



# INDIAN JOURNAL OF LEGAL AFFAIRS AND RESEARCH

VOLUME 3 ISSUE 1

Peer-reviewed, open-access, refereed journal

**IJLAR**

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## **Introduction**

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## **Preface**

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

## **Description**

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

# **DIGITAL GATEKEEPING AND THE INADEQUACY OF ABUSE OF DOMINANCE DOCTRINE - THE CASE FOR AN EX ANTE DIGITAL COMPETITION FRAMEWORK IN INDIA**

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## **ABSTRACT**

The exponential rise of digital markets have put large digital platforms as critical intermediaries. In India, where consumers and businesses increasingly depend on these global platforms, the framework of the Competition Act, 2002 appears inadequate to address the power exercised by such intermediaries. Section 4 of the act prohibits abuse of dominance. However, its provisions operates within the framework of conventional markets ill suited to the demands of digital market. This article argues that digital gatekeeping, the infrastructural control, exercised by these large digital platforms over market access, user data and distribution channels is conceptually different from and inadequately addressed by the traditional abuse of dominance doctrine. Drawing on Competition Commission of India jurisprudence, the EU Digital Markets Act, the Report of the Committee on Digital Competition Law, and the Draft Digital Competition Bill, 2024, the article identifies four structural features of gatekeeping: network effects, data accumulation, ecosystem lock-in, and bottleneck control: that together generate a form of market power that Section 4 cannot adequately capture. In order to accommodate these features, India requires an ex-ante, India specific regulatory framework, one that can target infrastructural power rather than market share and intervenes before competition is irreversibly foreclosed.

**Keywords:** *Digital gatekeeping, Section 4 Indian Competition Act, Ex-ante regulation, Network effects, platform economy*

## A. INTRODUCTION

The rise of digital economy has changed the course of modern commerce. The rise of internet as an inevitable part of daily life and the advancements in technology has transformed digital platforms as a critical infrastructure for economic activity. It enables in the production, distribution and consumption of goods, services and information transcending geographical boundaries. Digital platforms, through their online infrastructure, acts as the medium connecting businesses, consumers and advertisers. Traditionally, firms participated in markets and held large number of shares. Whereas global giants such as Google, Amazon, Meta platforms or Indian companies like Zomato, Flipkart acts as mediums were vast segments of commercial activity takes place. They operate as the very infrastructure through which market functions. This means that they possess the ability to control how transactions can take place in the market and determine which businesses can have interaction with consumers.

Digital platforms create a unique ecosystem. The value of a platform is depended on the number of users which results in accumulation of vast amounts of user data with the platform. This enables the platform to use its algorithms to suit the needs of the consumers and connect them with corresponding businesses which incentivises both the business and consumer to remain with the platform. This creates a huge entry barrier for competitors and allows small number of popular firms to remain the central position in digital markets. This structural position of intermediary infrastructure power is called digital gatekeeping.

Section 4 of Indian Competition Act, 2002 is the primary legislation that addresses this power and prohibits abuse of a dominant position in a relevant market. This provision was designed for suiting the needs of a conventional market. It operates within a single, identifiable relevant market, intervenes only after anticompetitive conduct has occurs and determines the dominant position of the enterprise by its market size. Digital markets defy these parameters. Digital markets can operate across multiple, deeply integrated markets simultaneously allthwhile holding negligible market share. By the time, Section 4 becomes applicable, the market may have already tipped irreversibly in favour of the dominant platform.

This article argues that digital gatekeeping is conceptually different from abuse of dominance as it is rooted in infrastructural control and that Section 4, as currently interpreted contains inherent limitations which cannot adequately accommodate gatekeeping conduct. Therefore, calls for an ex-ante regulatory framework, taking inspiration from the EU's Digital Market Act, and the recommendations of the Committee on Digital Competition Law.

