

Data Driven Anti-Competitive Practices of **Food Services Aggregators in India**



About Pacta

Pacta is a Bengaluru (India) based boutique law and policy think tank dedicated to supporting civil society organisations, universities, and non-profit initiatives. It has an unflinching commitment to provide legal and policy consulting support for public service delivery. Acknowledging the crucial role of research and scholarship for social development, Pacta engages in law and policy research through self-driven and collaborative projects.

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Preface

The idea for this paper originated from a research prompt listed in ITforChange's background paper titled 'Unskewing the Data Value Chain – A Policy Research Project for Equitable Platform Economies.' With the digital economy being a quickly expanding market, the structure and content of the project has undergone significant changes since its inception. In the period since the project was first conceived, the two Food Service Aggregators that we have focused on have undergone multiple shifts in strategy. At the same time, the regulatory regime has also undergone shifts, with developments including a Parliamentary Committee Report on Competition in Digital Markets, the formation of a Committee to bring about legislative changes in this area, and the passage of a new amendment to the Competition Act. We have adapted and shifted the contents of this project in view of these changes. We are thankful to all the people involved in the various stages of this report, whose contributions shaped the final product.

We thank Deepanshi Sharma, former Associate at Pacta, for her research and organisational assistance for the project in its early stages. We would like to acknowledge the constructive feedback provided by Manasvini Ranganathan (Associate, Pacta). We appreciate the excellent quality of work done by interns from Azim Premji University, Dishari Chakrabarti and Varsha Raghunandan, who undertook judgment analysis for this study and also assisted us in authoring parts of the report. We thank Mehr Puri, design and communications intern, for her contributions to the design component of this report.

We are grateful to the members of the National Restaurants Association of India, and Mr. Samir Agarwal, lawyer and complainant before the CCI, for agreeing to be interviewed for this report, and for their valuable insights. We place on record our gratitude to Prof. Dr. Ingrid Schneider (University of Hamburg), for her inputs and suggestions in our early stages of research. Sarvesh Mathi's (Medianama) feedback on the draft of the report proved extremely useful in shaping it to its current form. We also thank Soumya Ramasubramanian (YourStory) for providing us with practical insights into the food service aggregators market.

EXECUTIVE SUMMARY

Data & Duopolies:

Swiggy and Zomato form a duopoly in food delivery platforms, as together they control at least 90% of the food delivery market. In 2021, the National Restaurants Association of India [**“NRAI”**] approached the Competition Commission of India [**“CCI”**] alleging anti-competitive practices by Swiggy and Zomato. Prima facie, the CCI found certain practices of the Food Services Aggregators [**“FSAs”**] to be anti-competitive, and ordered a Director General [**“DG”**] investigation into the case. The case is still pending as the position of the Commissioner of the CCI has remained vacant since November 2022. Allegations of anti-competitive practices against other digital platforms such as Google, Facebook, Uber, Ola, Amazon and Flipkart have been frequent over the last decade. However, the success rate of such cases has been low.

Pacta’s research team identified a total of 33 cases pertaining to digital platforms before the CCI from January 2012 until December 2022. 31 of those cases pertained to either Section 4 exclusively or to both Section 3 (anti-competitive agreements) and Section 4 (abuse of dominance) of the Competition Act, 2002. In 15 (out of the 31)

cases, dominance was established. In the remaining 16 cases, dominance could not be established. But the true test of Section 4 is to prove that dominance was abused. Abuse of dominance was conclusively established in only 4 cases, revealing a low chance of success to prove abuse of dominance by digital platforms.

We hypothesised that the low rates of success of abuse of dominance cases against digital platforms can be attributed to two factors: firstly, the non-recognition of collective dominance, and secondly, the non-recognition of data as a significant factor in assessing the dominance of a firm under Indian law. Our study focussed on data-related practices pursued by FSAs, using FSAs as a proxy for any e-commerce platform, and intended to make recommendations to effectively counter these practices.

Data Related Anti-Competitive Practices of Food Services Aggregators:

Data to Cannibalise. Since they function as intermediaries, Swiggy and Zomato collect large scale consumer data and use such data to inform their own business strategy. For instance, Swiggy and Zomato use(d) the data to set up their self-branded cloud-kitchens that directly compete(d) with restaurant partners on their platforms. In a Pacta exclusive interview, a member of the NRAI raised this concern:

“

...So these aggregators, try to run their own kitchens, which are on the strength of data they collected of our restaurants, and they knew where there is more sale (kaha Biryani bikti hai, kaha pasta bikta hai) and they put up kitchens of their own

”

They also use the customer data to build opaque, “**proprietary**” algorithms that self-preference(d) their cloud kitchens and leave restaurant partners baffled as to why they featured so far below in search results.

Data Masking. Swiggy and Zomato have repeatedly refused to share customer-identifying data with restaurant partners citing privacy breach concerns. Alarming, the privacy policy on both platforms explicitly takes consent for sharing customer data with the restaurant partner via identical language. This point was raised by restaurants in the town hall meetings organised by the NRAI. In the town hall meeting dated

7th October 2022, Anurag Katriar, founder of Indigo Hospitality stated:

“

..We have yielded our complete pipeline in the hands of aggregators- right from discovery to delivery is totally controlled by them and slowly the business which was ours have become theirs. Theirs to an extent that they don't share the data of our customers with us

”

Expansion Into Horizontal Markets. The food-delivery platforms have recently abandoned their cloud-kitchen strategy to instead focus on the grocery delivery segment. Section 4(2)(e) of the Competition Act regards the use of dominance in one market to enter another market as an abuse of dominance. Swiggy and Zomato have expanded into the grocery delivery market without being in conflict with the letter of the law, because neither entity, taken singularly, is dominant.

Bundling. Swiggy launched Instamart in 2020. Instamart provides convenience-based delivery of groceries and other products. In 2022, Zomato acquired Blinkit, a quick commerce platform, calling it a **“natural extension to [its] core food delivery business”**. This expansion into horizontal markets is easier when all services are bundled in one platform, like Instamart is bundled with the Swiggy app. Blinkit, however, still remains a stand-alone app. On such other horizontal markets too, the platforms self-preference and guard the data.

In April 2022, Swiggy and Zomato jointly made strategic investments in a company called Urban Piper, further securing their control over data. Urban Piper is a software service offering point of sale software integration for restaurants, and claims to process about 20% of online food orders. This investment raises concerns on use of data, as data from restaurants whether or not they are listed on Swiggy-Zomato can now be accessed by the duopoly.

Big-data is thus collected by big-tech and is heavily guarded in walled gardens. When big-tech abuses their access to such large scale data, there is a chilling effect on competition, which falls through the cracks of Indian competition law. Pacta's research makes the case for why India needs a trifecta approach that includes legal and policy measures, private market responses and public/government innovations to curb the pursuit of data related anti-competitive practices holistically. Some steps are already underway.

