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### **ABSTRACT:**

*“In India, economic transactions have transitioned from the brick-and-mortar space to digital space at an unprecedented pace. The digital economy has conceived e-commerce as a contemporary means of business. Broadly, there are two models of e-commerce: (i) marketplace model of e-commerce - whereby entities operate a platform that acts as facilitators of transactions between market participants and may provide support services, and (ii) inventory model of e-commerce - whereby entities own the inventory that they sell on their platform. The transition has remodelled the way of doing business and consequently left conventional market participants miserable.*

*The elements of business strategy common to the leading e-commerce operators in India are that (i) they are prepared to forego profits in the quest to secure increased market share and (ii) in doing so, are integrating across multiple business lines. The elements mentioned above facilitate foreclose and discrimination.*

*The absence of sector-specific regulations has enabled e-commerce operators engaged as intermediaries to vertically integrate across business lines and potentially impede competition. Further, India's Competition Law may be unequipped to cope up with the evolving business practices of e-commerce platforms and network industries. Herein, the paper evaluates the prospects of structural separations to counter the implications on competition caused by e-commerce operators and their increasing market power”.*

**Keywords: Competition Law, Market Power, Economic Structuralism,  
Appreciable Adverse Effect on Competition, Structural Separations.**



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## **I. INTRODUCTION:**

In India, economic transactions have transitioned from the brick-and-mortar space to digital space at an unprecedented pace<sup>1</sup>. The digital economy has conceived e-commerce as a contemporary means of business. *Broadly, there are two models of e-commerce: (i) marketplace model of e-commerce - whereby entities operate a platform that acts as facilitators of transactions between market participants and may provide support services, and (ii) inventory model of e-commerce - whereby entities own the inventory that they sell on their platform*<sup>2</sup>. The transition has remodelled the way of doing business and consequently left conventional market participants miserable. As a result, India's Regulatory Authority - *the Ministry of Commerce and Industry and competition watchdog - the Competition Commission of India (“CCI”)* have intervened with the aim of resolving the dispute and maintaining market equilibrium<sup>3</sup>.

Amongst other things, the factors contributing to the dispute between conventional traders and e-commerce entities is the evolution of e-commerce entities from marketplaces to a - delivery and logistics network, inventory manager, payments platform, producer of television and films, hardware manufacturer, software developer, fashion designer and information technology service provider. The dual role of e-commerce entities creates an inherent conflict of interest between the entity's role as a marketplace and that as a market participant. Consequently, e-commerce entities have indulged in the promotion of their related/preferred sellers which has hurt the business of other third-party sellers participating on the platform. The CCI's report<sup>4</sup> establishes that the behaviour of the e-commerce entities vis-à-vis third-party sellers is a testimony of their market power and enables them to dictate terms on the third-party sellers

<sup>1</sup> India Brand Equity Foundation, 'E-Commerce Industry in India' (November 2019)  
< <https://www.ibef.org/industry/ecommerce.aspx>> accessed on 23 October 2021

<sup>2</sup> Department of Industrial Policy & Promotion, Policy on Foreign Direct Investment (FDI) in e-commerce (Press Note No. 2, 2018) para 5.2.15.2

<sup>3</sup> Aditya Karla, 'Amazon and Indian trader group in public spat over discounts' (Reuters, 30 August 2019)  
<<https://in.reuters.com/article/india-ecommerce-amazon-com/amazon-and-indian-trader-group-in-public-spat-over-discounts-idINKCN1VK1UQ>> accessed on 23 October 2021

<sup>4</sup> The Competition Commission of India, 'Market Study on E-commerce in India' (8 January 2020)

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and devise policies to the advantage of their preferred/related sellers. Further, the report establishes that an e-commerce entity with market power may be in a position to prevent the market from being competitive. The conduct of e-commerce entities may violate the mandate of the *Sections 3 and 4 of the Competition Act, 2002*. Thus, it has become essential to understand the functioning of e-commerce in its entirety and its implications on markets and competition. The paper aims to examine the potential jeopardies of market power vis-a-vis e-commerce and the viability of structural separations as a solution to maintain a competitive market structure.

