Attempt to Monopolisation and Digital Markets: Enforcement Gap

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Abstract: Rapid technological development, particularly in the Information and Communications Technology (ICT) sector, has led to a significant change in the industrial structure as well. Regulatory bodies world over are struggling to adjust to these changing scenarios. There is a widespread discussion regarding the need to regulate technology-driven markets such as e-commerce, telecommunication, etc. The practices used by some business giants are going against the neoclassical economic theory that profit maximisation is the goal of every firm. Firms are opting growth over profit. A large number of investigations were opened in India against business giants. Some of them were able to find contraventions of the Competition Act, 2002 (the Act). However, a large number of investigations were closed due to the lack of cognizance of collective dominance in law or inability to prove dominance in the traditional economic sense. It can be seen from the current jurisprudence of the Competition Commission of India (CCI) that there are constraints in handling competition issues in technology-driven industries mainly on account of the extant legal framework which does not recognise the need of assessing an appreciable adverse effect on competition where the dominance of the firm is not apparent. Although, the Act takes into account attempt to cartelisation as a contravention of the Act, it does not envisage an attempt to monopolise as a contravention of the Act. The past and current jurisprudence of the CCI indicates that CCI’s view is also undergoing radical change. This paper discusses the concept of “attempt to monopolise” as given in the Sherman Act and its applicability in the Indian context. The paper

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reviews the American antitrust literature existing on this subject and analyses the key factors which constitute antitrust violations under the clause “attempt to monopolise”. While the majority view emphasises on proving dangerous probability of success while determining an attempt to monopolise, as per the minority view, “attempt” connotes conduct and not a state of being. Unlawful intent can be inferred from the conduct as a proof of an “attempt”. The law does not require completion of a crime, it requires conduct. Thus, an attempt to monopolise is a conduct offence. This paper argues that borrowing the attempt to monopolise concept from the Sherman Act, 1890 will be helpful for the CCI in handling antitrust cases in technology-driven industries such as e-commerce, telecommunications, transport, etc.

It will go a long way in achieving competitive markets, increased consumer choice and welfare in the long-run.

**Keywords:** competition policy, attempt to monopolise, digital markets

1. **Introduction**

With the recent technological advancements, the business landscape is undergoing a substantial change. Digital transformation has become essential for businesses. Digitisation has changed the ways businesses operate. Digital platforms play an important role in these changes and have had disruptive effects in many economic sectors. Platforms such as Google, Amazon, Facebook, and Apple provide a variety of services such as search engine, market place, social networking and application stores. This platform economy is emerging as the “fourth industrial revolution”. It has been beneficial to the consumers by providing new products and services at their doorstep without any extra cost. This platformisation has also changed the ability of firms to scale rapidly, thereby affecting the structure of the sector. Rapid advances in cloud, mobile and analytics, and the falling cost of these new technologies, digital platforms are creating the next wave of disruption, growth and breakthrough innovation. Digital platforms bring together vast communities of customers and partners, including developers. They create markets of enormous scale and efficiency and they enable new levels of collaboration between companies from different industry sectors that can result in the conception of entirely new products and services.
Although digitisation has been beneficial for the consumers as well as producers, it also imposes various competition concerns. Competition concerns that arise in digital platform markets are mainly related to practices such as providing deep discounts to the consumers, control over data, mergers and acquisitions, etc. Competition policies which mainly concentrate on a consumer welfare approach are inadequate to handle the issues posed by digital markets.

The present paper analyses the applicability of an attempt to monopolise clause as mentioned in the Sherman Act 1890 of the United States in the Indian context especially for digital markets. Section 2 discusses various dimensions of digital platforms. Section 3 discusses competition issues arising in this sector and the response of various antitrust authorities. Section 4 deals with the attempt to monopolise as outlined in the Sherman Act. Section 5 discusses applicability of this concept in the Indian context. The last section summarises the paper.

