Court which said that an agreement between parties must be recorded as an inference with material on record rather than as something that appears to be the case.

The Judge also took note of the following background facts in the judgement.

- The CCI, in 2018, in the complaint filed by All India Online Vendors Association against Flipkart and another entity, absolved the Amazon and Flipkart of violation of Section 4 of the Act. In the mentioned case, the CCI invited Amazon, which was not a party in this case, but was called upon to understand nuances of the sector. However, the CCI did not call upon Amazon to put-forth its case in *Delhi Vyapar Mahasangh v. Flipkart and Amazon* despite the fact that the information filed in the case contained a reference to the CCI's order in AIOVA v. Flipkart.
- Confederation of All India Traders (CAIT) filed a WP each in the Delhi High Court and the Jodhpur High Court. In the former, namely *W.P. (C.) No. 9932/2018* against Directorate of Enforcement (DOE), Flipkart and another entity, the Court's disposal was based on the accepted submission that these entities were located in Bengaluru so the concerned authorities may have examined this issue and any inquiry if warranted would have to be carried out by these authorities.
- *W.P. (C) No. 7907/2018* filed by Telecom Regulatory Authority of India (TRAI) before the Delhi High Court against DOE, Amazon and

Flipkart was disposed of by recording the counter affidavit filed by the Union of India which stated that an investigation under FEMA, 1999 was in progress.

- CAIT filed *W.P. (C.) No. 14400/2019* before the Jodhpur High Court, that sought the Court to direct the Ministry of Commerce and Industry of Government of India to take immediate measures for ensuring that e-commerce entities do not circumvent FDI policies. CAIT then purchased a Demand Draft for Rs. 50,000 deposited in the CCI to get Delhi Vyapar Mahasangh to file the present complaint before the CCI.
- The verdicts of the Supreme Court in *CCI v. Bharti Airtel Limited and Others* and *CCI v. SAIL and another* were relied on by the learned judge to hold that in view of the order passed by the Delhi High Court in *W.P. No. 7907/2018 Telecom Watchdog v. Union of India and Others*<sup>13</sup>, and the specific delineation of e-commerce business model in Schedule I Item No. 15.2.3 of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, notified by a notification dated 17.10.2019, Section 13 of FEMA would apply for levying a penalty consequent to findings of an investigation by the Central Government regarding FEMA violations.

### **3.5. Decision of Appellate Tribunal in *Competition Appeal (AT) No. 16 of 2019: Second Chance for Investigation***

Aggrieved by the CCI's 26(2) order in *AIOVA v. Flipkart*, AIOVA appealed against it in National Company Law Appellate Tribunal (NCLAT). The 26(2) order dated 6.11.2018 passed by the CCI in *AIOVA v. Flipkart* was overturned by NCLAT in its order dated 04.03.2020 in *Competition Appeal (AT) No.16 of 2019*. The CCI has been directed to direct the DG to carry out investigation taking into consideration the submitted information by Appellant, and observations in the above-mentioned order. Quoting NCLAT,

*"The CCI is directed to direct the Director General to cause an investigation to be made into the matter considering the information submitted by the Appellant and observations made by us in the present Judgement."*<sup>14</sup>

According to NCLAT, there existed a *prima facie* case against Flipkart. NCLAT has relied primarily on the observations of Assessing Officer (AO) in *Flipkart India Private Limited v. Assistant Commissioner of Income-Tax*. NCLAT has argued in its order that although the Income Tax Appellate Tribunal (ITAT) set aside the order passed by AO, yet the observations made by AO are still relevant as they are on record. NCLAT acknowledges that the ITAT considered the observations of AO in the light of Income Tax Act only, but observations of AO are on record and can be considered. NCLAT concurs with the observations of AO regarding predatory pricing of Flipkart India Private Limited, and the link between what Flipkart India Private Limited and Flipkart Internet Private Limited was doing.<sup>15</sup> The AO captured the figures for net purchases and sales of Flipkart India Private Limited, referred as Assessee, for the previous relevant year and found that it incurred losses of 2.5 per cent due to selling of goods at prices lower than cost price. Based on this observation, which is not considered to be a normal business practice, AO called upon senior officials of Flipkart for examination. The remarks of AO are mentioned in ITAT judgement in para 7.