Existing Law and Policy Measures to Check Abuse of Access to Large Scale Data:

The recent Open Network for Digital Commerce [“**ONDC**”] protocol requires sellers to transparently disclose their algorithmic preferencing criteria and conduct audits to make platforms remain accountable to these disclosures. ONDC protocol also disallows platforms to prefer their closed group of vendors while broadcasting a query for a product or service. Secondly, the 53rd Report of the Standing Committee on Finance released in December 2022, recognised data-related anti-competitive practices by big-tech, and recommended the enactment of a separate Digital Competition Act on the lines of the Digital Markets Act of the European Union. Thirdly, apps such as Thrive, DotPay and Peppo, allow restaurants to be discoverable on their platforms, without charging exorbitant commissions, and provide restaurant partners access to customer data. But these alone will not suffice.

Recommendations to Curb Anti-competitive Uses of Access to Large Scale Data:

Since the recognition of collective dominance alone will not address data related abuses, we have come up with recommendations outside the ambit of competition law that would address these abuses. Firstly, a robust data privacy law that effectively prevents walled gardens and democratises data is urgently needed. The draft data protection law issued in December 2022, is not reassuring, since it provides sweeping powers to big tech to collect data for any legitimate purpose under the concept of “**deemed consent**”. Secondly, though platform co-operative models such as NammaYatri (transport app by the Auto drivers’ Union in Bengaluru) and Rezoy (food delivery service app by restaurant owners in Kerala) have seen promising uptake in the recent past, better institutional support through funding grants and legal concessions are necessary to help platform-cooperatives thrive. Thirdly, mandating ecommerce websites to maintain records on prior algorithms will help to make and prove the case for certain business and data practices having anti-competitive effects. Fourthly, the definition of a “**related party transaction**” must be expanded to include the vantage that data provides. So, data flow or sharing of data among companies which hold major or minor interest in each other, must get reported as a related party transaction. Finally, it is also critical to augment the technological capacity of the CCI to equip its members to navigate the quickly changing e-commerce landscape.

Part 1 – Introduction

1.1 Background & Context

In 2021, the National Restaurants Association of India [**“NRAI”**] approached the Competition Commission of India [**“CCI/Commission”**] alleging anti-competitive practices by Swiggy and Zomato. Prima facie, the CCI found certain practices of the food services aggregators [**“FSAs”**] to be anti-competitive, and has ordered a Director General [**“DG”**] investigation into the case. This is not the first time that anti-competitive practices of digital platforms have been raised with the CCI. Cases against digital platforms such as Google, Facebook, Uber, Ola, Amazon and Flipkart have been frequent over the last decade, with the increasing consumer adoption of these platforms. Each of these platforms has been accused of abusing its dominant position in the respective markets on varied counts. However, the success rate of such cases has been low.

We hypothesise that low rates of success of such cases against platforms relate to two factors: firstly, the non-recognition of collective dominance under Indian law, and secondly, the non-recognition of data as a significant factor in assessing the dominance of a firm.

¹ *National Restaurants Association of India v Zomato*, Case No. 16 of 2021 (Competition Commission of India)

In this paper, using FSAs as a proxy, we delve into data-related anti-competitive practices pursued by e-commerce platforms. While acknowledging the existing legal and regulatory measures taken to address these issues, we also provide additional recommendations that could be potential solutions to anti-competitive practices in digital markets.

1.2 Methodology

1.2.1. Judgement Analysis

To understand how the CCI has looked at allegations of abuse of dominance in digital markets, we undertook an extensive study of judgments between January 2012-December 2022. We found that there were 33 cases (inclusive of finally adjudicated, sub-judice, as of December 2022) pertaining to digital platforms. We then sorted these cases on the basis of the stage of the case (preliminary order, final order) and the nature of the complaint, that is, whether it was a case under Section 3 of the Competition Act, 2002 [**“Competition Act”**], Section 4 of the Competition Act, or both.

1.2.2. Interviews

To complement our findings from secondary research, we conducted interviews with complainants before the CCI and members of the NRAI. The questions to the former pertained to the judicial challenges of establishing dominance in the digital markets, whereas questions to the latter were related to the anti-competitive practices of the FSAs.

1.2.3. Internal Experiment

To understand whether Swiggy engaged in self-preferencing of its cloud kitchens, four members of the research team undertook an experiment, which was conducted in the following manner:

Step 1: Conducted a general search of a popular food item on the Swiggy App

Step 2: Noted the restaurants that came up first upon searching for the food item

Step 3: Noted the ranking of Swiggy’s cloud kitchens in the search

Step 4: Compared the prices for the first three restaurants that were listed with the prices for the same food item on Swiggy's cloud kitchens

1.2.4. Limitations

Under Indian laws, only publicly listed companies are obligated to disclose and publish their annual reports on their websites. Of the two FSAs that are focused on in this paper, only Zomato is a listed entity, amenable to disclosures of data of interest to its shareholders. Swiggy is privately held and shares very little disaggregated data on the number of active users, the value of orders placed, and consumers using varied features (SwiggyOne, Instamart etc). There is a paucity of reliable statistical and empirical data to make a research proposition and establish or debunk it. Hence, to understand the financial and value-based particulars of Swiggy, as well as to compare and get a consolidated view of the FSA market, we have relied extensively on secondary research such as market reports and news articles.

