

Abuse of Superior Bargaining Position in Digital Markets: A Way forward for India

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The digital economy has transformed the way economic activities were conducted and its distinctive features have prompted major legislative and regulatory initiatives throughout the globe. The growth of such markets has created countless opportunities, fostered competition, and enhanced consumer welfare. However, the uniqueness of the technology-driven markets has also brought in multiple regulatory challenges.

In the last few years, India has continued to deal with the issues surrounding the regulation of digital markets, contributing immensely to the development of competition law jurisprudence in the country.

The Competition Commission of India (“CCI”) is currently investigating the allegations of abuse of dominance, leveled against Alphabet Inc. (Google’s parent company), in a case filed by the Digital News Publishers Association. The observations made in the prima facie opinion² of the Commission, might prove to be yet another addition to the existing jurisprudence.

The complaint contends the following:

- Google imposes unfair, arbitrary, and unilaterally decided terms and conditions over news publishers while it makes publishers’ content visible to the users;
- the publishers are not being made aware of the actual revenue generated by the search engine through the advertisements shown on the publishers’ news websites; and
- Google fails to adequately compensate the publishers while it continues to use the content from the publishers’ websites for its services such as Google News, News Showcases, Snippets, etc.

In its prima facie opinion, the Commission noted that the case highlights the issue of imbalances in the bargaining power between the digital

platforms and the publishers who offer their services through such platforms. The observation is in consonance with similar developments taking place in other prominent jurisdictions. The CCI opined that the issue of abuse of superior bargaining power (“ASBP”) requires a detailed investigation.

I. Abuse of Superior Bargaining Power – Exploring the Concept in the Context of the Digital Economy

India’s consumer digital economy is expected to touch a mark of 800 billion in US Dollars by 2030,³ creating a plethora of opportunities for its user bases by the virtue of its distinct multi-sided nature. The gradual shift of users from the brick-and-mortar market to the online platform markets has increased businesses’ reliance on such platforms for their operations and prospective growth. Such markets have emerged as crucial facilitators and necessary trading partners for business entities in securing reach to a wider audience.

The issues of imbalanced bargaining power and its subsequent abuse stem from the increased reliance of business entities on such platform markets. ASBP refers to a situation wherein one party to the agreement, being placed at a relatively superior position in a commercial relationship, imposes unfair and unjustified terms and conditions on, the other party that has no option but to accept due to the latter’s dependence on the former’s business superiority for its business prospects.

A superior bargaining position may arise due to the following factors among others:

- (1) the high degree of dependence of other firms on such entity;
- (2) the market power of the entity; and

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² Case No. 41 of 2021, Available at <https://www.cci.gov.in/antitrust/orders/details/11/0>.

³ Available at https://www.ev.com/en_in/news/2022/04/india-s-consumer-digital-economy-is-expected-to-be-a-us-800-billion-dollar-market-in-2030#:~:text=According%20to%20industry%20estimates%2C%20India's,investments%20in%20the%20year%202021.

(3) the availability of other alternatives to both the contracting parties.

In the recent past, nations throughout the globe have taken progressive steps regulating the ASBP in the news media market to ensure that publishers are adequately compensated for the use of their content and that any imbalance in bargaining power is stabilized, including Australia, Germany, France, Romania, Canada, and; most recently The United States.

The principal legislation in India, the Competition Act, 2002, does not expressly deal with ASBP. However, recently, the Union Minister of State for Electronics and Information Technology stated that the government is deliberating upon enacting a law addressing the abuse, similar to the enactments in other regimes.

The article aims to reflect upon CCI's observations in cases where a practice involving ASBP was alleged and discussed. It also aims to contemplate the considerations attached to the idea of regulating ASBP under the existing legal framework in India and explore plausible regulatory measures.

II. Bargaining Power Imbalance – Trends in the Digital Economy and CCI's Approach

A. Allegations of Abuse of dominance against MakeMyTrip.Com

[Federation of Hotel & Restaurant Associations of India (FHRAI) and Anr. v. MakeMyTrip India Pvt. Ltd. (MMT) and Ors.

with

Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd. (MMT) and Ors.]⁴

A complaint alleging abuse of dominance was filed against online travel aggregators (Opposite Parties - hereinafter referred as "OP") - MakeMyTrip ("OP-1"), its subsidiary Go-Ibibo ("OP-2"), and hospitality chain Oravel Stays Private Limited ("OP-3"). The informants - Fab Hotels and Treebo initiated the information after they were delisted by the aggregators from OP's platform. In addition, informants' franchisee

service providers and other budget hotels availing some logistic support from them, were also delisted by OP-1 and OP-2.