*"7. ...The sum and substance of the statement of the Vice-President according to the AO was that the **strategy of selling at a price lower (predatory pricing) than the cost price is to capture market share and to earn profits in the long run.** According to the AO the benefit to the online buyer in the short run in the form of lower price is to create indirect benefit to the Assessee in the long run."*<sup>16</sup>

The AO concluded thereafter, as mentioned in para 9 of the ITAT judgement:

*"9. ... losses incurred by the Assessee was to create marketing intangible assets and therefore the loss to the extent it is created due to predatory pricing should be regarded as capital expenditure incurred by the Assessee and should be disallowed."*<sup>17</sup>

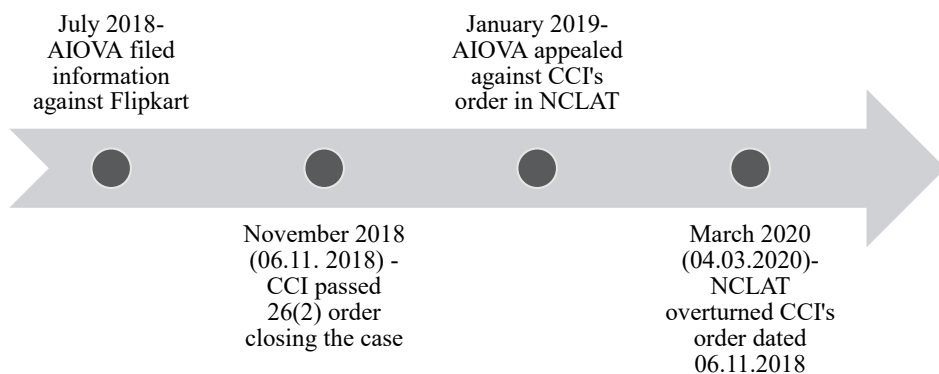
### 3.6. Summary of the Cases

In this section, the researchers attempt to summarise the cases against e-commerce platforms in goods category along with their current status.

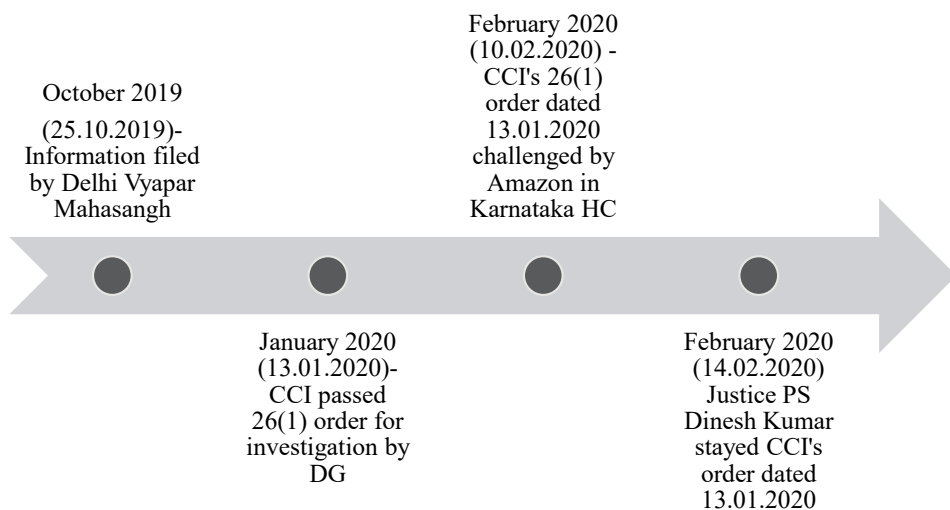
**Table 1: Summary of Cases against E-commerce Platforms**

Case Number	Informant	Opposite Parties	Alleged Violation	CCI's Response	Developments
17 of 2014	Ashish Ahuja	Snapdeal.com; SanDisk Corporation	Section 3; Section 4	<i>Prima Facie</i> no violation was found. Case closed u/s 26(2) in the order dated 19.05.2014.	Matter is closed now.
80 of 2014	Mohit Manglani	Flipkart India Private Limited; Jasper Infotech Private Limited, and others	Section 4	<i>Prima Facie</i> no violation was found. Case closed u/s 26(2) in the order dated 23.04.2015.	Matter is closed now.
20 of 2018	All India Online Vendors Association	Flipkart India Private Limited; Flipkart Internet Private Limited	Section 4	<i>Prima Facie</i> no violation was found. Case closed u/s 26(2) in the order dated 06.11.2018.	AIOVA appealed against the CCI's order in NCLAT (Competition Appeal (AT) No.16 of 2019) which overturned the CCI's order in its order dated 04.03.2020. CCI directed to direct the DG to carry out the investigation.
40 of 2019	Delhi Vyapar Mahasangh	Flipkart Internet Private Limited; Amazon Seller Services Private Limited	Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1)	<i>Prima Facie</i> case was made for contravention of Section 3(4) read with Section 3(1). The DG was directed to carry investigation u/s 26(1) in order dated 13.01.2020.	Amazon challenged the CCI's order dated 13.01.2020 in Hon'ble Karnataka High Court (WP 3363/2020). Hon'ble HC in its order dated 14.02.2020 stayed CCI's order in Case No 40/2019