## **II. EXISTING RESEARCH PROBLEM:**

India's e-commerce ecosystem is dominated by a few e-commerce entities that have positioned themselves as pivotal to the e-commerce infrastructure. The market positioning of such e-commerce entities creates an inherent conflict of interest between the platform's role as a marketplace and that as a market participant. Additionally, the vertically integrated structures of these entities enable them to fortify their dominance, impede competition and smother innovation. The legal scenario of this is that the absence of sector-specific regulations has enabled e-commerce operators engaged as intermediaries to vertically integrate across business lines and potentially impede competition. Further, India's competition law may be unequipped to cope up with the evolving business practices of e-commerce platforms and network industries.

## **III. LITERATURE REVIEW:**

### **III.I LINA M. KHAN, 'AMAZON'S ANTITRUST PARADOX'**

**(2017) 126 THE YALE LAW JOURNAL 712:**

The article delves into Amazon.com Inc.'s business structure in the e-commerce market and attempts to explain the shift of amazon.com's modus and strategy from the traditional ways of doing business and competitive process. It further explains why competitive process and structure matters to the business ecosystem. Further, the author dissects amazon.com's strategy of predatory pricing of e-books, acquisition of businesses to create entry barriers, it's a delivery strategy that is aimed at acquiring market power. The authors address how such a dominant

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position and market power may facilitate anticompetitive business conduct and structures. Towards the end, the author proposes two-fold methods to avoid creating dominant players in the e-commerce market, (i) *restoring traditional antitrust and competition policy principles* or (ii) *applying the common carrier obligations and duties*. The article facilitates an understanding of the interplay of anti-trust laws vis-à-vis e-commerce in the U.S.

### **III.II RICHARD A. POSNER, ‘THE CHICAGO SCHOOL OF ANTITRUST ANALYSIS’ (1979) (127) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 925:**

The literature commences by recounting the development of the Chicago School of Antitrust Analysis along with a brief introduction to the Harvard School of Antitrust Analysis. The literature further proceeds to explain the sharpest differences between the two schools of antitrust analysis. In the subsequent chapters, the literature explains the areas where the two schools of antitrust analysis overlapped and converged with special reference to the concept of predatory pricing. The literature facilitates an understanding of the Chicago School of Antitrust’s interpretation of antitrust questions.

### **III.III KALAARI CAPITAL, ‘IMAGINING TRILLION DOLLAR DIGITAL INDIA’ (2018):**

The document is a report prepared by India’s leading venture capitalist ‘Kalaari Capital’ outlining a 30-point implementation module for creating up to \$1trillion of digital revenue by 2022 and \$1 trillion of economic value from the digital economy by 2025. The document presents a vision for how India’s digital economy can unlock productivity and value through transformative infrastructure, applications and ecosystems. The literature facilitates an understanding of the scope of digital economy in India and highlights the increasing relevance of the market dynamics.

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### **III.IV DAVID B. AUDRETSCH, ‘DIVERGENT VIEWS IN ANTITRUST ECONOMICS’ (1988) 33 ANTITRUST BULL 135:**

The literature commences with an acknowledgement of two distinct views of antitrust economics. The literature concisely explains the two school of antitrust thought: the mainstream view and the neo-Chicago view on antitrust vis-a-vis their impact on horizontal restrictions, monopolization, mergers and vertical restrictions. The literature facilitates an explanation of how the two school of thoughts perceived certain business structure and conduct.

### **III.V ROBERT SKITOL, KENNETH VORRASI, ‘THE REMARKABLE 50-YEAR LEGACY OF BROWN SHOE CO. V UNITED STATES’ (2012) 26 (2) ANTITRUST 47:**

The literature traces the judicial legacy of the Brown Shoe Case. The literature briefly explains the judicial decision of the case by highlighting the vertical and horizontal effects therein. Further, it traces the journey from the Brown Shoe decision to the Baxter Merger Guidelines. The literature facilitates an understanding of the implications of vertical integration on competition.