The Commission found that OP-1 holds a dominant position in the 'market for online intermediation services for booking of hotels in India'. Further, OP-3 was found to be one of the significant players in the 'market for franchising services for budget hotels in India'. The informants also sought interim relief to get relisted on the aggregators' platform citing their increased dependence on such platforms. The Commission noted that OP-1 entered into a commercial agreement with OP-3 pursuant to which the closest competitors of OP-3 were delisted by OP-1 from its platform.

The informant hotels relied on OP-1's position as a necessary trading partner to ensure their visibility to prospective consumers. The informants contended that the delisting led to a denial of market access to online intermediation, hampering informants' business operations and further distorting the level playing field amongst the competitors in the downstream market where the informants are active. On the other hand, OP-1 contended that it was in its commercial interest to partner with OP-3 given the latter's market access throughout the country. Other alleged conducts included – charging exorbitant commissions, predatory pricing and maintaining price parity.

The CCI, granting interim relief and directing the Director General to initiate an investigation into the matter under Section 3(4) and Section 4 of the Competition Act, 2002, noted that the digital economy and the existence of unique characteristics such as processing of data, strong direct and indirect network effects, etc., have increased business entities' dependency over the platform markets, leading to asymmetrical bargaining power.

B. Allegations of Abuse of Dominance against WhatsApp

[In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users]⁵

⁴ Case No. 14 of 2019 and Case No. 1 of 2020, Available at <https://www.cci.gov.in/antitrust/orders/details/978/0>.

⁵ Case No. 01 of 2021, Available at <https://www.cci.gov.in/antitrust/orders/details/100/0>.

A suo-moto case was initiated by the CCI against WhatsApp after the messaging application, in January 2021, updated its privacy policy, imposing a “take it or leave it” condition upon its users. The updated terms made it mandatory for all the users to accept the new terms and conditions, or else they would no longer be able to use the app’s services. The policy imposed a condition wherein users’ data (both individual and business accounts) was to be shared by WhatsApp, with its parent company Facebook (now Meta) and other Meta companies.

The Commission had on previous occasions and in its note to the OECD, observed that data serves as a major competitive advantage and is being used by companies for targeted advertisements and undertaking other marketing strategies.

The CCI took note of WhatsApp’s position in the market as the second largest player after “Messenger”, the latter also being a “Meta” Company. Even though there exist multiple competitors of WhatsApp in the relevant market and the competitors have witnessed an increase in downloads as well, the growth of other competing apps has hardly affected the user base of WhatsApp. Hence, it holds an influential position in the market which is further reinforced by network effects and high switching costs in terms of the accumulated consumer data on WhatsApp. CCI further emphasized that users in such cases have no bargaining power and ordered an investigation over the plausible anti-competitive effects emerging out of such unilaterally imposed terms and conditions.

C. Allegations of Abuse of dominance against Google

[Matrimony.com Limited v. Google LLC and Ors. with

Consumer Unity and Trust Society (CUTS) v. Google and Ors.]⁶

The case is one of the foremost decisions of the Commission pertaining to the regulation of enterprises’ conduct in digital markets. It was alleged that Google, being a dominant player in

both the markets of the online general web search services and online search advertising in India, has abused its dominant position.

The complaint alleged:

- a) Google unfairly determines the search results instead of results being algorithmically driven,
- b) Google uses one-boxes to favor publishers based on its commercial agreements, integrating specialized search results with its commercial units to generate revenue through sponsored content and advertisements; and
- c) Google favors its own verticals like – YouTube, Google News, Google Maps, and other partners by placing them prominently on its search engine results page (“SERP”).

Further, relevant to our discussion, the intermediation agreements negotiated between Google and the business entities revealed unfair and discriminatory terms being imposed on the business entities primarily including - preventing publishers from implementing search services on their websites similar to that of Google search services and prohibiting them from using the services of other competing search engines.

The Commission found Google abusing its dominant position and further opined that Google is an unavoidable trading partner for business entities given its position of strength in the relevant market and that Google’s conduct leads to an uneven playing field between the competing entities.

D. Allegations of Abuse of Dominance against Alphabet Inc.

[XYZ v. Alphabet Inc. and Ors.]⁷

Allegations of abuse of dominant position were leveled against Google in relation to its payment offering – Google Pay (G-Pay).

The complaint contended the following:

- a) Google exercises exclusivity by imposing a mandate over the Apps to use Playstore’s payment system and In-App billing (for

⁶ Case No. 07 and 30 of 2012, Available at <https://www.cci.gov.in/antitrust/orders/details/746/0>.