1.3 Anti-Competitive Practices under the Competition Act:

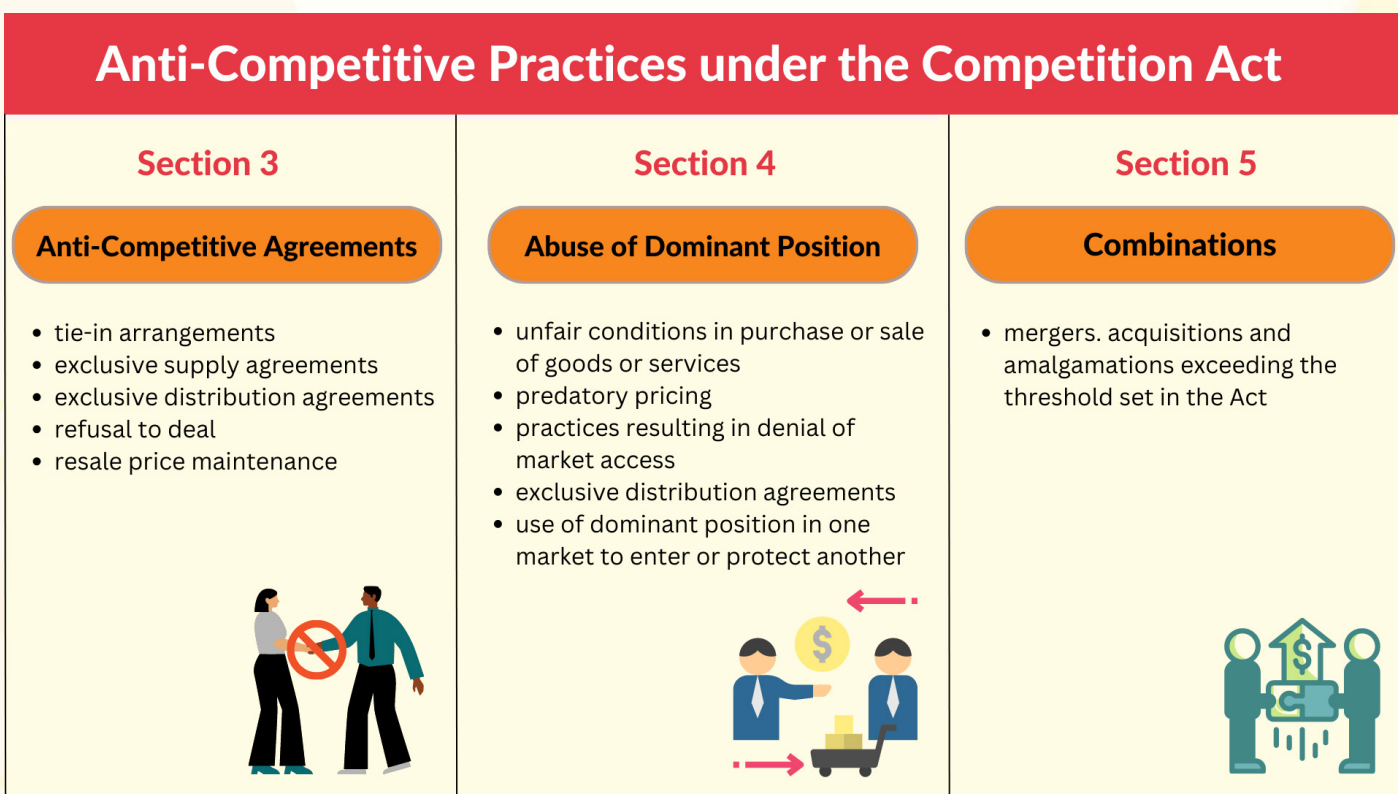


Figure 1.1 Anti-competitive practices under the Competition Act

With the objective to prevent practices having an adverse effect on competition, promote and sustain competition in markets, protect the interests of consumers and ensure freedom of trade, the Competition Act² was introduced in 2002 (made effective from 2009)³, to replace the Monopolies and Restrictive Trade Practices Act, 1969. The Competition Act prohibits anti-competitive agreements, abuse of dominant positions and combinations that have an appreciable adverse effect on competition.

a. Prohibition of Anti-Competitive Agreements

Section 3 of the Competition Act prohibits enterprises/persons from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition [“**AAEC**”] within India.

AAEC is presumed for agreements (including cartels) of the nature of the determination of purchase or sale prices; limitation or control on production, supply, markets; bid rigging or collusive bidding and other agreements defined under Section 3(3) of the Competition Act. Tie-in arrangements; exclusive supply agreements; exclusive distribution agreements; agreements to refusal to deal; agreements on resale price maintenance and other agreements as provided under Section 3(4) require the complainant to establish an appreciable adverse effect.⁴

b. Prohibition of Abuse of Dominant Position

Section 4 of the Competition Act prohibits abuse of dominant position by enterprises. In order to establish a violation of this Section, the complainant needs to establish three aspects:

- **Identify the relevant geographic and product market.**
- **Determine that the enterprise is dominant in the relevant market.** To assess dominance in the relevant market, Section 19(3) requires the CCI to consider factors such as size and resources; economic power; vertical integration; dependence of consumers; entry barriers; countervailing buying power, and other such factors as provided under Section 19(3) of the Competition Act.

² Competition Act 2002

³ 'Ministry Of Corporate Affairs - Competition Act 2002' (Ministry of Corporate Affairs - Competition Act) <https://www.mca.gov.in/mca/html/mcav2_en/home/actsandrules/the+competitionact+2002/competitionact.html#:~:text=The%20Monopolies%20and%20Restrictive%20Trade,Dated%2028th%20August%2C%202009%5D.> accessed 1 March 2023

⁴ Rajat S and Simran Dhir S, 'Anti-Competitive Agreements Under the Competition Act, 2002' (2013) 24(2) National Law School of India Review <<https://www.jstor.org/stable/44283760>> accessed 1 March 2023

■ **Establish that the enterprise has abused its dominant position in the market.** Abuses under the Competition Act broadly fall under two categories:⁵

- 1. Exploitative Practices:** Imposition of unfair or discriminatory condition and/or price in the purchase or sale of goods and services qualify as exploitative practices under the law.
- 2. Exclusionary Practices:** Practices that preclude competitors from entering the market. For example, denial of market access in any manner shall be construed as an exclusionary practice.

c. Regulation of Combinations

A transaction between enterprises involving a merger, an amalgamation or acquisition of control, shares, voting rights, or assets, where the assets or turnover of the enterprise(s) involved meet the threshold as specified under Section 5 of the Competition Act can be construed as a combination, thus, regulated under Section 4 and 5 of the Competition Act.⁶ Combinations are not anti-competitive prima facie, but however, may be prohibited if likely to cause an appreciable adverse effect on the market. Such combinations are required to be notified to the CCI and cannot be given effect for 210 days from the date of notification or till the date of order of CCI.⁷ CCI assesses the potential impact of combinations on the market and (do not)/provide permissions for the combination.⁸

The regulation on combinations is ex-ante in nature as a combination is required to be notified and assessed prior to its execution. However, in the event of failure of notification, CCI may inquire into the combination within one year of the combination taking effect.

Before we delve into the anti-competitive practices followed by Swiggy and Zomato, we lay down some of the peculiar characteristics of digital platforms.

⁵ Competition Commission of India, 'Provisions Relating to Abuse of Dominance: Competition Act 2002' (*Competition Commission of India, 2020*) <https://www.cci.gov.in/public/images/publications_booklet/en/provisions-relating-to-abuse-of-dominance1652177254.pdf> accessed 2 March 2023

⁶ Ashok Chawla, 'Global Business and Competition Law in India' (2014) 9(1) IFAJ <<https://www.jstor.org/stable/45341926>> accessed 2 March 2023

⁷ Competition Commission of India (n 4)

⁸ B.S. Chauhan, 'Indian Competition Law: Global Context' (2012) 54(3) JILI <<https://www.jstor.org/stable/44782475>> accessed 3 March 2023

1.4 Characteristics of Digital Platforms

The expected performance of the Business 2 Consumer e-commerce industry looks attractive as it is expected to register a Compound Annual Growth Rate [“CAGR”] of around 15% during 2022-2026.⁹ There is wide scope for growth in digital markets facilitated by both demand and supply side factors. Below we discuss some peculiar features of the digital market.