### **III.VI INDIA BRAND EQUITY FOUNDATION, ‘E-COMMERCE INDUSTRY IN INDIA’ (NOVEMBER 2019):**

The literature delves into an explanation of the e-commerce sector in India. It commences with an information aimed at highlighting the unprecedented growth of the e-commerce sector in India. Further, it explains the reasons for such an unprecedented growth and highlights the key models of e-commerce. Furthermore, the literature explains the strategies adopted by the leading e-commerce operators. The literature facilitates an understanding of the e-commerce sector in India and the intricacies involved therein.



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#### **IV. SCOPE AND OBJECTIVES:**

The scope of the study extends to examining the potential hazards of market power vis-a-vis e-commerce and the viability of structural separations as a solution to maintain a competitive market structure.

**The objectives set out for the purpose of the study are:**

- i. To critically examine the market power vis-à-vis e-commerce;*
- ii. To extrapolate its impact on economic structuralism; and*
- iii. To evaluate the viability of structural separations as a potential solution.*

#### **V. RESEARCH QUESTION AND HYPOTHESIS:**

- i. Whether the concentration of market power vis-à-vis e-commerce pose an impending threat to the market structure?*
- ii. Is structural separation a viable solution?*

Market Power poses a threat to the market structure.

#### **VI. RESEARCH METHODOLOGY:**

The paper is based on the doctrinal approach and reliance is placed on scholarly articles and opinions, primary sources like the Competition Act, 2002.

#### **VII. MARKET POWER VIS-À-VIS E-COMMERCE IN INDIA:**

In India, commercial transactions have transitioned from the medium of brick and mortar to digital at an unprecedented pace<sup>5</sup>. The digital economy has conceived e-commerce as a contemporary means of business. A market research report indicates that the Indian e-commerce market has been on a skyward growth trajectory and exhibits enormous growth potential<sup>6</sup>.

<sup>5</sup> Ibid

<sup>6</sup> Kalaari Capital, 'Imagining Trillion Dollar Digital India' 2018

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**The following factors contribute to the growth of e-commerce in India;**

- (i) **Demand.** India's burgeoning demographic outline, progressing mobile-phone penetration and usage, internet ingression and comparatively enhanced economic performances are contributing to the growth of the e-commerce sector in India;
- (ii) **Policy.** India's e-commerce related policy framework is indicating signs of progression, albeit with reasonable restrictions; and
- (iii) **Opportunities.** The growth-trend of e-commerce in India is attracting private equity and venture capital investments<sup>7</sup>.

**India's policy framework classifies e-commerce into two business models:**

- (i) **Marketplace Model** of e-commerce - whereby entities operate a platform that acts as facilitators of transactions between market participants and may provide support services, and
- (ii) **Inventory Model** of e-commerce - whereby entities own the inventory that they sell on their platform<sup>8</sup>.

The transition to digital medium has remodelled the way of doing business and consequently left conventional market participants miserable. As a result, India's Regulatory Authority - **the Ministry of Commerce and Industry and the Competition watchdog - the Competition Commission of India ("CCI")** have intervened to resolve the dispute and maintain a robust market equilibrium<sup>9</sup>. Amongst other things, the increasing market power of e-commerce operators contributes to the agony of the conventional market participants. To effectively comprehend the role of market power vis-à-vis the e-commerce sector in India, it is critical to analyse and understand the functioning of an e-commerce operator.

