THE ROLE AND EFFECTIVENESS OF INTERIM MEASURES IN INDIAN COMPETITION LAW: INSIGHTS FROM CCI V AMAZON–FUTURE COUPONS

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I. Introduction

The pace with which digital markets are growing is much faster than what competition law ever anticipated. Amazon invested in Future Coupons in 2019, to which the Competition Commission of India granted approval.[1] However, little did CCI anticipate the impact of this approval on the digital market. During COVID-19, in 2020, the Future Group decided to sell its business to Reliance Retail; by this time, the concerns arising due to competitiveness had already become difficult, if not irreversible, to address.

This research paper studies whether interim measures are effective under Indian competition law. To understand this, the paper delves into the dispute in *CCI v Amazon–Future Coupons* Case. This case is significant, as it helps in understanding the limits and effectiveness of Section 33 of the Competition Act, 2002.[2] Additionally, this paper incorporates the Collingridge Dilemma, which explains that early on it is easy to control technology or digital markets, but their harm and impact cannot be predicted at that stage; and by the time the impact and harm becomes visible, it becomes too late for the regulator to fix it.[3]

II. What is Section 33 & How has CCI Interpreted Section 33

Section 33 of the Competition Act, 2002 gives the Competition Commission of India the power to grant interim orders during the pendency of an inquiry.[4] The objective of this section is to temporarily stop or restrain a party from continuing an anti-competitive practice until the inquiry is concluded.

[1] Competition Commission of India, Combination Registration No C-2019/09/688, Order dated 28 November 2019 (Amazon/Future Coupons).
[2] Competition Act 2002, s 33.
[3] David Collingridge, The Social Control of Technology (Frances Pinter 1980).
[4] Competition Act 2002, s 33.

Section 33 echoes the same essence that a civil injunction carries under the Code of Civil Procedure.[5] In order to grant interim relief, the Competition Commission of India must be fully convinced that the balance of convenience favours such an injunction and that failure to grant it will lead to serious harm. However, Section 33 is quite ambiguous. It does not define a specific time limit for how long an interim order shall continue. This gives the CCI very broad and unrestricted power.

Section 33 has been used very few times. However, it still gives us a crucial basis to understand its application through cases. In *FICCI Multiplex Association of India v United Producers/Distributors Forum (2009)*, the Competition Commission of India restrained film distributors from boycotting multiplexes while an investigation was already ongoing.[6] This case reflects an accurate and intended use of Section 33.

A more recent example is the *MakeMyTrip-Goibibo/Oyo case (2021),* wherein the CCI passed an interim order concerning the removal of FabHotels and Treebo from online travel portals.[7] This case highlights the use of Section 33 in digital markets, however it remains unclear whether such intervention is effective in fast-changing digital markets.

Section 33 indicates that the rule was designed with conventional market structures in account, rendering it inadequate for addressing the speed and complexity of digital market conflicts. In contrast to its counterparts in the European Union and the United Kingdom, Section 33 lacks procedural safeguards, like mandated prior consultation, proportionality assessment, or defined time frames for review. This gives rise to a paradox, which is that the CCI, possesses extensive authority to intervene, yet is devoid of the structural mechanisms necessary for the effective and timely exercise of these powers in digital markets.

The Amazon–Future Coupons case is an essential case in this regard, as here the CCI used Section 33 to suspend its own earlier approval.[8] This was an unprecedented move, as the CCI had never done this before.

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[5] Code of Civil Procedure 1908, Order XXXIX rr 1–2; the three-part test mirrors the civil injunction standard of prima facie case, balance of convenience and irreparable harm.

[6] FICCI Multiplex Association of India v United Producers/Distributors Forum, Case No 1/2009, CCI Order dated 25 May 2011.

[7] MMT-Goibibo v OYO, Suo Motu Case No 01/2021, CCI Interim Order dated 9 February 2021.

[8] Competition Commission of India, Suo Motu Interim Order, Case No 01/2021 (Amazon/Future Retail), January 2021.

III. Insight into Amazon–Future Coupons Dispute

Amazon had bought a stake of 49% in Future Coupons. The Future Coupons was connected to the Future Retail which is, India's biggest physical retail chains. In 2019, the Competition Commission of India gave an approval to this deal.[9]

Amazon had gained certain contractual rights too which included, the '*Right of First Refusal*' over Future Retail. This contractual right gave Amazon a control and authority over any future sale. The main conflict started

The main dispute arose in 2020, when Future Group decided to sell its business to Reliance Retail as it was in a huge distress due to financial crisis post COVID-19. The Future Group decided to sell its business for over Rs.24,713 Crores. Amazon felt that this sell breached the deal and thus it knocked the door of Singapore International Arbitration Centre (SIAC). In October 2020, an emergency arbitration order was passed restraining the Future Group from selling its business to the Reliance.[10] This in turn affected a deal that had been approved by an Indian regulator. During this time, CCI reviewed its approval given in 2019 and discovered that Amazon had failed to disclose crucial details pertaining to the investment. Thereafter, in 2021, January, CCI suspended its approval of 2019 by using Section 33 of the Competition Act, 2002.