⁷ Case No. 07 of 2020, Available at <https://www.cci.gov.in/antitrust/orders/details/71/0>.

purchase of Apps and for other in-app purchases) which prefers G-Pay;

- b) Google levies a 30% commission on App developers in addition to the payment for getting listed on the Playstore's platform;
- c) Google encourages pre-installation of G-Pay by setting it as a default payment app on new android mobile devices (given its control over Android Ecosystem) and exercises self-preferencing by placing G-Pay as the first result whenever the word 'Pay' is searched by any user on the Play Store;
- d) Google displays G-Pay's advertisement prominently on the top of the search results on the Playstore even in cases where users search for other competing UPI payment Apps.

While ordering an investigation into the matter, CCI in its prima facie opinion observed that the alleged conduct has the potential to impede competition. The Commission noted that placing G-pay prominently on the Play store, and attempting to facilitate the use of G-Pay to the detriment of other competitors may distort the level playing field and can yield negative welfare effects given that users and other parties have negligible countervailing power.

E. Allegations of Anti-Competitive Practices against Zomato and Swiggy

[National Restaurant Association of India v. Zomato Limited (Zomato) and Bundl Technologies Private Limited (Swiggy)]⁸

A complaint was filed against the two most prominent online food aggregators – Zomato (“OP-1”) and Swiggy (“OP-2”) by their restaurant partners (“RPs”) contending violation of Section 3 of the Act.

The complaints primarily alleged the following:

- a) OPs bundle the food delivery services with the food ordering services on their platform by restricting the RPs from operating their own self-delivery services;
- b) OPs operate their own cloud kitchens parallelly to the RPs and giving preferential treatments to such kitchens and imposing

unfair conditions on RPs through one-sided contracts including –

- i) reserving the sole right to terminate the contractual agreement with or without cause at any point in time or in the cases of non-compliance by the RPs;
- ii) restricting RPs from availing the services of any third-party aggregator for a period of 12 months (Synergy terms);
- iii) charging commissions retrospectively, as high as 25% of the net sales in cases of non-compliance/breach;
- iv) imposing price parity clauses on the RPs restricting them from charging lower prices or providing better terms on their RP's own websites/offline shops/other sales channels.

The Commission in its prima facie opinion noted that neither OP-1 nor OP-2 holds a dominant position in India and thus a case under Section 4 is not warranted. However, it noted that the alleged conduct of imposing unfair conditions on the restaurants appeared to be highly restrictive and arbitrary, adversely affecting the business interest of the RPs, and prohibiting restaurants from competing on fair terms. The Commission ordered DG to investigate the conduct as a possible violation of Section 3.

From the study of the aforementioned decided and ongoing cases, it can be inferred that the Commission has acknowledged the presence of an imbalance in bargaining power with few market players emerging as superior entities in terms of the negotiating power they possess in any agreement with the counterparty. It has also been observed that the unique characteristics of digital markets make them more conducive to imbalances in bargaining power. Further, it is evident from the cases that an imbalance in bargaining powers may stem from enterprises holding a dominant position. It also reveals that it is important to appreciate that the scope of ASBP is wider than abuse of dominant position and that ASBP can even occur in situations

⁸ Case No. 16 of 2021, Available at <https://www.cci.gov.in/antitrust/orders/details/6/0>.

where the market structure is oligopolistic/duopolistic in nature.

III. ASBP – An Analysis of the Existing Legal Framework in India

As evident from the cases, the Commission has been dealing with cases involving issues related to ASBP under the existing framework of Section 3 and Section 4 of the Act.

Evidence from nations where ASBP has been incorporated within the antitrust framework, primarily South Korea and Japan show that an ASBP is considered an unfair trade practice (UTP). Contrastingly, in India, CCI has held that UTPs do not form part of the Competition Act per se. In *Sh. Ravi Beriwal v. Lexus Motors Limited, and M/s Indiacan Education Pvt. Ltd. v. M/s Aldine Venture Pvt. Ltd. and Others*, the CCI opined that the Act covers UTP only if such a practice violates Section 3 or Section 4, resulting in an appreciable adverse effect on competition (“AAEC”).

Further, assessing the possibility of dealing with a situation like ASBP under the existing provisions also reveals a few limitations. ASBP essentially is understood to occur in a vertical relationship where the contracting parties are operating in different markets. Under the Act, Section 3(4) governs the anti-competitive agreements between enterprises operating at different levels of the production chain (vertical agreements) that cause an AAEC.