<sup>7</sup> Ibid

<sup>8</sup> Department of Industrial Policy & Promotion, Policy on Foreign Direct Investment (FDI) in e-commerce (Press Note No. 2, 2018) para 5.2.15.2

<sup>9</sup> The Competition Commission of India, 'Market Study on E-commerce in India' (8 January 2020)

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## **VIII. ANALYSIS OF THE E-COMMERCE OPERATORS IN INDIA:**

A perceptive examination of the e-commerce operators in India indicates an extensive expansion strategy<sup>10</sup> and continuing losses<sup>11</sup>. The leading e-commerce operators in India have ventured into multiple sectors such as e-retail, warehousing and logistics services, last-mile delivery services, digital payment services, marketing and advertising services, book publication services, content production services, fashion consulting, hardware manufacturing and information technology services<sup>12</sup>. However, despite such widespread expansion, the e-commerce operators in India have failed to recoup investments and record profits<sup>13</sup>. The elements of business strategy common to the leading e-commerce operators in India are that *(i) they are prepared to forego profits in the quest to secure increased market share and (ii) in doing so, are integrating across multiple business lines*<sup>14</sup>. The elements of business strategy mentioned above are intertwined and challenge the Chicago School of Antitrust's hypothesis of rational profit-seeking market participants<sup>15</sup>.

The business strategy may indicate that the underlying purpose of e-commerce operators is to accomplish a meaningful scale of operations and market share in its pursuit of recouping investments, creating shareholder value and unlocking the potential of its business model. Therefore, to understand the market power of e-commerce operators thoroughly, they may have

<sup>10</sup> Saritha Rai, 'Amazon Opens Its Largest Campus Yet' (Bloomberg, 21 August 2019) <<https://www.bloomberg.com/news/articles/2019-08-21/amazon-opens-india-campus-its-largest-in-the-world>> accessed on 22 October 2021

<sup>11</sup> Sayan Chakraborty, 'Profits for Flipkart, Amazon India could be a distant dream' (Forbes, 4 November 2019) <<https://www.forbesindia.com/article/leaderboard/profits-for-flipkart-amazon-india-could-be-a-distant-dream/55987/1>> accessed on 22 October 2021

<sup>12</sup> Saritha Rai, 'Amazon Opens Its Largest Campus Yet' (Bloomberg, 21 August 2019) <<https://www.bloomberg.com/news/articles/2019-08-21/amazon-opens-india-campus-its-largest-in-the-world>> accessed on 22 October 2021

<sup>13</sup> Sayan Chakraborty, 'Profits for Flipkart, Amazon India could be a distant dream' (Forbes, 4 November 2019) <<https://www.forbesindia.com/article/leaderboard/profits-for-flipkart-amazon-india-could-be-a-distant-dream/55987/1>> accessed on 22 October 2021

<sup>14</sup> Ibid

<sup>15</sup> Richard Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 University of Pennsylvania Law Review 925

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to be reviewed as an integrated entity<sup>16</sup>. An integrated e-commerce entity may imply multiple conflicts of interests and access to business information. *For instance*, an e-commerce operator engaged in the business of e-retail and logistics may effectively provide logistics support to another e-retailer competing for the same set of target customers. Thus, an integrated e-commerce operator may control crucial internet infrastructure that may enable the e-commerce operator to engage in business with all the stakeholders of the internet economy and may facilitate structural dominance and market power, thereby may provide incentive to abuse its dominant position.

However, critical elements of the business strategy that implicate competition are the below-cost pricing strategy<sup>17</sup>, construction of entry barriers and the inherent conflict of interests. The elements mentioned above facilitate foreclosure and discrimination. *For instance*, Amazon India’s flagship product is the Amazon.in – a marketplace model of e-commerce aimed at facilitating transactions between buyers and sellers. Further, Amazon.in acquired stake in e-sellers namely *Couldtail India and Appario Retail (hereinafter “related e-sellers”)*<sup>18</sup>. The equity participation in the related e-sellers may provide reasonable incentive to the marketplace (Amazon.in) to discriminate between sellers by affording a favourable treatment to the products offered by the related e-sellers over that offered by other independent sellers<sup>19</sup>. Similarly, Flipkart.com – a marketplace model of e-commerce has integrated its services by venturing into warehousing and logistics<sup>20</sup>. Such a robust portfolio of services may confer a

<sup>16</sup> Lina M Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 Yale Law Journal 710