## **B. ARCHITECTURE OF SECTION 4 - STATUTORY FRAMEWORK**

The statutory framework of the act provides that no enterprise or group shall abuse its dominant position<sup>1</sup>. The statute does not make dominance per se as illegal but prohibits abuse of the dominance<sup>2</sup> to the advantage of the enterprise or group. The legislative design reflects a competition policy that curbs anticompetitive conduct without penalising the effects of a successful venture. The enforcement mechanism takes upon an ex post adjudicatory framework. It commences upon the receiving of information or upon the CCI's own motion, where upon prima facie opinion of abuse by CCI, an investigation by the Director General shall commence<sup>3</sup>. The enforcement inquiry starts by identifying whether the enterprise belongs to a relevant market. Section 2(r) defines a relevant market as the market determined with reference to the relevant product market or the relevant geographic market.<sup>4</sup> Upon identification, the commission must determine whether the enterprise occupies a dominant position in the relevant market. Section 19(4) sets out the factors relevant to the determination of dominance, including market share, size of the enterprise, size and importance of competitors, economic power of the enterprise, the entry barriers in the relevant market, dependence of consumers on the enterprise, and the countervailing buying power available to consumers.<sup>5</sup> The Explanation to Section 4 defines 'dominant position' as a position of strength enjoyed by an enterprise in the relevant market enabling it to operate independently of competitive forces, or to affect its competitors, consumers, or the market in its favour.<sup>6</sup> Read together, the regulatory scrutiny under the act is triggered after a potentially anti-competitive practise has been brought to the notice of CCI, where an enterprise is supposed to be dominant within the ambits of 'relevant market' and abuses its power to the disadvantage of other enterprises.

## **C. DIGITAL GATEKEEPING - STRUCTURAL FEATURES**

### **I. NETWORK EFFECTS**

Network effect is a unique characteristic of a digital market. It arises when the value of a platform increases with the increase in its user base. Direct network effect occurs when users benefit from the presence of other users on the same platform such as in messaging applications like whatsapp. Indirect network effect arises in multi sided platforms where users on one side of the platform is benefited by the participation of more users on the other side such as in food delivery platforms like swiggy. As the user base grows, the volume of user interactions generate vast datasets, which in turn improves algorithms, personalizes user experiences, and increases platform stickiness<sup>7</sup>. These dynamics create a self-reinforcing feedback loop: increased usage enhances the value of the service, which in turn attracts additional users and further strengthens the platform's position<sup>8</sup>. Competition authorities have observed that such positive feedback mechanisms can amplify network effects and, when sufficiently strong, lead markets to "tip" toward a single dominant platform, particularly where competitors cannot match the scale-driven attractiveness of the incumbent platform<sup>9</sup>. Users then become reluctant to switch platforms as migrating to another platform would mean losing established network of contacts, accumulated data and transaction histories. Therefore, users tend to rely on a single platform within a particular category, a phenomenon known as single homing. In such a saturated situation, even if rival competitors create better services, they cannot attract users from the old platform. The real power of digital markets hence, not only relies on the price of its services but in controlling access to the platform and its user base providing competitive advantage even in the presence of potentially superior competing services.

### **II. DATA ACCUMULATION.**

As the number of users in a platform increases, vast quantities of data regarding user behaviour, preferences, and transactions gets accumulated with the dominant platform. This enables the platform to improve the quality of their services and offer personalised services to its users. Data analytics also allow platforms to understand and identify market trends and respond strategically to the requirements of its user. One of the significant feature of data is that it does not diminish with use but rather gets accumulated with time. As a result, a platform can use the same dataset

to improve multiple services simultaneously allowing them to expand to new markets, reinforcing its competitive advantage. In this regard, the Committee on Digital Competition Law has observed that the accumulation and aggregation of user data may provide incumbent digital enterprises with a significant competitive advantage, enabling them to enter related markets and potentially foreclose new entrants who lack access to comparable datasets<sup>10</sup>. In the Google Android Case, the Competition Commission of India observed that Google's ability to collect and combine data from different applications within its ecosystem strengthened its dominant position in several related markets<sup>11</sup>.

### **III. ECOSYSTEM LOCK-IN**

Digital platforms provide a wide range of interconnected services together creating a single integrated ecosystem which users extensively rely upon. Once users become involved in a platform, switching to another platform incurs considerable switching costs. Users face difficulties not only in transferring data across platforms, but also the convenience associated with personalized services and integration within different services in the ecosystem. Thus, users tend to remain with the same ecosystem. This leads to user lock-in consolidating the platform's market position. This produces anti-competitive effects as it acts as a barrier for potential competitors. Section 4(2)(e) prohibits an enterprise from using its dominant position in one relevant market to enter into other relevant markets<sup>12</sup>. However, this provision assumes that the dominance can be identified clearly defined markets. Digital markets are closely integrated where multiple services are bundled together making it difficult to fall within the ambit of this provision