2. **Dimensions of Digital Platform**

A digital platform is a technology-enabled business model that creates value by facilitating exchanges between two or more interdependent groups. Typically, platforms bring together end-users and producers to transact with each other. They also enable companies to share information to enhance collaboration or the innovation of new products and services. The platform’s ecosystem connects two or more sides, creating powerful network effects whereby the value increases as more members participate.

Digital platforms function with algorithms which are designed to collect and process data. Such platforms require huge up-front sunk cost but low marginal cost. The technology required to store and process data is costly but once it becomes operational, the marginal cost goes on declining indicating large scale economies. Data can help to improve the algorithms to provide better and more personalised services to consumers. Digital platforms are characterised by high economies of scale and scope. Economies of scope exist when it is beneficial to produce two or more products or services within a single firm than by separate firms. Economies of scope exist due to the presence of shareable inputs in the production process, i.e. inputs that can be used to produce various outputs. For example, production platforms, human capital, knowledge, data, etc. Economies of scope can,
therefore, facilitate market concentration of big data in the hands of a few players.

The power behind digital platforms lies in their two distinct features, i.e. network effects and data. Network effect arises when more customers attract more number of merchants and partners and vice versa. This shifts the cost and risk burden of creating markets from the business to the network. As the network gathers its own dynamic momentum, the platform owner acts as a facilitator to spread that burden among a growing number of participants. Open and shared data can be used to create new forms of value. Data is a crucial element of the business model of digital platforms and control over data gives market power to such platforms. Further, platforms with a large user base are able to collect more data to improve the quality of the services which further enable them to attract new users. In addition, such platforms are able to improve targeted advertisement and monetise their services. Thus, a large user base provides an incumbent market player the edge over new entrants. A new start-up which enters the market faces competition from technology giants such as Apple, Google, etc. Those who cannot survive the competition eventually go out of the market. Whereas, start-ups which have the potential are acquired by dominant platforms. For example, Google has acquired 212 business entities since it was found in 1998 and the value of its acquisitions exceeds US$ 17 billion (TWN, 2019).

Dominant digital platforms have expanded into other related businesses, with the objective of accessing more data. Digital platforms have challenged the neoclassical approach to doing business, which defines that the goal of a private company is to maximise profit. New business models prioritise growth over profits in the short to medium term. Frequently, platform owners emphasise critical mass over profit generation in the initial stages of platform development, while maintaining a focus on value creation. For example, Alibaba’s Taobao platform used free listings to gain user momentum. Amazon, a 21st century e-commerce giant, posted consistent losses for the first seven years it was in business, with debts of US$ 2 billion (CNN, 2002). In 2018, Amazon was ranked first in terms of company revenue among global publicly traded internet companies with annual revenue of almost US$ 233 billion, the e-retailer ranked far ahead of its closest competitors, Google (US$ 136.22 billion) and Facebook (US$ 55.84 billion) (Clement, 2020). Although Amazon has been recording double-digit percentage increase in net sales annually, it reports meagre profits,
choosing to invest aggressively instead. The company has remained out of the radar of antitrust authorities by choosing to price below cost and expanding widely instead.¹

A similar phenomenon was observed in the case of telecom industry in India. Jio, a new entrant in the telecom industry provided free of charge services as a promotional or welcome offer. Telecom industry saw an unprecedented trend of mergers and consolidation with the entry of Jio. Thus, Jio Infocomm became the country’s No. 1 telco by revenue market share (RMS) in April-June quarter of 2019, in less than three years since it launched mobile services (Pandey and Sharma, 2020). During the same period, Airtel and Vodafone Idea, two major competitors of Jio incurred heavy losses of Rs. 2,866 crore and Rs. 4,874 crore, respectively, in the April-June period (Parbat, 2019).