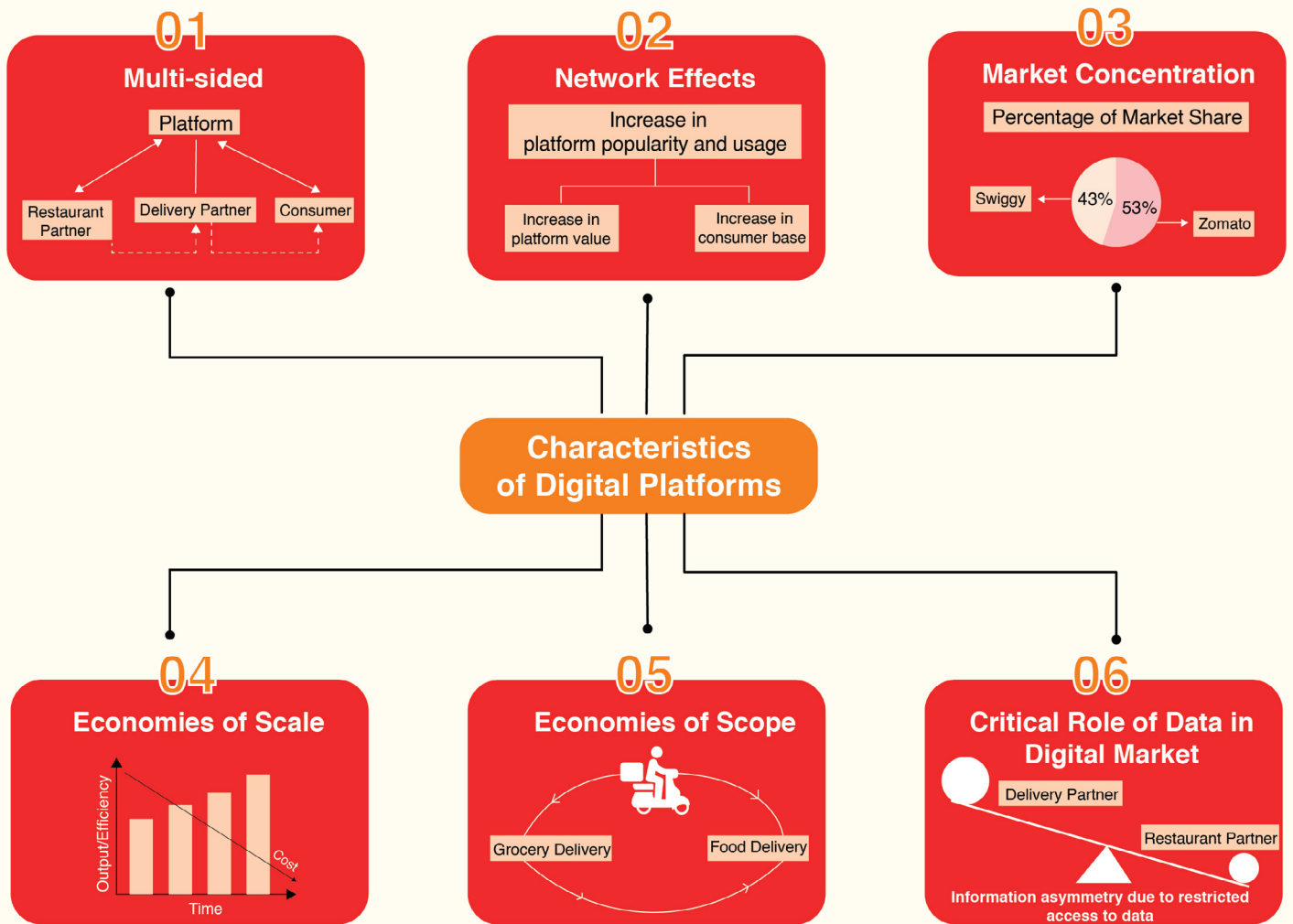


Figure 1.2 Characteristics of digital platforms

⁹ 'India B2C e-Commerce Market Opportunities Report 2022: Market Is Expected to Grow by 21.52% to Reach \$105 Billion in 2022 - Forecasts to 2026 - ResearchAndMarkets.com', *Businesswire* (27 September 2022) <<https://www.businesswire.com/news/home/20220927005824/en/India-B2C-e-Commerce-Market-Opportunities-Report-2022-Market-is-Expected-to-Grow-by-21.52-to-Reach-105-Billion-in-2022--Forecasts-to-2026--ResearchAndMarkets.com#:~:text=The%20B2C%20Ecommerce%20market%20in,US%24105.0%20billion%20in%202022>> accessed 3 March 2023

a. Multi-sided

Digital markets are multi-sided as they bring together multiple users involved in the business model. Due to this cross-interaction, decisions by platforms related to one stakeholder may have an impact on the other stakeholders. It implies that the expansion of the interaction of the platform with one of the stakeholders will influence its interaction with the other.¹⁰ This feature in the economic literature is referred to as “**cross-platform network externalities**”.

In the food delivery market, the stakeholders include restaurants, delivery partners, and end-consumers. The expansion of the network of restaurants provides delivery platforms access to an increased network of consumers associated with these restaurants. Such market dynamics created through network effects can result in feedback loops. This means that change in demand conditions on one side of the market (positive/negative) can be further amplified through its impact on the other side of the market.¹¹

b. Network Effects

Network effect is defined as the change in benefit derived by an agent as the number of agents using the same good/s changes.¹²

This is quite evident in the case of delivery platforms as an increase in their popularity will increase their value through improved outreach. As restaurants get registered on a delivery platform, there will be greater incentives for other restaurants to follow their pursuit to become more competitive. Such a pattern could also be observed in the case of consumers wherein increased usage of platforms by some consumers will attract other consumers drawing benefits from others' experiences.¹³ Following this, both Swiggy and Zomato in their initial phase of entering the delivery market attracted more restaurants by waiving off commissions and more consumers by offering discounts.