### **IV. BOTTLENECK PROBLEM**

Traditional bottleneck monopoly was when a single firm controlled an essential facility or infrastructure which other market participants had to use in order to operate giving them considerable power of access to market, its entry and participation. In the digital sphere, strong network effects, large user bases and integrated ecosystem create the same bottleneck problem. Certain digital services like app stores, operating systems, search engines function as unavoidable intermediaries for digital market participants, both business and consumers alike. A platform may become a gatekeeper by controlling access by firms to their final customers through its intermediary position and control over user data and distribution channels<sup>13</sup>. For example, Google

playstore essentially acts as the gateway through which application developers reach consumers. The platform can effectively decide which application to be listed and distributed on the platform thereby regulating who have access to the market. They can thereby shape the conditions under which competition occurs. Such platforms through their strategic position acts as gatekeepers and bring about anti-competitive behaviour.

## **D. HOW GATE KEEPING IS DIFFERENT FROM DOMINANCE**

### **I. CONCEPTUAL DIFFERENCE**

The concept of dominance under Section 4 is rooted in the idea of static market power. It pertains to the position of economic power enjoyed by an enterprise in the relevant market to operate independently of competitive forces or affect its competitors or consumers in its favour. Abuse of dominance doctrine asks whether this power has been misused by the enterprise through discriminatory or exploitative conduct. In contrast, the fundamental character of gatekeeping, in the context of digital platform, is structural control of the market rather than access. It is the ability to determine who can participate in the market or have access to market, user base and essential digital infrastructure. Large digital platforms often operate as critical intermediaries that can control the infrastructure on which other businesses depend, allowing them to shape competitive conditions even without traditional dominance metrics<sup>14</sup>.

### **II. MARKET SHARE VS ACCESS CONTROL**

Section 19(4) lists several factors that are considered when determining if a firm holds dominant position. The market share that an enterprise holds in a relevant market is a key factor to identify its position in a relevant market. In a conventional market, this method is effective in identifying market power. However, in digital markets, evaluating dominance based on market share can give misleading impression with respect to the actual power that it holds. A digital platform shall hold very little market share while simultaneously penetrating to every other market. The power of a gatekeeper therefore arises from controlling the infrastructure through which the market operates. By controlling the access to this infrastructure, they can influence which business and users are able to interact in the ecosystem. The Competition Commission of India in the Google Play Store investigation had found that exclusion from the Google Play Store, given its wide reach among

Android users, may significantly disadvantage app developers in accessing end users, thereby amounting to prima facie denial of market access<sup>15</sup>. Therefore, gatekeeping provides the structural advantage to platforms allowing them to discriminate among participants, control access and exclude potential competitors.

### **III. EX POST VS EX ANTE**

One of the most important structural difference from a regulatory perspective is that abuse of dominance framework under Section 4 is inherently ex-post in nature. The law intervenes only after anticompetitive conduct has occurred and is then investigated. In a conventional market, where the competition dynamics evolve slowly, this approach can be effective for restoring competition. However, digital markets are characterised by strong network effects, rapid growth, data-driven advantageous and market tipping. A single platform can quickly become an unavoidable intermediary. In case tipping occurs, it can be very difficult for competitors to challenge a market which has already established its position. The time taken for legal intervention can prove to be futile as by the time of enforcement the market may have tipped in favour of one platform. The CDCL had noted that, 'certain aspects of the ex-post framework, including the time-consuming nature of enforcement proceedings, may not be appropriate for digital markets, given the unique characteristics of such markets'<sup>16</sup>. Therefore, for regulation of gatekeepers, law needs to be preventive rather than reactive.

### **IV. MULTISIDEDNESS PROBLEM**

The legislative design of Section 4 was largely to deal with a set of identifiable consumers and competitors within a defined market. However, digital markets operate in multi-sided markets, simultaneously serving different groups of consumers, businesses and advertisers, users and app developers. They are intertwined to such an extent that any conduct affecting one side of the platform can have countervailing effect on the other side. Consequently, conduct that raises costs or imposes restrictions on one side of the platform may simultaneously generate benefits for users on another side, making a one-sided assessment of competitive harm potentially misleading<sup>17</sup>. A conduct of the platform can adversely affect business users while at the same time it can benefit consumers. Therefore, while assessing competitive harm, in a digital market, one must assess the overall competitive impact of the conduct which can fall short of the provisions of Section 4,

making it inadequate to address gatekeeping.