There are various dimensions of digital platform businesses. Over the years, this segment has witnessed a number of mergers and acquisitions, which have a bearing on the competitive structure of this sector. Strong interlinkages among various business segments enable these conglomerates to leverage their position in one market to enter into another market. Major technology giants like Amazon, Apple, Facebook, Google and Microsoft are aggressively involved in mergers and acquisitions. During 2008-2018, Google acquired 168 companies, Facebook acquired 71 companies and Amazon acquired 60 companies (Argentesi et al., 2020). In majority of the cases, the targets were young start-ups. These acquisitions have a large potential to benefit consumers by allowing innovation to be scaled-up and integrated into richer and better functioning platforms. However, such acquisitions might restrict competition and consolidate the acquirer’s position in the market. The firm acquires a target which develops a technology that can be used to compete with its own products in the future and the acquisition kills the competitive threat. These acquisitions are particularly problematic in the context of digital markets, where due to strong network effects, competition is often for the market rather than in the market. In such markets, the competitive pressure exerted by new entrants is essential to discipline incumbents’ market behaviour and foster innovation.

These acquisition patterns have implications for innovation, investment as well as consumer choice. The prospect of a takeover by an incumbent can
be an incentive for a start-up to develop potentially successful projects if it otherwise can’t get enough external funding to bring the project to market. However, the incumbent may decide not to develop the project/product after the acquisition. Thus, such acquisitions can kill innovations and also restrict consumer choice.

Digital markets exhibit characteristics of conglomerates, i.e. a high degree of diversification into weakly related or sometimes even unrelated sectors. For example, Amazon which initially entered into the business of bookselling has expanded into sale of almost everything online, including payment systems, cloud computing and production and distribution of movies and series. Google which started as a search engine has ventured into maps, operating systems, mobile and personal computing devices and cloud services. Facebook has diversified into photo and video social networking with Instagram, messaging with WhatsApp and virtual reality with Oculus VR. Digital platforms prefer to diversify due to supply-side as well as demand-side synergies. Digital firms use or generate inputs such as consumer data that can be used for a variety of products. Operation of multiple product lines helps these firms to manage resources for optimal utilisation. Further, synergies also arise from the demand side. Consumers also prefer to purchase different products from the same seller due to a reduction in search cost/time.

As per market power theory, although conglomerates diversify into seemingly unrelated markets, this may indirectly increase their market power as a high degree of diversification increases multi-market contacts, thereby facilitating (tacit) collusion among conglomerate firms. Conglomerates may also use cross-subsidies between different lines of business to increase their market power in a given market, for example through predatory pricing. This is also referred to as the “deep pocket” theory. Another theory which seems more relevant to digital markets is resource theory. As per this theory, digital players have important resources such as data or technological expertise that may be at a moment of time in excess capacity, which would incentivise the firms to expand. For example, Amazon invested in the huge data centre to support the development of e-commerce. However, later due to excess capacity, Amazon decided to enter the market for cloud services through AWS (Amazon Web Services).
Competition concerns that may arise with digital conglomerates are of four types, namely, bundling, access to data, gatekeeper status and acquisition of start-ups. Supply-side and demand-side synergies facilitate bundling strategies, which may have both efficiency effects because they generate consumption synergies and anti-competitive effects particularly when incumbent creates entry barriers for the new entrants. Secondly, the firms controlling essential components such as data may have a competitive edge over potential rivals in diversifying into new product markets. Third, firms that develop as multi-product conglomerate entities may achieve a position where they become gatekeepers for access to their consumers by third parties like advertisers, sellers, etc., giving them strong market power over these third parties. Finally, dominant firms might expand into new markets by acquisition of promising start-ups. These acquisitions can be efficient as large firms may bring complementary skills and resources to develop these new innovations. However, they could also be driven by pre-emptive motives and be harmful to competition and innovation, in particular, if these start-up projects are shut down after acquisition.