¹⁰ Hagiu A, 'Two-Sided Platforms: Product Variety and Pricing Structures' (2009) 18 Journal of Economics & Management Strategy 1011 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1530-9134.2009.00236.x>> accessed 22 February 2023

¹¹ Organisation for Economic Co-operation and Development (OECD), Handbook of Competition Policy in the Digital Age (OECD, 2022)<<https://www.oecd.org/daf/competition/oecd-handbook-on-competition-policy-in-the-digital-age.pdf>>accessed 26 February 2023

¹²Liebowitz SJ and Margolis SE, 'Network Effects and Externalities' [2002] The New Palgrave Dictionary of Economics and the Law 1329 <<https://personal.utdallas.edu/~liebowit/palgrave/network.html>> accessed 21 February 2023

¹³Martens B, 'An Economic Policy Perspective on Online Platforms' [2016] SSRN Electronic Journal <[joint-research-centre.ec.europa.eu/system/files/2016-05/JRC101501.pdf](https://www.joint-research-centre.ec.europa.eu/system/files/2016-05/JRC101501.pdf)> accessed 22 February 2023

c. Market Concentration

According to OECD, market concentration refers to the extent to which market shares of an industry are concentrated amongst a few firms. The self-perpetuating cross-platform network externalities and network effects contribute to market concentration in the case of digital platforms.¹⁴ It is used to quantify the competitive nature of a specific market i.e. higher market concentration implies less competition and vice versa. According to the NRAI, Zomato holds 53% of the total market, followed by Swiggy accounting for 43% market share. These platforms also attempt to ensure consistent market share through “**loyalty programmes**” such as adopting a subscription model to provide additional benefits and cater to the needs of its customers.

d. Economies of Scale

One of the distinguishing features of digital platforms in comparison to brick-and-mortar firms is the cost structure. The former benefits over the latter as their business operations are not based on physical presence. This waives the requirement of undertaking huge investments in building physical market spaces. Further, they enable interaction between various platforms users through storage and transmission of information. This implies that digital goods and services accrue significant fixed costs and little to no variable costs. It allows firms to expand and reduce per unit cost of output produced or service provided. This per-unit cost reduction is referred to as “**economies of scale**”.

The use of data and the application of innovative tools such as machine learning have enabled platforms to accrue benefits of economies of scale. Swiggy produces around 40 billion data points per day from the platform. Using data analysis techniques, it has been able to provide a list of restaurants based on consumers’ personal choices, not limited by the location. It also uses heatmap features that allow delivery partners to inform them of the path to follow after completing an order.¹⁵ Zomato, on similar grounds, has been using machine learning to deal with uncertain aspects of the business model. It includes the allocation of delivery partners and the estimation of the time of order delivery. The features derived from the use of data have enabled the platforms to take advantage of economies of scale by ensuring faster pickups and deliveries.¹⁶

¹⁴ Organisation for Economic Co-operation and Development (n 10)

¹⁵ S.H. Salman, ‘Zomato, Swiggy Using AI, Machine Learning to Drive More Growth’ *Livemint* (19 September 2019) <<https://www.livemint.com/companies/news/zomato-swiggy-using-ai-machine-learning-to-drive-more-growth-1568868757522.html>> accessed 8 March 2023

¹⁶ Amit Raja Naik, ‘How-Zomato-Uses-Machine-Learning’ *Analytics* (20 August 2021) <<https://analyticsindiamag.com/how-zomato-uses-machine-learning/>> accessed 10 March 2023

e. Economies of Scope

A firm is said to benefit from the economies of scope when the average cost over a long period of time and additional cost incurred in providing subsequent units of goods or services i.e marginal cost, reduces due to the production of complementary goods or services.¹⁷ A recent example of economies of scope in the case of FSAs can be seen in how Zomato benefits from economies of scope to conquer the grocery delivery market through the acquisition of Blinkit in July, 2022.¹⁸

Quick commerce is an attractive prospect for food delivery platforms due to underlying synergies between food delivery and grocery delivery. This is because both of them cater to hyperlocal market models and can leverage their delivery fleet in food delivery for grocery delivery.¹⁹ This is also a pro-competitive move for Zomato as Swiggy launched its Instamart services in 2020. The USP of Blinkit is that it offers delivery within just 10-15 minutes of order placement. For Zomato, the addition of Blinkit will not just increase the per-consumer amount spent on quick commerce and expand its market reach but also allow it to effectively utilise its delivery fleet resources. For instance, demand for food delivery generally peaks at meal times i.e.during lunch and dinner hours. However, the demand for grocery delivery is generally high during mid-morning or mid-evening times. Hence, by deploying its delivery personnel based on the relative demand schedule of each of these segments, food delivery platforms can reduce their overall delivery costs.¹⁹

f. Critical Role of Data in Digital Markets

Data as a conspicuous feature of digital markets cannot be overlooked. The delivery platform serves as a bridge between the seller and buyer of goods and services. Such facilitation allows platforms to access large-scale consumer data across users and other market segments. Existing research evidences that large and varied datasets offer better insights relative to small and separated datasets.²⁰ Information aggregation by platforms across multiple users such as consumers, restaurant partners and delivery partners results in information asymmetry. In the FSA market, the information asymmetry particularly aggravates the information gap between platforms and restaurant partners. This eventually plays out in terms of reducing the bargain-

¹⁷ Gupta P (ed), 'The E-Platform Economy: A Study of Market Structure and Implications,' E-commerce in India: Economic and Legal Perspectives (SAGE 2021)

¹⁸ Abhishek Goel, 'How Will Zomato Benefit from Blinkit's Grocery Delivery Business?' *JungleWorks* (27 June 2022) <<https://jungleworks.com/how-will-zomato-benefit-from-blinkits-grocery-delivery-business/>> accessed 12 March 2023

¹⁹ Soni Y, 'Food Delivery and Quick Commerce Converge Globally Seeking Profits' *The Hindu* (15 July 2022) <<https://www.thehindubusinessline.com/companies/food-delivery-and-quick-commerce-converge-globally-seeking-profits/article65639540.ece>> accessed March 10, 2023

²⁰ Martens (n 12)

ing power of restaurants relative to delivery platforms. For example, restaurants feel compelled to list themselves on Swiggy/Zomato for better discoverability, even if it means paying consistently rising commissions to Swiggy/Zomato.²¹ The restricted access to end-user data by restaurant partners limits their ability to better understand and cater to consumer preferences.¹⁹ In other words, platforms have a comparative advantage over the other users of the platforms in the market (i.e restaurant partners in the food delivery ecosystem). This implies that, if restaurants have access to end-user data, for instance, on the most preferred food options, it can help restaurants optimise their menu options by minimising wastage and promoting menu items with relatively higher demand. Henceforth, a loss of link between restaurant partners and the end consumers deters downstream innovation.

1.5 Digital Platforms and the Competition Commission of India

To understand the capacity of the legal system in dealing with digital markets, we conducted a study on competition law rulings in cases related to digital platforms, from January 2012 to January 2023. The findings have been listed in this section. For a comprehensive list of the cases analysed, refer to Annexure I.