It must be assessed that in regulating the vertical restraints, the assessment focuses on the impact of any agreement between upstream and downstream players, on the competition and ultimately on the consumers. Moreover, since vertical agreements are necessary to keep a robust production chain active and efficient, a rule of reason analysis has been prescribed in place of the per se rule which requires regulators to weigh the pro-competitive and anti-competitive effects of any act in question.

The cases discussed show that OPs have argued that their alleged conducts are justified on the ground of efficiency gains and are meant to benefit the end-users. It is evident that the inclusion of an assessment of ASBP under the

existing provision would widen the scope of scrutiny as it would also pertain to the impact of an unfair agreement on one of the contracting parties. Whether the same negatively affects competition would be a separate question.

Such an assessment would require the commission to ascertain the following queries:

- a) What constitutes a superior bargaining position,
- b) The parameters to decide that the position has been abused; and
- c) The remedies to rectify the imbalance

Such an assessment would also require drawing a connection between the protection of an inferior market player and the goals which the Act aims to accomplish.

In other words, connecting the harm caused to a counter-party’s growth and development with the widely accepted consumer welfare standard appears too far-fetched. Such an assessment would require greater scrutiny of vertical agreements and imposition of greater restrictions on vertical agreements. Additionally, making all commercial contracts contestable does not seem to be a favorable idea considering its possible impact on the ease of doing business and the possibility of over-enforcement.

For Section 4 to be applicable, establishing the dominance of the opposite party in the relevant market is a prerequisite. The ongoing case pertaining to the news media market can be squarely covered within Section 4 of the Act given Google’s dominant position in the relevant market. However, it is clear that the scope of ASBP is not restricted to a dominant entity only. It is evident that it may occur in cases where the market is oligopolistic/duopolistic in nature and could also emanate from the intrinsic nature of the market given the growing dependence of other market participants on such multi-sided markets possessing significant market power. Recently, Romanian Competition Council (“RCC”) introduced its ‘Draft Government Emergency Ordinance’ and amended ‘Law No. 11/1991 on the Repression of Unfair Competition’ incorporating ASBP in the law, making it applicable to any entity possessing at least 30 percent market share.

With an aim of regulating ASBP, several measures have been adopted by nations primarily including the introduction of bargaining codes, requiring the market players to offer voluntary measures and other commitments aimed at maintaining a level playing field amongst the market participants. However, being relatively recent, the long-term effectiveness of such measures and their compatibility with the Indian regime is yet to be assessed.

IV. The Way Forward

In the backdrop of the discussion and as India continues its investigation pertaining to the news media market, the following suggestions appear relevant:

- The issue of ASBP would fit uncomfortably within the existing scheme of Section 3 and Section 4. Analysis of the cases discussed reveals that a situation involving ASBP has been alleged against dominant entities in most of the cases. However, it must also be noted that applicability of Section 4 is limited only to the dominant entities whereas a situation like ASBP may also exist where a superior entity does not possess a dominant position in the relevant market. Further, accommodating ASBP under Section 3(4) would require the commission to consider a change in its assessment since it may distort the rule of reason analysis by tilting the analysis towards the protection of an inferior market player.
- Regulating ASBP would require the commission to govern the commercial relations between contracting entities more closely. While moving ahead in this direction, the regulations must be structured in a way that the independence of the contracting parties is not compromised. Any rampant

attempt to control and guide the terms of the contracts between the parties, without any guidelines and boundaries, can result in over-enforcement, unwanted interference in commercial relations, and huge compliance costs for the intermediaries, which in the long run may affect business efficiency.

- Proceeding in the direction of regulating the ASBP and, following safeguards appear relevant - narrowing the vagueness of any standards adopted to eliminate the chances of making every commercial agreement open to the scrutiny of the agencies; defining as clearly as possible the degree of dependency of other market players on the superior entity; what level of coercion exercised by such a superior entity is challengeable; and designing procedures that are relatively quick and inexpensive since it has the potential to directly affect the day-to-day operations of the parties involved.
- It is evident that the laws around ASBP are still evolving and new elements are being introduced across jurisdictions to ensure greater accountability of the parties and transparency in commercial dealings. The initiatives undertaken by other regimes and the evolving mechanisms can serve as a reference for India. However, for the time being, undertaking voluntary measures and commitments appears to offer a convenient middle ground ensuring adequate compensation for the contributors.

It must also be considered that instances of alleged ASBP are not limited to the news media market. Even though India would be deliberating upon enacting a bargaining code for the news media market, it is also equally relevant to acknowledge that ASBP can be equally problematic in other relevant markets.