3. Challenges Faced by Antitrust Authorities

Rapid technological development has changed the business models as well as nature of marketplaces. This has posed new challenges for competition authorities worldwide. The current prominent approach in antitrust is the ‘consumer welfare approach’ which is based on measuring benefits or harm to consumers in the form of low prices or more value, respectively. Consumer welfare approach does not raise any concern over practices where predatory pricing is used to grow and monopolise the market. This practice results in lower prices for consumers in the short to medium term until competitors are driven out of the market. Therefore, it is plausible to argue that consumer welfare approach does not adequately address the anti-competitive business practices in the digital platforms.

New approach to competition investigation needs to be adopted. Some scholars have suggested that the competition authorities should focus on anti-competitive effects of the control of personal data by platforms whereas others have suggested reforms in competition policy. Khan (2017) stresses the need to adopt process-based approach which would focus on entry barriers, conflicts of interest, the emergence of gatekeepers and
bottlenecks, the use and control of data and the dynamics of bargaining power.

It is widely recommended to change competition policy when applied to digital markets. Market power assessment, theories of harm and modes of operation need to be improved. Considering the importance of innovation in digital markets, it is also suggested that dynamic efficiency should be prioritised over static efficiencies. Market power should be assessed more dynamically by focusing more on potential competition and entry barriers. It is also recommended to err on the side of disallowing potentially anti-competitive conducts and impose on the incumbent the burden of proof for showing the pro-competitive effect of its conduct. Competition authorities worldwide are making changes in their competition policies by taking into account the challenges posed by the digital economy. For example, Germany revised its competition law in 2017 to adapt its legal framework and tools to new features of the digital economy, and introduced a provision recognising free products or services provided by platforms as a market, stating that “the assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge” (Section 18(2a)) (UNCTAD, 2019).

4. Sherman Act: Attempt to Monopolise

Section 2 of the Sherman Act, 1890 reads “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars is a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

The phrase “attempt to monopolise” has been widely discussed in the US antitrust literature with a greater emphasis on what constitutes an attempt to monopolise. The US Supreme Court faced difficulty while dealing with this issue substantively given the complexity of the factors involved therein. The US Supreme Court in its judgement in American Tobacco Co. v. United States² stated: “[t]he phrase ‘attempt to monopolize’ means the employment of means and procedures which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous
probability of it…..” In Walker Process Equipment Inc. v. Food Machine & Chemical Corp³, the Supreme Court stated that monopolisation and attempt to monopolise require assessing the defendant’s ability to lessen or destroy competition in the relevant market.

The majority of the cases brought before the circuit courts in the United States followed the traditional approach set in 1905 by Justice Oliver Wendell Holmes of the Supreme Court in the first attempt offence matter in Swift & Co. v. United States⁴.

On the basis of jurisprudence set in Swift & Co. v. United States case, the three key elements to bring down an action under an attempt to monopolisation in the US antitrust regime are: (1) specific intent to monopolise, (2) conduct designed to implement that intent; and (3) a dangerous probability of success.⁵ A plaintiff in an attempt to monopolise case proves a dangerous probability of success by showing that the defendant possesses a sufficiently high share of the relevant geographic and product market.