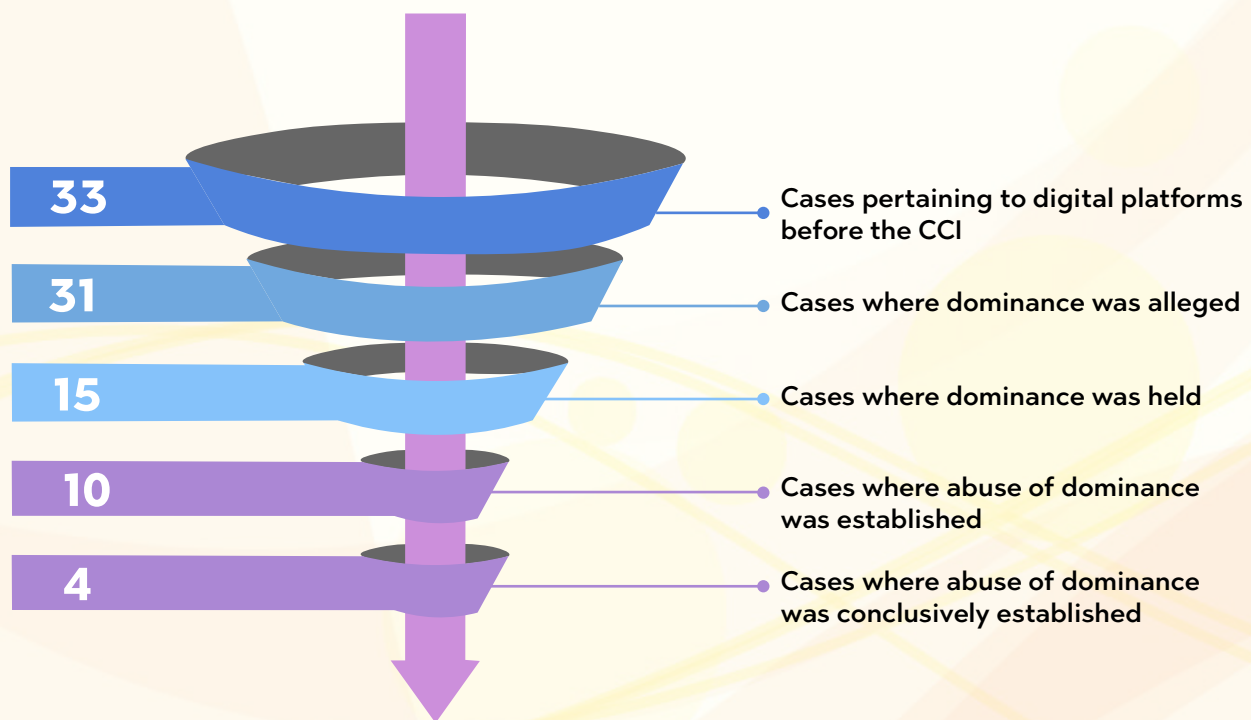


Figure 1.3 CCI rulings in cases related to digital platforms

²¹ Sowmya Ramasubramanian, 'Zomato Seeks Higher Commission from Restaurants As Food Delivery Business Slows' *Yourstory* (27 February 2023) <https://yourstory.com/2023/02/zomato-asks-for-higher-commission-from-restaurants-food-delivery-slows?utm_pageloadtype=scroll> accessed 28 February 2023

Cases where Dominance of the Opposite Party was Established

In order for the adjudicating authority to conclude that an entity is abusing their dominant position in the relevant market (Section 4 of the Competition Act), the said authority must establish that such entity is dominant in the market in the first place. In 15 out of the 31 cases where abuse of dominance was alleged under Section 4, dominance was found. In the remaining 16 cases, dominance could not be established. It is to be noted that dominance here includes both prima facie dominance and cases where dominance was conclusively established by the CCI.

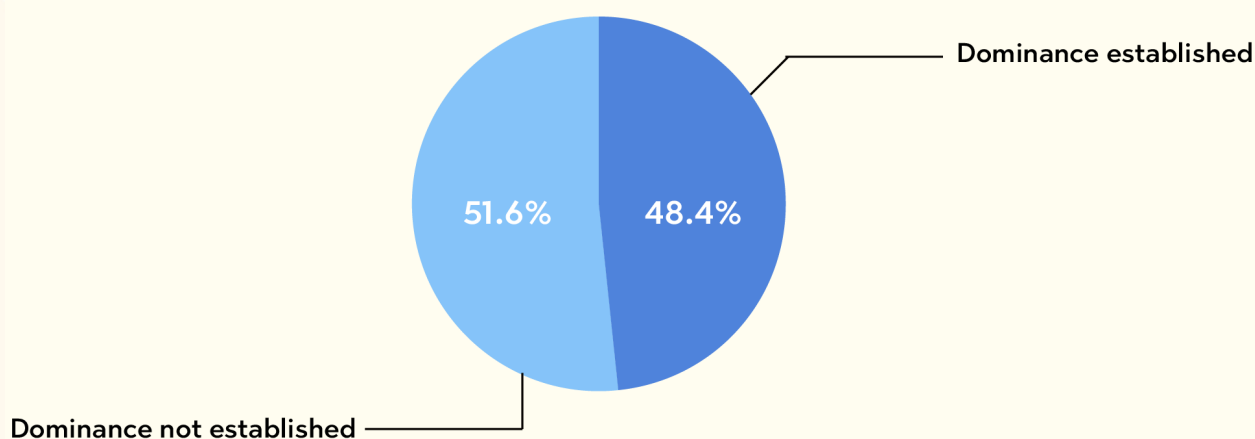


Figure 1.4: Establishment of dominance by the CCI

In nine of the 15 cases where dominance was established, the CCI issued a final order conclusively establishing dominance. In the remaining six cases, only prima facie dominance has been established

Abuse of Dominance

Subsequent to establishing dominance, the authority delves into the question of abuse of such dominance in the relevant market. Abuse of dominance was found in 10 cases out of the 15 cases where dominance was established. **It is to be noted that these 10 cases include cases of prima facie abuse of dominance as well as cases where abuse of dominance was finally established by the CCI.**

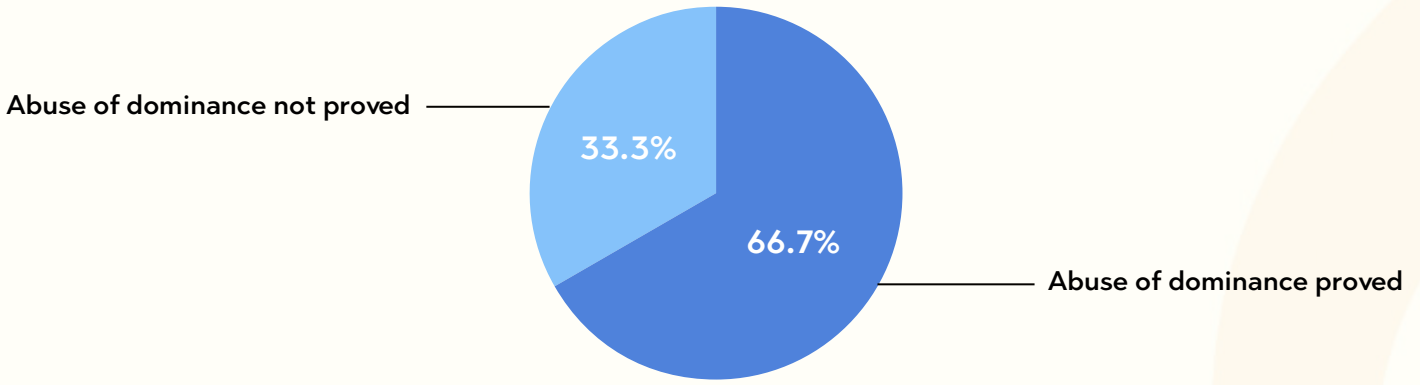


Figure 1.5: Establishment of abuse of dominance by the CCI

Among the 10 cases where abuse of dominance was found by the CCI, six cases were that of prima facie abuse of dominance and in only four cases abuse of dominance was conclusively held. It is interesting to note that among the 27 conclusively decided cases against digital platforms wherein abuse of dominance was alleged, in only four cases, that is, approximately 14.8 percent of cases, abuse of dominance was conclusively established.