<sup>17</sup> Aditya Karla, Devjyot Ghoshal, Aditi Shah, ‘India warns foreign e-commerce firms like Amazon, Flipkart over discounts: sources’ (Reuters, 25 June 2019) <<https://www.reuters.com/article/us-india-ecommerce/india-warns-foreign-e-commerce-firms-like-amazon-flipkart-over-discounts-sources-idUSKCN1TQ1PT>> accessed on 21 October 2021

<sup>18</sup> Aditya Karla, Sankalp Phartiyal, ‘Amazon changes business structures in India to bring big sellers back: sources’ (Reuters, 7 February 2019) <<https://in.reuters.com/article/us-india-ecommerce-amazon-com/amazon-changes-business-structures-in-india-to-bring-big-seller-back-sources-idINKCN1PW0K5>> accessed on 21 October 2021

<sup>19</sup> Sankalp Phartiyal, ‘Walmart, Amazon scrambling to comply with India’s new e-commerce rules’ (Reuters, 31 January 2019) <<https://in.reuters.com/article/india-ecommerce/walmart-amazon-scrambling-to-comply-with-indias-new-e-commerce-rules-idINKCN1PP1Y3>> accessed on 20 October 2021.

<sup>20</sup> Vijaykumar Pitchah, ‘Flipkart injects \$147 mn into logistics arm eKart’ (VCCircle, 2 October 2017)



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competitive advantage to an e-commerce operator and incentivise them to foreclose competition by the construction of expensive entry barriers.

***Electronic commerce may operate in the following manner:*** below-cost pricing may entail increased lock-in costs and higher marginal costs for early sales but facilitate market infiltration → such infiltration may drive rivals / competitors out of business → thereby increase market share → an increased market share facilitates control and enables future monopolisation → such a structure generates market power<sup>21</sup>. The diverse portfolio of products and services offered by the integrated e-commerce operators may enable the cross-market recoupment of losses and hinder the realisation of the full pro-competitive potential of the e-commerce sector.

***The Competition Commission of India (the “CCI”),*** in its market study on e-commerce has identified the above-mentioned elements to co-exist and reinforce their effects of each other<sup>22</sup>. Additionally, diversely integrated e-commerce operators glean on unique insights and data from its participants and customers<sup>23</sup>. Such competitively significant business information may enable an e-commerce operator to orderly tilt a particular market in its favour without redefining the sector or triggering the mandate of the Competition Act, 2002.

In light of the above, it may be contended that the Competition Act may fail to cope up with the fast-evolving, dynamic business practises peculiar to the e-commerce sector and in the process, may fail to appreciate the architect of ‘market power’ in the e-commerce sector. To adequately appreciate the anticompetitive effects of e-commerce operators, the Competition Policy may examine the underlying market structure, its dynamics and the competitive process<sup>24</sup>. Additionally, the Competition Policy framework may factor in that below-cost pricing is highly rational for e-commerce operators and evaluate the critical business elements

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<<https://www.vccircle.com/sanjay-kaushik-netrika-consulting-on-why-forensic-due-diligence-should-be-your-first-step-when-planning-an-investment>> accessed on 20 October 2021.

<sup>21</sup> Lina M Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 Yale Law Journal 710

<sup>22</sup> The Competition Commission of India, ‘Market Study on E-commerce in India’ (8 January 2020)

<sup>23</sup> Ibid

<sup>24</sup> Lina M Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 Yale Law Journal 710

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mentioned above. The Competition Policy may appreciate that potential risks of vertically integrated e-commerce operators on the market structure. However, there have been indications of the competition watchdog – the CCI taking cognisance of the elements and challenges peculiar to the e-commerce sector in India<sup>25</sup>.