The discussion over the past regarding the elements that constitute an attempt to monopolise indicates two different and divergent approaches. The majority is of the view that dangerous probability of success is an essential element of an attempt to monopolise case. A deviation from the dangerous probability of success test is unwarranted in view of the majority approach as the majority believes that giving up this test will open up a Pandora's box of nuisance cases. Secondly, removing this test would result into a chilling effect on competition. The majority view argues that requiring proof of the dangerous probability of success shelters firms with no real potential for monopolising the market from antitrust liability. Thus, small firms can compete with larger firms without the threat of antitrust liability. Further, the elimination of dangerous probability of success might encourage courts to crack down on aggressive business conduct. Thus, big firms will not engage in aggressive pricing to avoid risking antitrust liability. Dominant firms will hold back production, raise prices and create a “price umbrella” under which smaller firms may produce inefficiently yet still exist. This results in a non-competitive market and higher prices for consumers.
The minority view de-emphasises the dangerous probability of success element. The minority is of the view that in an attempt to monopolise case, dangerous probability of success may be inferred from specific intent. In A.H. Cox & Co. v. Star Machinery Co., the Ninth Circuit Court stated that “[i]n most cases dangerous probability of success will be inferred from predatory conduct and specific intent to control prices or exclude competition”. In California Steel & Tube v. Kaiser Steel Corp., the Ninth Circuit Court stated that “when conduct and intent are not clearly predatory or anticompetitive, the plaintiff must present independent proof of dangerous probability of success by showing the defendant already controls a significant market share”. Thus, when the conduct is not anti-competitive, then only the plaintiff needs to prove dangerous probability of success by showing that defendant already controls a significant market share. As per the minority view, “Attempt” connotes conduct and not a state of being. Unlawful intent can be inferred from the conduct as a proof of an “attempt”. The law does not require completion of the crime, it requires conduct. Thus, an attempt to monopolise is a conduct offence. Market share analysis, the typical proof of dangerous probability of success is, thus, used to prove monopolisation. However, market share is not related to conduct and, therefore, should be irrelevant for the conduct offence such as the attempt to monopolise.

In United States v. Yellow Cab Co., the defendant conspired to monopolise the sale of taxicabs in four mid-western and eastern cities. The Supreme Court held that proof of defendant’s market share was not necessary in a conspiracy to monopolise case. Although Yellow Cab involved a conspiracy to monopolise, the Supreme Court’s conclusion that the market share is not necessary in a conspiracy to monopolise action has persuasive authority.

Further, contrary to the majority argument, it was seen that the dangerous probability of success requirement impedes competition rather than promoting it. In United States v. Empire Gas Corp., the defendant was a large wholesaler and retailer of liquefied petroleum charged with an attempt to monopolise the market for these fuels. Empire Gas Corp had engaged in a host of anti-competitive activities, including requesting competitors to raise their prices to meet its own and threatening to oust competitors from market if they refused to do so. It also retaliated against recalcitrant competitors by drastically reducing its prices in the competitors’ market and, on several occasions, by purchasing a competitor’s fuel supply.
and then charging him prices so high that the competitor was unable to effectively compete. The record indicated that the defendant successfully forced at least one competitor to capitulate and sell at a uniform higher price. The Eighth Circuit Court found a specific intent to monopolise and a probable market share of approximately fifty per cent. The court did not, however, find an attempt to monopolise because it found no dangerous probability of success. Conduct like that involved in *Empire Gas* case *supra* seems to stifle rather than foster competition by reducing the amount of competition between the firm and its uncooperative competitors and new entrants in the market.

*Union Leader Corp. v. Newspaper of New England, Inc.¹⁰* provides a good example of an intent to achieve monopoly. The case involved Haverhill, a small Massachusetts town which had been served by a single newspaper for almost a century. When the printers of the Haverhill Gazette newspaper went on strike, the Union Leader, a publisher from a nearby town, published a shoppers’ guide for the town of Haverhill. Later Union Leader began to publish and distribute its paper in Haverhill on a regular basis. Union Leader filed suit against the Gazette alleging unfair practices to maintain monopoly power in Haverhill. In this case, the District Court of Massachusetts noted that Haverhill was a “one newspaper city” and the market could not support two high-quality daily newspapers. The Court further recognised that the intent to capture the market through skill, foresight and industry would not be a violation of the Sherman Act. Exclusionary conduct, however, could be proven through evidence of the use of unfair means to gain control in the natural monopoly market. In the extant case, Gazette secretly lowered advertising rates to compete with Union Leader’s rates and Union Leader was indulged in secret payment to Haverhill merchants and also charged discriminatory advertising rates. The court ruled that actions of both the Gazette as well as the Union Leader were “not honestly industrial” and constituted attempt to monopolise. The appellate court took a view that the Gazette’s actions were taken in self-defence and had no wrongful intention.