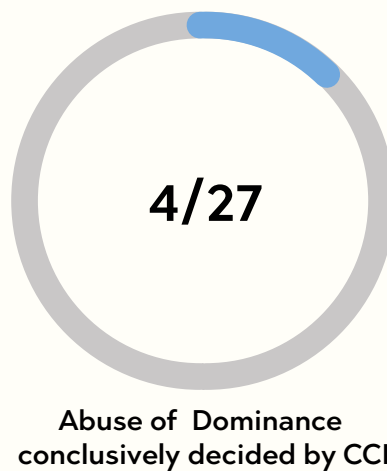


Figure 1.6: Cases where abuse of dominance was established conclusively by the CCI

In conclusion, we found that the threshold for proving dominance is difficult in the case of platform businesses. Even if dominance is proven, proving abuse of dominance is harder.

Table 1: Cases of abuse of dominance

	Total cases (including preliminary orders)	Final orders
Number of cases	31	27
Cases where dominance was established	15	9
Cases where abuse of dominance was established	10	4

Part 2 – Non-Recognition of Collective Dominance as an Impediment to Regulate Anti-Competitive Practices in the FSA Market

2.1. Dominance in the Swiggy-Zomato Case

Indian laws do not consider collective dominance as dominance for the purpose of establishing whether an entity has adopted anti-competitive practices. The Competition Act only recognizes dominance by a single enterprise or a group. The Competition Act defines “**dominant position**” as a “**position of strength**, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

- (i) operate independently of competitive forces prevailing in the relevant market; or
- (ii) affect its competitors or consumers or the relevant market in its favour”²²

This precludes the CCI from investigating abuses of dominance by two or more players collectively. Based on an expert committee recommendation,²³ the Competition

²² Competition Act 2002, explanation to s 4(2)

²³ Competition Law Review Committee, Report of the Competition Law Review Committee (2019) 98-100

petition Amendment Bill 2012,²⁴ had sought to introduce collective dominance in the Act by insertion of the terms “**jointly or singly**” in Section 4. However, the bill was not passed.

2.2 Collective Dominance of Swiggy/Zomato and Impact on Competition

Swiggy and Zomato form a duopoly in food delivery platforms. Though they follow several exploitative practices such as charging high commissions and providing deep discounts to entice customers (without necessarily consulting the restaurant about this), they escape scrutiny under Section 4 of the Competition Act, because the complainant is unable to prove that Swiggy/Zomato is individually dominant in the respective market. Most digital platform markets in India exhibit a duopoly or oligopoly structure. The taxi aggregator market has an Uber-Ola duopoly, the e-commerce market is led by Amazon-Flipkart and the food delivery market by Swiggy and Zomato.

Before the 2020 Covid-19 lockdowns, Zomato dominated the market with over 70% of users in the online food delivery market. On the other hand, Swiggy and Uber Eats had a combined market share of less than 30%.²⁵ There was little overlap in the user base among the players.

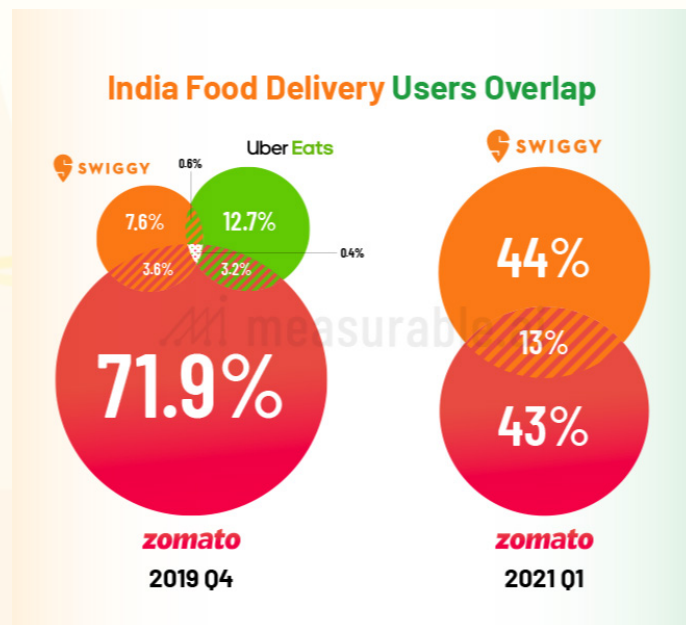


Figure 2.1

Source: DfD News²⁶

²⁴ Competition (Amendment) Bill 2012

²⁵ 'Who Leads the Food Delivery Race between Zomato and Swiggy in India?' *KrASIA* (12 August 2021) <<https://kr-asia.com/who-leads-the-food-delivery-race-between-zomato-and-swiggy-in-india>> accessed 23 February 2023

²⁶ 'Zomato vs Swiggy - Who Leads the Food Delivery Race in India' *Derived from Data News* (12 August 2021) <<https://dfdnews.com/2021/08/12/zomato-vs-swiggy-who-leads-the-food-delivery-race-in-india/#:~:text=When%20it%20comes%20to%20app,user%20base%20amongst%20the%20players>> accessed 25 February 2023

In January 2020, Zomato acquired UberEats which held 10-12 % of the market share in the first move of the food-tech industry towards consolidation.²⁷ A November 2022 report by Jefferies estimates that Zomato achieved a market share of 55% in the first half of 2022, citing that that would be Zomato's highest market share ever.²⁸ Thus combined together Swiggy-Zomato hold a majority of the food delivery market share in India.²⁹

2.3 Why are Duopolies Problematic?

Duopolies are a form of a market structure composed of two dominant firms. Such dominance in the case of digital platforms has a significant impact on competition and other market players such as restaurants, delivery agents, and consumers. Some reasons why duopolies are problematic are as follows:

a. Interdependence

High degree of interdependence is a deriving characteristic of a few firms having dominant market positions. It implies that a firm is aware of the effect of its actions on its rivals and vice versa. An analysis of a duopolistic market structure reflects an element of similarity between the two firms.³⁰

Today, Zomato and Swiggy hold 95% of the total FSA market,³¹ leaving little space for new entrants. On an individual level, however, they cannot operate independently of one another. Consistently holding around 40-50% per cent of the market each, the pricing and other strategies of the two FSAs is determined by the other FSA. If Swiggy raises its charges significantly, it will face the threat of losing consumers to Zomato, which has a substitutable service.