### **IX. IMPLICATIONS OF MARKET POWER:**

The present e-commerce market structure<sup>26</sup> may indicate toward Economic Structuralism - a theory of market structure that proposes that a concentrated market promotes anticompetitive forms of conduct. To elaborate, the theory proposes that a market dominated by a small number of large companies is likely to be less competitive than a market populated with many small or medium sized companies. The rationale supporting the theory is that on the supply-side (i) *monopolistic and oligopolistic market structure enables dominant actors to coordinate with greater ease and subtlety, thereby facilitating anticompetitive conduct like price-fixing, market division and collusion; (ii) monopolistic and oligopolistic firms can use their existing dominance to block new entrants; (iii) monopolistic and oligopolistic firms have greater bargaining power against consumers, suppliers and workers which enables them to hike prices, stifle innovations and quality while maintaining profit margins*<sup>27</sup>. Further, on the demand-side (i) *economic structuralism converts disposable income of the middle-class into capital gains, dividends and hefty compensations for the monopolists / oligopolists.*

The objective of India’s Competition Policy is to prevent practices having an adverse effect on competition, to promote and sustain competition in the market, to protect the interest of consumers and to ensure freedom of trade by the participants in the markets<sup>28</sup>. The objectives of the policy framework may indicate a consumer-centric policy framework. However, given the peculiar characteristics of electronic commerce and the intricacies involved therein and as

<sup>25</sup> The Competition Commission of India, ‘Market Study on E-commerce in India’ (8 January 2020)

<sup>26</sup> India Brand Equity Foundation, ‘E-Commerce Industry in India’ (November 2019)

<sup>27</sup> Lina M Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 Yale Law Journal 710

<sup>28</sup> The Competition Act 2002 (12 of 2003)

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highlighted herein above, the Competition Policy vis-à-vis e-commerce may be required appreciate the inclusive protection of consumers, producers, suppliers and other market participants. An inclusive approach may facilitate a pro-competitive market structure and unlock the potential of the e-commerce sector in India. *India’s Competition Law and Policy Framework proposes two forms of remedies: (i) behavioural remedies aimed to prohibit a specific form of conduct and (ii) structural remedies aimed to eliminate the source / incentive for the anticompetitive conduct*<sup>29</sup>.

There have been attempts to regulate the e-commerce sector in India. *The competition watchdog - the Competition Commission of India (the "CCI")* in the matter involving an e-commerce operator<sup>30</sup> acknowledged that e-commerce operators may be inclined to resort to predatory pricing by its access to substantial financial resources and low transactional costs which is a by-product of the efficiencies offered by the e-commerce business model. Further, the CCI observed that the e-commerce operator would not have any reason to provide goods and services below-average cost unless it intends to drive out or reduce competition in the relevant market. However, the CCI refused to intervene in the matter because it believed that the market was still in its incipiency stages and, that there was no conclusive evidence of either dominance or intentions to hurt competitors. Further, the regulator, the Ministry of Commerce & Industry imposed several behavioural obligations<sup>31</sup> on the e-commerce operators. Unfortunately, the behavioural obligations imposed on the e-commerce operators may not have been effective as the e-commerce operators have defeated the purpose of the divestiture by one device or another<sup>32</sup>. Traditionally, the *‘doctrine of common carriages’* was applied to intermediaries / infrastructure engaged companies to combat the implications of market power induced discrimination and lock-ins, thereby requiring common carriers to offer equal access

<sup>29</sup> Ibid

<sup>30</sup> Fast Track Call Cab Private Limited v M/S ANI Technologies Pvt. Ltd., case no. 06 of 2015

<sup>31</sup> Department of Industrial Policy & Promotion, Policy on Foreign Direct Investment (FDI) in e-commerce (Press Note No. 2, 2018) para 5.2.15.2

<sup>32</sup> Stephanie Findlay, ‘Amazon products return to Indian website after restructuring’ (Financial Times, 7 February 2019) <<https://www.ft.com/content/447628dc-2ad5-11e9-88a4-c32129756dd8>> accessed on 20 October 2021

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to all persons on equal terms<sup>33</sup>. However, the doctrine of common carriages may not be applicable to e-commerce operators due the characteristic of *data appropriation* that is peculiar to e-commerce operators.

Therefore, the paper will delve into the prospects of the applicability of the doctrine of structural separation<sup>34</sup> to restore and maintain the competitive e-commerce market.