In *Paschall v. Kansas City Star Co.*¹¹ (‘Star’), the courts have turned to economic analysis for guidance in making their decision in antitrust litigation. In this case, Star held the monopoly of its wholesale newspaper market in Kansas City, Missouri. The Star used independent carriers to
deliver the newspaper. When Star decided to discontinue its independent delivery system, the independent newspaper carriers filed a lawsuit alleging refusal to deal and attempted monopolisation of the carrier market. In this case, the Eighth Circuit Court used optimum monopoly price theory of the Chicago School of Economics and concluded that Star’s decision to vertically integrate would lower prices and improve the quality of services to consumers. This case indicates that analysis of predictable effects rather than the means used to achieve those effects may be useful in natural monopoly settings.

Thus, an attempt to monopolisation is used very often in the natural monopoly industries due to large economies of scale. In such cases, intent to monopolise which can be interpreted from the actions of the firms and the effects of that monopolisation should be taken into consideration.

5. Attempt to Monopolise and Emerging Markets: Indian Perspective

Emerging markets such as telecommunication and e-commerce pose different challenges for the competition authorities globally. Competition law assumes that market power is not inherently harmful. It could result from efficiencies and also generate the same. It is believed that market power can be harmful only if it leads to higher prices or reduced output. This only emphasises on the effect and does not look into the ways resorted by the firm to amass the market power. This further makes it difficult to check the abuse of such power at a later stage. Further, antitrust injury cannot solely be assessed from a price yardstick, other factors such as quality of products, availability of choice, reduced service or impact on innovation also need to be taken into consideration. In this regard, the CCI’s recent jurisprudence can be taken into consideration.

In Bharti Airtel Limited v. Reliance Industries Limited & others case, it was alleged that the defendants, who owned the largest amount of spectrum for 4G LTE had newly entered the market and was providing promotional offers to subscribers under which data, voice, video and the full bouquet of applications and content were available to the subscribers absolutely free. Such predatory pricing tactics used by the defendants were leading to ouster the existing competitors from the market. However, the CCI found it difficult to construe the dominant position of the defendant as the
market share of the opposite parties were minimal in the relevant market on account of being a new entrant. The CCI was of the view that short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature. In the absence of clear dominance in terms of market share, the CCI preferred to abstain from taking cognizance of the predatory pricing strategy adopted by the defendants to capture the market which further led to ouster of small market players from the telecom industry.

In *All India Online Vendors Association v. Flipkart India Private Limited and Flipkart Internet Private Limited*¹³, it was alleged that Flipkart is abusing its dominant position by providing preferential treatment to certain entities and that unfair trade practices were being carried out by the Opposite Parties (OPs) for which corporate veil was required to be lifted to assess economic nexus and wrongdoings. It was further alleged that Flipkart had direct conflict of interest with other manufacturers selling on their platform and their own brands. The CCI, considering present market structure of online platforms market in India, did not find any one player to command a dominant position. The CCI also observed that the marketplace-based e-commerce model is still relatively nascent and evolving model of retail distribution in India. The CCI was cognizant of the technology-driven nature of this business model. Recognising the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the CCI was of the considered opinion that any intervention in such markets needed to be carefully crafted lest it stifles innovation.