**Source:** Compiled by Authors.

**Figure 6: Timeline in AIOVA v. Flipkart**

*Source:* Drawn by Authors.

**Figure 7: Timeline in Delhi Vyapar Mahasangh v. Flipkart and Amazon**

*Source:* Drawn by Authors.

In the previous sub-sections, the researchers provided the details of the investigation process along with timelines in competition cases against e-commerce platforms in India. In *Delhi Vyapar Mahasangh v. Flipkart & Amazon*, the CCI directed the DG for investigation in 26(1) order dated 13.01.2020. This order was stayed by Honourable High Court of Karnataka in the order dated 14.02.2020. It is seen that judicial interventions and stay

ordered by Honourable High Court has derailed the investigation process. In *AIOVA v. Flipkart*, the CCI passed 26(2) order dated 06.11.2018. This was challenged in NCLAT which overturned the CCI's order and directed the CCI to direct the DG for investigation in its order dated 04.03.2020. It can be clearly seen that considerable time has elapsed in the process and, hence may defeat the purpose of the Act given the fast-moving nature of the online businesses.

#### **4. LPA 137 of 2014 *Competition Commission of India v. M/s Grasim Industries Limited: A Way Forward for Holistic Investigation by Director General***

Taking into light the recent developments in *AIOVA v. Flipkart* and *Delhi Vyapar Mahasangh v. Flipkart and Amazon*, there is a situation where the DG has to investigate the matter pertaining to Section 4 violation against Flipkart. But, during the investigation, the DG may also find violations of Section 3. It becomes important to discuss existing jurisprudence in this regard, i.e. whether the DG can holistically investigate for all the violations, not limited to the views of the CCI, in an investigation referred to it by the CCI.

The investigative powers of the DG have been brought out very well by Honourable High Court of Delhi in *Competition Commission of India v. M/s Grasim Industries Limited (GIL)* in the judgement dated 12.09.2019. Quoting HC,

*"...an order of the CCI under Section 26 (1) of the Act 'triggers' investigation by the DG, and that the powers of the DG are not necessarily circumscribed to examine only such matters that formed the subject matter of the original complaint. No doubt, the language of the order passed by the CCI issuing directions to the DG will have a bearing on the scope of such investigation by the DG."*<sup>18</sup>

This means that the scope of investigation of the DG is not limited to the views expressed by the CCI. Let us look at some background facts to this case referred to in this judgement by HC.

On 30.05.2011, Section 19(1) information was filed against the manufacturers of Man-Made Fibers (MMF) for an alleged contravention of Section 3 of the Act. *Prima facie*, the CCI found a case against GIL and ordered an



investigation by the DG in its 26(1) order dated 22.06.2011. The DG carried out the investigation and found that there was no violation of Section 3, but interestingly it found that GIL has violated Section 4 and submitted the report accordingly to the CCI on 26.02.2013. This report was, however, challenged by GIL in HC of Delhi in *W.P. (C) No.4159/2013* alleging that scope of the DG was limited to the investigation for Section 3 violation, and the DG could not investigate, as it did, for any Section 4 violation. On 17.12.2013, the learned Single Judge quashed the DG's report and ruled that the DG could not investigate for a violation under Section 4 in this case.