### **E. COMPARATIVE FRAMEWORK: EU DMA**

The European Union legislation of the Digital Market Act represents the most developed regulatory response to digital gatekeeping. The preamble of DMA acknowledges that, existing competition law does not address effectively the challenges posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms<sup>18</sup>. A platform which has a significant impact on the EU internal market may be designated as a gatekeeper where it provides “core platform services” and satisfies certain quantitative thresholds, including annual EU turnover of at least €7.5 billion or a market capitalization of €75 billion, and at least 45 million monthly end-users and 10,000 business users within the European Union<sup>19</sup>. The act also establishes an ex ante regulatory regime targeting platforms that act as critical intermediaries between business and users. These features are a significant improvement over the traditional dominance framework that features in competition act including Section 4. The DMA act recognizes gatekeeping and therefore imposes obligations without requiring the platform to be dominant or abuse its dominance. It shifts its primary focus to a platform which holds control over an infrastructure in a digital ecosystem, regardless of its market share. The act prohibits self preferencing which is favouring the platform’s own services, anti steering restrictions preventing businesses from directing customers to other offers and combining user data from different services.

### **F. THE WAY FORWARD FOR INDIA**

The Competition (Amendment) Act, 2023 had introduced several meaningful procedural innovations including deal value merger thresholds, a settlement and commitment mechanism and speedy digital sector investigation processes. However, the amendment did not alter the Section 4’s substantive framework for governing abuse of dominance. They strengthen the enforcement mechanism, but fail to address the structural features that give rise to gate keeping, including not bringing in ex ante regulatory framework.

The structural features of digital gatekeeping including network effects, data accumulation,

ecosystem lock in and bottleneck control creates immense market power which can be impossible to overturn or rectify if remedial intervention is delayed. The Committee on Digital Competition Law (CDCL) has cautioned that digital markets may ‘tip’ irreversibly toward a dominant platform before competition authorities are able to impose effective remedies, highlighting the limitations of purely ex post antitrust enforcement<sup>20</sup>. Every year the digital market functions without a ex ante regulatory framework, the market tips towards gatekeepers and Indian small startups, business and potential improved platforms fails to access market. Recent enforcement actions also illustrate the difficulty of addressing digital gatekeeping through the traditional abuse of dominance framework.

The draft Digital Competition Bill, 2024, developed following the CDCL Report, proposes the designation of ‘Systemically Significant Digital Enterprise’ (SSDE). It is based on qualitative and quantitative thresholds and would impose ex-ante obligations on designated entities, including prohibitions on self preferencing which is favouring the platform’s own services, anti steering restrictions preventing businesses from directing customers to other offers and combining user data from different services. Such a framework would focus not only on market share but also on the infrastructural nature of platform power. A designation of gatekeeper shall be based on infrastructural significance, which I sthe extend to which the platform functions as a critical intermediary through which other businesses are compelled to interact or the platform which incurs substantial switching costs or data advantages that cannot be easily replicated any potential competitors or opertates a multi sided market or acquires strong network effects. An act which can optimize the Section 4 flexibility while introducing structural ex ante obligations for entities which meet the the threshold of gatekeeping significance ought to be developed.

## **G. CONCLUSION**

Digital gatekeeping and abuse of dominance are related but conceptually distinct legal problems. Section 4 of the Indian Competition Act, 2002, has been designed for traditional markets and conventonal forms of market power. It is structurally unable to accommodate the infrastructural, data-driven, and multi-sided nature of gatekeeping power of digital economies. The reliance on relevant market, market share, ex-post enforcement frameworks, and single sided market

assumptions collectively render it inadequate to prevent competitive harms that arise from control of digital infrastructure.

The CDCL Report and the draft Digital Competition Bill, 2024 represents attempts that has been taken to address the problem. The EU Digital Market Act provides a comparative model that India can weigh its improvements on regulating the digital platform. In order to effectively address the problem of gatekeeping, India requires legislative commitment. It requires a carefully curated act that designates gatekeepers on the basis of infrastructural power, imposes ex ante structural obligations, and creates a regulatory architecture capable of preserving contestability and fairness in India's digital economy before market tipping renders intervention futile.

Competition Law has to keep pace with the changing circumstances. Among legislations, Competition act has to adapt quickly for structural change to prevent irrecoverable damages. Law can change, the environment facilitates that, the lookout now shall be if the change shall arise before or after the market has permanently tipped.