## **X. STRUCTURAL SEPARATION OF E-COMMERCE**

### **OPERATORS:**

In Part 2 of the paper, we have established that e-commerce operators have integrated business structures and that they operate a platform model to mediate market participants, market their inhouse products and services on the same platform and have placed themselves pivotal to the internet infrastructure. Further, that such a structure may entail inherent conflicts of interest, may facilitate concentration of market power and impede competition and innovation. Herein, the paper evaluates the prospects of structural separations to counter the implications on competition caused by e-commerce operators and their increasing market power. India's Competition Act provides for structural separations under Section 28<sup>35</sup>. In the context of e-commerce operators, structural separations will demarcate the lines of business that an e-commerce operator may or may not be allowed to operate. Structural Separation may be in the form of (i) *a complete ban that prohibits a company from any engagement, involvement or ownership in a particular activity or (ii) a partial ban (functional separations) that permits a company to engage in a particular activity but prescribes the organisational form*<sup>36</sup>. The theory animating structural separations is non-competition and it may achieve, amongst other things, (i) *the elimination of conflict of interests, (ii) the prevention of cross-leveraging of*

<sup>33</sup> The Carriers Act 1865 (3 of 1865)

<sup>34</sup> Section 28, The Competition Act 2002 (12 of 2003)

<sup>35</sup> Section 28 provides that the Commission may order the division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

<sup>36</sup> Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973



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*market advantages, (iii) the preservation of market efficiency and dynamism, (iv) the promotion of market diversity and (v) the prevention of market power concentration<sup>37</sup>.*

*(i) **Elimination of Conflict of Interests.*** The market study conducted by the CCI identified the e-commerce operators’ private labels and preferential treatment to related e-sellers as two broad concerns that facilitate an incentive to the e-commerce operators to leverage their control over the platform in favour of their own / preferred e-sellers products to the disadvantage of other sellers / business users of the e-commerce operator (conflict of interests). Further, the report records that e-commerce operators have numerous means to act upon such data including the access to competitively significant business information<sup>38</sup>. Furthermore, the vertically integrated e-commerce operators may tend to create several levels of expensive entry barriers for competition. Such a market structure may facilitate foreclosures, discrimination and stifled innovation thereby causing an appreciable adverse effect on competition in India. Therefore, structural separations may facilitate the elimination of conflict of interests by prohibiting cross-ownership and eliminating the root-cause of the tendency to discriminate and foreclose. Although vertical integrations may enhance efficiencies, in electronic commerce, the implications of abuse outweigh the advantages of efficiency.

*(ii) **Prevention of Cross-Leveraging.*** The cross-leveraging of advantages may facilitate entry barriers and foreclose competition in the following ways: (i) it may enable the bundling of services by the dominant e-commerce operator. Therefore, a potential competitor will have to compete at multiple levels. For instance, Amazon’s Prime Video and Prime Delivery are bundled along with the Prime Subscription.

The study conducted by the CCI identifies and highlights the potential of e-commerce operators to cross-leverage advantages to its benefit<sup>39</sup>. For instance, an e-commerce operator is engaged

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<sup>37</sup> Ibid

<sup>38</sup> The Competition Commission of India, ‘Market Study on E-commerce in India’ (8 January 2020)

<sup>39</sup> Ibid

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in the business of video content production and cloud computing services. If the video content production competitor of the e-commerce operator is a business user of the e-commerce operators cloud computing services, then the e-commerce operator may use insights derived from its cloud computing services to its advantage and subvert its video content production competitor. Therefore, structural separations are key since prohibits the cross-leveraging of market advantages and market dominance. Prevention of cross-leveraging is essential to promote innovation and preserve market dynamics in terms of competition.

(iii) ***Preserving Market Efficiency and Dynamism.*** Since e-commerce operators serve as critical electronic intermediaries, it is essential that for their operations to be stable and disruption-shielded. A disruption in services may have an insurmountable micro-impact on the supply chains and macro impact on the economy<sup>40</sup>. For instance, an e-commerce operator engaged in the business of e-retail, warehousing and logistics provides warehousing and logistics services to a competitors of the e-commerce operators' e-retail business and if there is a disruption to the logistics services or accidental damage to the warehousing facility, then the impact of such an event will implicate competition. Therefore, structural separations may ensure a stability of intermediary services.