This order of single bench was further challenged by the CCI in HC in *LPA 137 of 2014* which reversed the judgement of learned single bench in *W.P. (C) No.4159/2013*. To summarise, the major point of contention was that if the DG is directed to investigate any matter for Section 3, can he also investigate for Section 4 simultaneously if some violation is found during the investigation process? Quoting HC in *LPA 137 of 2014*:

*"...DG was within his powers in terms of Section 26 (1) of the Act read with Regulations 18, 20 and 41 of the CCI (General) Regulations 2009 (CCI Regulations), to submit a report regarding the violation of Section 4 of the Act by GIL, although the direction issued by the CCI under Section 26 (1) of the Act was with reference to information pertaining to violation of Section 3(3) (a), (b) and (c) of the Act."*<sup>19</sup>

In the aforementioned judgement in *LPA 137 of 2014*, the Honourable HC relied on various other judgements whose discussion also becomes important here. In *Competition Commission of India v. Steel Authority of India Limited*, the Honourable Supreme Court (SC) ruled:

*"The scope of investigation to be made by the DG cannot be limited by the prima facie opinion expressed by the Commission. Neither, the DG is bound by the views given by the Commission."*<sup>20</sup>

The Hon'ble SC in this judgement has also pointed out the need for rapid investigation by the competition authority. Quoting SC,

*"In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out."*<sup>21</sup>

In *Excel Crop Care Limited v. Competition Commission of India*, SC ruled that although the complaint made initially may be limited but the DG during the investigation may look into other aspects as well, as it may come out during the investigation.<sup>22</sup> Another important case that has been cited in the order is *Cadila Healthcare Limited v. Competition Commission of India*. In this case, HC has ruled that a party which was not the part of the initial complaint can also be investigated if the course of investigation points in that direction.<sup>23</sup>

## 5. Conclusion

Based on the discussion of the cases and the features of e-commerce platforms in previous sections, it can be concluded that as per the dynamic situation of markets, it is imperative that a time-bound investigation may be completed so that the true picture comes out. In the cases discussed in previous sections against e-commerce platforms in goods category, the investigation process has been derailed due to judicial interventions by Appellate and Hon'ble HC, resulting in delays. In *AIOVA v. Flipkart*, the information was filed in July 2018, but the case has still not reached to its final outcome; similarly, in *Delhi Vyapar Mahasangh v. Flipkart and Amazon*, the information was filed in October 2019 but the case has not reached to its final outcome. Given the fast-moving nature of businesses of such platforms, this delay defeats the purpose of the Act. We suggest a possible way out to speed up the process in the form of an holistic investigation by the DG: it means while investigating one aspect, say alleged Section 4 violation, if the DG comes across for violation of Section 3(4), then the same should also be recorded rather than going back to Section 26(1) stage separately for that alleged violation and starting investigation de novo. However, the timeline should be followed in letter and spirit of 60 days as laid down by the Supreme Court in *SAIL Judgement*. This will save time and fulfil the intended objective of the Act. For example, in the current status of investigation against e-commerce, there is one case, *AIOVA v. Flipkart*, in which NCLAT has directed the CCI to direct the DG to carry out investigation into the matter for alleged violation of Section 4 by Flipkart. In the other case, *Delhi Vyapar Mahasangh v. Amazon & Flipkart*, the CCI's order for the DG to carry out the investigation for violation of Section 3(1) read with Section 3(4) has been stayed by the Honourable High Court of

Karnataka. A possible way out in this situation is that the DG may carry out the investigation holistically as stated above.

Apart from the suggested holistic investigation by the DG in such cases, negotiated remedies such as Settlements and Commitments are a good way to reduce the average duration of cases and ensuring timeliness. To pursue this recommendation, the provision of settlement and commitment may be included in the Act; this has also been highlighted in Recommendations of the CLRC. With such mechanisms in place, the CCI may be able to resolve cases faster. The settlement and commitment mechanism has helped competition authorities in other jurisdictions to reduce the average duration of procedures and closing cases. To quote some statistics, Belgian Competition Authority was able to reduce the duration of procedures from 36 months to 22 months using settlements process; whereas, in Italy about half of the cases were resolved by commitment mechanism (OECD, 2019, p. 46). While Settlement and Commitment may help in early disposal of cases, it will be successful only if the violators would be sure that it will be better to accept settlement rather than fight it out before the CCI and later in courts. This can happen only when the parties are convinced of the strength of the evidence gathered in the investigation or in their internal audit.