In *M/s Mega Cabs Pvt. Ltd. v. M/s ANI Technologies Pvt. Ltd.*¹⁴ (‘ANI’), it was alleged that ANI, a dominant player in the market, was abusing its dominant position. It was also alleged that ANI entered into anti-competitive agreements with the taxi drivers registered on its network which adversely affected competition in the market. ANI managed to raise huge investments in order to acquire a position of dominance in the Delhi-NCR region and engaged itself in abusive tactics like predatory pricing, offering periodical discounts to consumers and incentivising drivers with the sole aim to eliminate competition from the market. The CCI observed that the inability of existing players or new entrants to match the innovative technology or app developed by any player or the model created for operating in a particular industry cannot be said to be creating entry barriers in itself and hence, closed the matter.
In contrast with the view taken in earlier cases, the CCI, in subsequent cases involving technology-driven market players, has followed a cautioned approach. In *Mr. Umar Javeed and others v. Google LLC and others*, it was alleged that a wide range of Google apps such as Google Maps, Gmail, and YouTube were available only through GMS and could not be downloaded separately by device manufacturers. In order to obtain the right to install these applications and services on their Android devices, manufacturers had to enter into certain agreements with Google. The Informants also alleged that end-users could not avail such services directly. The Informants further alleged that Google engaged in different kinds of anti-competitive practices, either in the market in which they are dominant or in separate markets, to strengthen its dominant position in Online General Web Search Services and Online Video Hosting Platform (through YouTube). The CCI observed that the mandatory pre-installation of the entire GMS suite under MADA (Mobile Application Distribution Agreement) amounted to imposition of unfair condition on device manufacturers. It also *prima facie* appeared to the CCI that Google leveraged its dominance in Play Store to strengthen and protect its position in other relevant markets such as online general search in contravention of the Act. In view of the foregoing, the CCI ordered an investigation into the matter.

In *M/s Fast Track Call Cab Private Limited v. M/s ANI Technologies Pvt. Ltd.* (ANI) and *Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*, it was alleged that ANI was using unfair trade practices such as unfair conditions, predatory pricing, etc., to establish its monopoly and eliminate otherwise equally efficient competitors who cannot indulge in such predatory pricing in the radio taxi services market. It was also alleged that ANI incentivised the drivers unrealistically by using money available with it due to the foreign investments which could not be matched by existing radio cab operators or potential indigenous enterprises desirous of starting such operations in India. Such practices resulted in the exclusion of existing players and created entry barriers for the new entrants. The CCI observed that ANI was spending more money on discounts and incentives (apart from the variable costs it may be incurring) on customers and drivers compared to the revenue it was earning. The CCI was of the *prima facie* view that the prices indicated predatory pricing aimed to oust other players from the relevant market and, hence, ordered detailed investigation. However, the CCI did not find ANI dominant in the relevant
market and, hence, no case of contravention of the provisions of the Act could be made out against the OP.

Later, Meru Travel Solutions Private Limited filed multiple information(s)\(^{19}\) against M/s ANI Technologies Pvt. Ltd., Uber India Systems Pvt. Ltd. and its parent entities alleging that Ola and Uber were individually and jointly dominant (on account of common ownership by institutional investors) in the relevant market in Hyderabad, Mumbai, Kolkata and Chennai. In the absence of any evidence indicating lessening of competition, the CCI closed these cases.\(^{20}\)

In *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities*\(^{21}\), the Informant alleged that these market places are distorting level playing field by providing deep discounts to their preferred sellers to the detriment of the non-preferred sellers. It was further alleged that both Amazon and Flipkart had exclusive tie ups with smartphone manufacturers and their private labels also get preference in sales through a few preferential sellers. In this case, the CCI recognised the fact that online intermediation services are key enablers of entrepreneurship which offer access to new markets to sellers/business users and increase the consumers’ choice of goods and services. These services form a fulcrum of commercial success of the sellers who avail such services to reach consumers on the platform. At the same time, online platforms providing intermediation services result in the growing dependence of businesses on these platforms. The CCI, *prima facie*, found that 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 and ordered investigation into the matter.

Strategy of growth over profit is widely adopted to gain foothold in the market. New business enterprises are adopting such strategies with the backing of financial institutions. Competition authorities need to be careful while assessing such situations where new ventures are providing free of cost services to get a foothold in the market. Mistaking competitive pricing as predatory will tend to inhibit price competition in the economy. On the other hand, mistaking predation for competition may foster higher prices from increased concentration in the long run. In light of these
considerations, competition authorities should not take action unless the existence of predatory pricing can be established with a reasonable degree of accuracy and should recognise that it may be better to have no explicit rule prohibiting predatory pricing than to mechanically enforce such a rule. In such situations, competition authorities need to be careful while implementing the attempt to monopolise concept and it is essential to analyse the intent of the firm. If the firm is adopting growth over profit strategy in order to enter the market or to establish its own new market and there is no intention to remove competition, then there is no concern. However, if the intent or result of such strategy is to remove competitors from the market, then cognizance of such offence needs to be taken by competition authorities.