(iv) ***Diversity.*** A pro-competitive market structure promotes market participation, encourages innovation and maintain a welfare-centric equilibrium. Therefore, structural separations may incentivise producers and suppliers to participate in the market and may restore market dynamics and diversity in the competitive process.

(v) ***Preventing Accumulation of Market Power.*** A vertically integrated e-commerce operator may control elements of the e-commerce market, and such control can enable the e-commerce

<sup>40</sup> Romellaine Arsenio, 'Amazon Web Services Suffers Crash, Takes Down Netflix, Reddit, Tinder And Other Huge Parts of the Internet' (Tech Times, 23 September 2015)  
<<https://www.techtimes.com/articles/86667/20150923/amazon-web-services-suffers-crash-takes-down-netflix-reddit-tinder-and-other-huge-parts-of-the-internet.htm>> accessed on 22 October 2021

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operators to impose unfavorable conditions upon participants competing with the goods or services of the e-commerce operator. Because the 'access to the market' is controlled by these e-commerce operators, the prospects of market power posing threat to the competition are heightened. For instance, an e-commerce operator engaged in multiple verticals of business may extract favourable terms and conditions from third party service providers and cause a waterbed effect<sup>41</sup>. Therefore, structural separation may prevent the accumulation of market power.

To summarize, structural separations may promote dynamic performance of the e-commerce sector and may preserve the integrity of the competitive process. Further, structural separations may eliminate the incentive for platforms to cause market harm by securing market power. However, structural separation entails a case-specific assessment that requires evaluation of multiple factors like the status of dominance, relevant market, network effects at operation, the scope of entry barriers in existence and the economic and social costs of the abuse of market power. Further, several costs may accompany structural separations. First, Vertical integrations reduce costs of goods and services due to efficiency and separations may increase the costs of goods and services marginally and thereby increase prices of the goods and services. Second, Structural separations may eliminate the e-commerce operators' incentive to innovate with the primary operations. It is critical to weight the loss in efficiency with the prospects of creating an ecosystem that stifles innovation and competition<sup>42</sup>.

## **XI. CONCLUSION:**

The absence of sector-specific regulations has enabled e-commerce operators engaged as intermediaries to vertically integrate across business lines and potentially impede competition. Further, India's Competition Law may be unequipped to cope up with the evolving business

<sup>41</sup> Waterbed Effects refers to the economic cycle whereby a dominant participant extracts favourable terms and conditions from the third-party service provider by virtue of sheer volume. Further, to recover the discount provided to the dominant participant, the third-party service provider hikes prices for smaller, independent players.

<sup>42</sup> Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973

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practices of e-commerce platforms and network industries. The e-commerce sector in India brings to the thought, the relevance and resurgence of the Harvard School of Antitrust's analysis of antitrust conduct. The Harvard School of Antitrust (*the "Harvard School"*) advocates allocative efficiency, income distribution and the decentralization of aggregate concentration. The Harvard School proposes that market power per se is harmful and therefore, should be illegal. Further, the Harvard School focused on market structure rather than on business conduct as the source of adverse economic performance and thereby regarded the creation of entry barriers and foreclosure of competition as the most onerous exclusionary business conduct<sup>43</sup>. Indeed, as A.D Neale quotes, the *Brown Shoe case* may be regarded as the high-watermark of judicial interpretation<sup>44</sup>. The *Brown Shoe*<sup>45</sup> jurisprudence observed that the primary vice of a vertical integration was to foreclose the competition of either party from a segment of a market otherwise open to them and that vertical integration may act as a clog to competition<sup>46</sup>.

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<sup>44</sup> Ibid

<sup>45</sup> *Brown Shoe Co. v United States*, (1962) 370 U.S 294

<sup>46</sup> Robert Skitol, Kenneth Vorrasi, 'The Remarkable 50-Year Legacy of *Brown Shoe Co. v United States*' (2012) 26 (2) Antitrust 47



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