The case was thereafter, taken to Delhi High Court[11] and then to Supreme Court where, the Future Group challenged whether the emergency arbitration order given by Singapore International Arbitration Centre (SIAC) can be enforceable in India.[12] This exposed serious legal gap between SIAC, CCI and Indian Courts.

The multi-forum character of this issue highlights the lack of a cohesive coordination framework between India's competition authority and foreign arbitration tribunals. The conflicting directives from various forums like the SIAC emergency arbitrator, the Delhi High Court, and the Supreme Court created legal ambiguity that eventually undermined market

[9] Competition Commission of India, Combination Registration No C-2019/09/688, Order dated 28 November 2019.

[10] SIAC Emergency Arbitration Rules 2016, r 1–9; Emergency Arbitrator's Award in the matter of Amazon.com NV Investment Holdings LLC v Future Retail Ltd, dated 25 October 2020.

[11] Future Retail Ltd v Amazon.com NV Investment Holdings LLC, OMP (ENF) (COMM) 17/2021, Delhi High Court.

[12] Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors, Civil Appeal No 4492 of 2021, Supreme Court of India.

stability. This fragmentation significantly reduced the efficacy of any interim measures that the CCI may impose, as parties could evade regulatory action by adopting the means to alternate forums. This jurisdictional ambiguity poses significant risks in digital markets, because the opportunity for effective and efficient action is limited and the repercussions or consequences of regulatory delays are majorly irreversible.

IV. What is Collingridge Dilemma?

In 1980, David Collingridge came up with the dilemma of technology and digital markets regulation.[13] The Collingridge Dilemma posits a dilemma that when a technology is new, its impact and harm are not clear, thus, regulators fail to regulate or control effectively. However, by the time, the impact of the technology becomes visible the harm is already so deep that it makes regulation difficult. In the competition law, this dilemma can be reflected in the digital markets where the harm is irreversible and difficult to be controlled.

In this case, in 2019, Amazon had invested in Future Coupons. Competition Commission of India, failed to acknowledge what the Collingridge Dilemma could foresee. Collingridge Dilemma was the strategy and digital alignment structure underlying this investment. In this deal it was not just a mere incident for Amazon to have those contractual rights over the deal but rather it was a well thought and strategized mechanisms built to give Amazon a advantage and a strong position in Indian retail. Additionally, the timing of this is important too as this happened during a time when the intersection digital and physical retail market was redefining Indian market. Thus, it was a failure on the front of CCI, to lack those regulatory mechanism that can predict these strategies, especially in the digital markets.

In the year 2020, when the Reliance and Future Retails deal became visible, the destruction, the harm and the abuse had already become clear but it was too difficult now to reverse it in anyway. The Reliance-Future deal threatened to restrain Amazon from exercising its contractual rights and this could change the structure of India's retail market in a massive manner. In the digital markets, it is often said that once a Company becomes powerful and big it is very unlikely that its competitors could survive it.[14] This happens majorly due to-

[13] David Collingridge, The Social Control of Technology (Frances Pinter 1980) 11.
[14] Ariel Ezrachi and Maurice Stucke, Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy (Harvard University Press 2016) 38–42.

1. Network Effects i.e more the number of user more, stronger the platform is likely to become

2. Data Advantage i.e. the larger and bigger a company is the more data it can collect, thus aligning more to the consumer needs than others

3. Market Tipping-Markets can be dominated by a big player in a short span of time.

Hence, this is where the Interim Measures given under Section 33 become useful, in order to stop the harm, while an inquiry is ongoing, before the harm becomes irreversible.[15] Section 33, was not effective and impactful in the case of Amazon-Future Coupons Case. The CCI acted but it acted too late, and the interim measure by the CCI, was not capable to restrain what was it was trying to stop. This is a portrayal of the Collingridge Dilemma, which shows that when the issues become visible and hard to control.

V. Comparative Study between EU & UK

On comparison, between the European Union (EU) and the United Kingdom (UK) on how the interim measures operate in the competition law in these two jurisdictions and what are the gaps, in India's Legal system, it becomes clear that as per the Article 8 of the Regulation 1/2003 of the European Union,[16] the authority has the power to issue interim measures only in those case which require have a urgent need and where there is a serious and grave threat involved to competition. However, there are very strong safeguards involved like- the authorities must see if there is a violation prima facia, then the interim measures taken in this regard must be reasonable and proportionate to the objective, lastly since they are interim measures i.e. temporary, they should not be excessive. In the case of Facebook-WhatsApp, the European Union acted timely and understood that while dealing with digital markets, delay can lead to harm.[17]

While, on the other hand, in the UK, the Competition and Markets Authority (CMA) uses Interim Enforcement Orders under the Enterprise Act of 2002.[18] The Interim Enforcement Orders are better structured than Section 33 of Competition Act of India. This is because it has