6. Conclusion

It can be seen that jurisdictional practice of the CCI has been evolving over the period. Earlier, the CCI closed cases in the absence of apparent indication of market dominance of the firm, i.e. lack of market share. In addition, consumer welfare was also taken into consideration as predatory pricing practices were actually beneficial to the consumers. However, in recent cases, the CCI is taking cognizance of the fact that companies are using business tactics such as providing deep discounts to customers, free services to oust competitors. Predatory prices and their market power are not getting reflected in their market shares. Further, it can be seen that the lack of legal provisions recognising an attempt to monopolise or collective dominance of the companies is restricting the powers of the CCI. Therefore, this paper is of the view that borrowing such provisions from the Sherman Act and without placing much emphasis on the dangerous probability of success could help in checking anti-competitive practices in the technology driven industries and will go a long way in promoting innovation as well as consumer welfare. The intent of the firm can be deciphered from the conduct. Further, as can be seen from the US antitrust cases in sectors where natural monopoly exists, the conduct of the firm for achieving monopoly, i.e. whether it has been achieved organically or by employing unlawful tactics should be taken into consideration.
Endnotes

1 US Department of Justice (DoJ) has launched a wide-ranging review of the four tech giants, referred as “GAFA” — Google, Amazon, Facebook, and Apple to investigate the influence of big tech on the economy and in particular to understand how information is found and consumed (https://www.technologyreview.com/f/614287/50-us-states-have-launched-an-antitrust-investigation-of-google/ accessed on 20.01.2020). Similarly, the European Commission, the executive arm of the European Union, has imposed a combined US$ 9.5 billion in antitrust fines against Google since 2017, and Facebook, Amazon and Apple are also facing investigations across Europe. (https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html accessed on 20.01.2020).

2 328 U.S. 781 (1946).

3 382 U.S. 172 (1965).

4 196 US. 375 (1905).

5 The fourth element is of course the proof of antitrust injury.

6 653 F.2d 1302 (9th Cir. 1981), United States Court of Appeals.

7 650 F.2d 1001 (9th Cir. 1981), United States Court of Appeals.

8 332 U.S. 218 (1947).

9 537 F.2d 296 (8th Cir. 1976), United States Court of Appeals.


11 695 F.2d 322 (8th Cir. 1982) and 605 F.2d 403 (8th Cir. 1979), United States Court of Appeals, Eight Circuit, 441 F. Supp. 349 (W.D. Mo. 1977), United States District Court, W.D. Missouri.

12 Case No. 03 of 2017.

13 Case No. 20 of 2018.

14 Case No. 82 of 2015.

15 Case No. 39 of 2018.

16 GMS is a collection of Google applications and Application Programme Interface (APIs) that help support functionality across devices.

17 Case No. 06 of 2015.

18 Case No. 07 of 2015.
Case No. 25, 26, 27 and 28 of 2017.

The order passed by the Commission in Case No. 96 of 2015 was challenged by the Informant before the Competition Appellate Tribunal (COMPAT). The COMPAT reversed the order passed by the CCI dated 07.12.2016 directing the DG to cause an investigation into the matter involving huge discounts and incentives offered by Uber in order to find out if the same is result of new efficient business model or there is any anti-competitive stance to it. Uber preferred an appeal against the order of COMPAT. The Hon’ble Supreme Court, vide its judgement dated 03.09.2019, dismissed the appeal and upheld the order of the COMPAT.

Case No. 40 of 2019.

References