We see that the parties have been successful in stalling the proceedings of the CCI/DG by obtaining stay orders from HCs. We fully recognise the recourse to writ jurisdiction of courts and do not want to challenge it, but we suggest that courts should equally share the responsibility for ensuring that the CCI's proceedings do not get delayed or impeded unduly. Quoting SC in *Competition Commission of India v. JCB India Ltd. & others* relevant to the issue: "... The High Court should, in our view, be more circumspect before it restrains an investigation under the statutory authority of the Director General."<sup>24</sup>

Some other general recommendations include capacity building and providing resources for NCLAT, which took more than a year to decide on an appeal in *AIOVA v. Flipkart*. An internal team may be set up in the CCI which could look specifically and build capacity for digital economy cases.

To sum up, there is a need for fine-tuning the current competition law regime in India so as to address anti-competitive conduct of firms in a timely manner in a technology-driven market.

## Endnotes

- <sup>1</sup> Tipping generally means increase in a firm's market share dominance caused by indirect network effects (Dubé, Hitsch, and Chintagunta, 2008).
- <sup>2</sup> In the case of e-commerce platforms, indirect network effects, also known as cross-side network effects, are more pronounced. Due to indirect network effects, the value of service increases for one user group when a new user of a different user group joins the network/platform. In e-commerce platforms, if there are more consumers on the platform then platform is more valuable to service providers/sellers, and vice-versa (CCI, 2020, p. 11). A platform is said to exhibit data-network effects if the more that the platform learns from the data it collects on users, the more valuable the platform becomes to each user (Gregory et al., 2020; Ruutu, Casey, and Kotovirta, 2017, p. 121). See also Section 2.3.
- <sup>3</sup> See Section 2.2 for detailed statistics.
- <sup>4</sup> The scope of this study is limited to cases against e-commerce platforms in goods category also known as *online marketplace platforms* such as Flipkart or Amazon (All India Online Vendors Association (AIOVA) v. Flipkart India Private Limited and another, Case No. 20 of 2018, para 24, CCI, November 06, 2018, p. 9). This is different from food services, accommodation services, cab aggregator services, etc. See Section 2.2 for concept of e-commerce.
- <sup>5</sup> Multi-homing, in simple terms, means that a seller can post an item for sale on several market places, and buyers can browse the goods offered on several marketplaces (Tadelis, 2016).
- <sup>6</sup> Ashish Ahuja v. Snapdeal.com and SanDisk Corporation, Case No. 17 of 2014, CCI, May 19, 2014, p. 6.
- <sup>7</sup> All India Online Vendors Association (AIOVA) v. Flipkart India Private Limited and another, Case No. 20 of 2018, CCI, November 06, 2018, p. 9.
- <sup>8</sup> *Ibid.*, p. 10.
- <sup>9</sup> *Ibid.*, p.5.
- <sup>10</sup> Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities, Case No. 40 of 2019, CCI, January 13, 2020, p. 8.
- <sup>11</sup> *Ibid.*, p. 9.
- <sup>12</sup> Amazon v. Competition Commission of India, WP 3363/2020, High Court of Karnataka, February 14, 2020.
- <sup>13</sup> Telecom Watchdog v. Union of India and others, W.P.(C) 7907/2018, High Court of Delhi, March 18, 2019.
- <sup>14</sup> All India Online Vendors Association (AIOVA) v. Competition Commission of India (CCI), Flipkart India Private Limited, and Flipkart Internet Private Limited, Competition Appeal (AT) No.16 of 2019, NCLAT, March 4, 2020, pp. 13 and 14.
- <sup>15</sup> *Ibid.*

- <sup>16</sup> Flipkart India Private Limited v. Assistant Commissioner of Income-Tax, ITA No.202/Bang/2018, Hon'ble Income Tax Appellate Tribunal, April 15, 2018.
- <sup>17</sup> *Ibid.*
- <sup>18</sup> Competition Commission of India v. M/s Grasim Industries limited, LPA 137 of 2014, High Court of Delhi, September 12, 2019, p. 34.
- <sup>19</sup> *Ibid.*, para 1.4, p. 2.
- <sup>20</sup> Competition Commission of India v. Steel Authority of India Limited, 10 SCC 744, Supreme Court of India, 2010.
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Excel Crop Care Limited v. Competition Commission of India, (2017) 8 SCC 47, Supreme Court of India, 2017.
- <sup>23</sup> Cadila Healthcare Limited v. Competition Commission of India, LPA 160/2018, Delhi High Court, 2018.
- <sup>24</sup> Competition Commission of India v. JCB India Ltd. & others, Criminal Appeal No. 76-77 of 2019, Supreme Court of India, January 14, 2019, pp. 7 & 8.

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