[15] OECD, 'Interim Measures in Competition Cases' (2022) DAF/COMP(2022)1, 14.
[16] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 8.
[17] European Commission, Decision in Case M.7217 – Facebook/WhatsApp [2014] OJ C 417/02.
[18] Enterprise Act 2002 (UK), s 72; Competition and Markets Authority, 'Interim Measures in Merger Investigations' (CMA108, 2019).

a provision of prior consultation, structured guidelines about time frames, and speedier appeals options. Especially, in cases of mergers, the CMA can, not only act quickly but also fairly and this is exactly what the CCI failed at while dealing with the Amazon-Future Coupons Case. Thus, it can be concluded that the both EU and UK have proper procedures in place that, that allows fairness and due process, which the Indian Competition Law currently lacks.[19]

Both the EU and UK frameworks have a strong foundation of proportionality, i.e., the authorities have to take an action swiftly, but they must also keep procedural fairness in consideration while acting swiftly. Thus, this ensures that interim measures do not result in regulatory overreach. However, on the other hand, Section 33 of the Competition Act of India lacks both the procedural structure and support and also particularly the digital-market guidelines that the EU and UK have. Let us take, for instance, the Digital Markets Act (DMA) of the European Union that adds sector-specific duties for "gatekeepers" to the general competition framework. Hence, enabling the regulators to impose interim obligations without having to present that harm happened in reality. The creation of a comparable regulatory tool that is designed to cater to digital markets and that not only increases but also supplements the Indian Competition Act's current provisions would be highly advantageous for India.

VI. Reforms

The Amazon–Future dispute, shows that the Indian Competition Act requires crucial reforms.

Firstly, the ambiguity in Section 33 must be removed and it should be made clear if Section 33 can be used once a deal has been approved and under what circumstances.[20] Also, there should be some steps clearly laid down, that needs to be followed prior to the issuance of an interim measure and the duration for which this measures or orders can subsist for must be clearly stated. At present, Section 33 does not have a clarity, which creates confusion.

Secondly, India needs a separate set of rules that govern and regulate the digital markets, because in digital markets the harm can be irreversible due to the data advantages and network effects.[21] So, to make interim measures more effective it must not only be faster but also fair.

[19] OECD (n 15) 22–25; Amelia Fletcher, 'Effective Interim Measures in Competition Law' (2020) 11(3) Journal of European Competition Law & Practice 145.

[20] Competition Act 2002, s 31; Competition Commission of India v Steel Authority of India Ltd (2010) 10 SCC 744.

[21] OECD, 'Digital Markets and Competition Policy' (2020) DAF/COMP(2020)3, 8–12.

Thirdly, the CCI should adopt a hybrid approach while dealing with the digital markets, it should not act once the harm has already happened (ex-post) but must also be able to prevent the harm (ex-ante). In order to achieve, this the CCI should be much more efficient in scrutinising and examining the digital deals more stringently, during the approval instead of trying to control the damage later through interim measures. Fourthly, a special fast-track bench should be set up in National Company Law Appellate Tribunal (NCLAT) for the cases pertaining to the competition law. This will reduce the delays in the digital market cases, and thus the process will be more efficient and effective. Lastly, comity of courts must be followed where a case involves both CCI and foreign arbitration. This will not only save multiplicity of proceeding but also prevent conflicting decisions.

VII. Conclusion

The Amazon–Future Coupons case is a pivotal case because it checks the readiness of the India's Competition Law's to handle the challenges posed by digital markets. Section 33, as currently framed is not competent enough to deal with the Digital Markets. In the digital markets where harm travels at an unbeatable speed and an interim measure proves to be slower in the race and thus, ultimately lacks to stop the harm. Furthermore, the Collingridge Dilemma makes it clear that the Competition Authorities and Regulators will very often have an information gap in terms of technological advancements and digital markets. Thus, waiting for the information is not going to help, rather it is to come up with frameworks that are strong, and vigorous enough to act impact fully even in uncertainty. Thus, combining with the solutions mentioned above and taking Amazon–Future Coupons Case, as a lesson. It is time when Indian Competition Law must aspire to move towards a competition law which is a hybrid of ex-ante and ex-post i.e. is it is anticipatory instead only being reactive to the harm. Amending Section 33 is the need of hour and strengthening digital-market regulation along with adopting efficient interim measures, the CCI can prevent irreversible market harm and thereby ensure that regulations are capable enough to handle the evolving technological and digital innovations.

The Amazon–Future Coupons lawsuit is undoubtedly a pivotal point in Indian Competition Law. It reveals the shortcomings of the framework of interim measures, which is majorly intended and competent for a pre- digital era and highlights the alarming need for an urgent legislative reform. The crucial insights from Amazon- Future Coupons case should not merely dissolve into theoretical and shallow discussion; rather it they must engender a practical action. India stands at a crucial juncture- it can either continue to rely on ex-post measures, case-by-case specific interventions that are mostly delayed, or it can build a competition law that is equipped to govern the digital markets economy with swiftness, and fairness. The path forwards requires amendments to Section 33, but also a new age thinking to how India can regulates the intersection of technology, digital markets and competition.