The interdependence is not just evident in the pricing decisions but also ubiquitous in the identically themed investments made by Swiggy and Zomato. The complete list

²⁷ Kashyaap S, 'What Zomato's Acquisition of UberEats Means for India's Foodtech Ecosystem' *YourStory* (22 January 2020) <<https://yourstory.com/2020/01/zomato-uber-eats-acquisition-foodtech-deepinder-goyal-swiggy>> accessed 23 February 2023

'Zomato vs Swiggy – Who Leads the Food Delivery Race in India? | Data Insights - Measurable AI' *Data Insights - Measurable AI* (11 August 2021) <<https://blog.measurable.ai/2021/08/11/zomato-vs-swiggy-who-leads-the-food-delivery-race-in-india/>> accessed 23 February 2023

²⁹ Bhatnagar R, 'Zomato Vs Swiggy: Jefferies Offers Insight Into Who May Be Winning' *BQ Prime* (24 November 2022) <<https://www.bqprime.com/business/zomato-vs-swiggy-jefferies-offers-insight-into-who-may-be-wining>> accessed 23 February 2023

³⁰ Lipczynski J and others, *Industrial Organization: Competition, Strategy, Policy* (4th edn, Pearson Education, 2017)

³¹ As alleged by the NRAI in *National Restaurants Association of India v Zomato*, Case No. 16 of 2021 (Competition Commission of India)

of investments undertaken by Swiggy and Zomato respectively has been attached to Annexure II. The mirrored practices undertaken by Swiggy and Zomato can be broadly categorised as follows:

Table 2: Common market practices of Zomato and Swiggy

A. Services

Services	Swiggy	Zomato
Entering into grocery delivery	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Setting up and running own Cloud Kitchens ³²	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Ultra-fast delivery	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Dine-out Services	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

B. Common Investments

Investments	Swiggy	Zomato
Restaurant Management: Urban Piper	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

C. Market Practices

Market Practices	Swiggy	Zomato
Deep discounting	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
High Commissions payable by restaurant partners	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Refusal to share end-user identifying data with restaurant partners	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

³² As on March 2023, Swiggy and Zomato have changed their market strategy and de-prioritised the cloud kitchen business

Economics of Oligopoly and Collusion

Based on the status of the realisation of the mutual interdependence of firms on rivals' decisions, there are two possibilities. First, where firms realise it, there exists a tendency for cooperation to maximise the industry's profit. This is called a “**collusive oligopoly**”. By matching each other's conduct, the rival firms can push prices to even monopoly level.

In a traditional market, factors that influence the risk of collusion are the number of firms and barriers to entry. As the number of firms in the market reduces, the prospects of collusion become attractive. It will also allow a larger share of accrued benefits for each firm. Barriers to entry and exit will enable sustained collusion in absence of which entry of additional firms in case of high profit will erode profits for existing firms.

On the other hand, failure to realise interdependence often leads to price wars and situations in which markets do not function optimally i.e market failures. This is called “**non-collusive oligopoly**”.

Therefore, duopolistic market structures have serious consequences for existing and potential firms entering the market. In either case, there is a chilling effect on product innovation, pricing and market practices in that market.

The recent emergence of big data and machine learning has led to concerns around “**algorithmic collusion**”. (An algorithm is a set of commands provided during computation to convert inputs to outputs.) Through algorithmic collusion, coordination among firms can be facilitated by algorithms without signing any agreement or direct communication. This is also referred to as tactic coordination. Since platforms are typically non-transparent about their algorithm and hide behind a veil of “**proprietary algorithms that maximise user experience**”, it is difficult to pursue legal action to provide algorithmic collusion.

b. Barriers to Entry and Exit

According to American economist George J. Stigler, the barrier to entry is **“a cost of production that must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry”**. There are two types of entry barriers:

1. Natural barriers include network effects, restricted use of specific resources, economies of scale, and high initial set-up costs.
2. Artificial barriers include switching costs, predatory pricing, price limiting, branding, advertising, etc.

In the case of FSAs, first, it is difficult to build the capacity to cater to a vast market, matching that of Swiggy and Zomato. Second, even if a new entrant develops such efficiency levels, there exists high marketing costs attached, pressure to reduce delivery fees for consumers and better wages to employees including delivery partners and the attached risk of acquisition by the dominant firms which happened in case of acquisition of Uber Eats by Zomato.

A customer while deciding on the platform to buy from considers the value of money derived from the services being provided.³³ For instance, the loyalty program for food delivery like Zomato Gold and Swiggy One makes it more suitable for the customers to use one platform on which the customer has a premium membership (against a certain membership fee). Hence, such strategies (like loyalty programs) result in consumers choosing the specific platform and sticking to it, instead of choosing a new entrant. This prevents new firms from reaching a viable amount of sales, hence creating entry barriers.

In duopolies, one way of market exit is through a horizontal merger which happened in the case of the merger of Uber Eats with Zomato. As a consequence, Swiggy and Zomato became two dominant market players in the food delivery market.³⁴ The concentration of market power makes few firms an attractive source of investment. This kind of market arrangement negatively affects free competition and hence efficiency and innovation in the economy.

³³ “Mergers,” A framework for the design and implementation of competition law and policy (World Bank 1999)

³⁴ Khatri B, ‘Zomato-Swiggy Duopoly? The Fallout From The Uber Eats Acquisition’ *Inc42* (23 January 2020) <<https://inc42.com/buzz/zomato-swiggy-duopoly-the-fallout-from-the-uber-eats-acquisition/>> accessed 3 March 2023

Thus, a duopoly form of market structure enables digital platforms to engage in abusive practices clearly prohibited under Section 4 of the Competition Act and escape the scrutiny of the CCI. In India, it has been difficult to prove the existence of links, and collusive behaviour. Such allegations have at best been only anecdotal. In Meru Travels Solutions Pvt Ltd,³⁵ allegations of collusive behaviour were raised against Ola and Uber, which had common investors. The complainant could not present clear evidence of collusive behaviour, and hence, the CCI refrained from ordering an investigation into it solely based on **“conjectures and apprehensions”**. Moreover, the fact that the individual market shares of the two FSAs are not big enough to constitute “dominance” has impeded successful competition lawsuits against them.

This problem is not unique to India. Even mature competition law jurisdictions have not been successful in addressing collective dominance. The US Sherman Act³⁶ does not recognise collective dominance. But in the European Union, Article 102 of the Treaty on the Functioning of the European Union [**“TFEU”**]³⁷ prohibits the abuse of dominance by **“one or more undertakings”**. However, the European Commission has so far only dealt with allegations of collective dominance which involves demonstrable links between the competitors.³⁸

³⁵ *Meru Travel Solutions Pvt. Ltd v M/S Ani Technologies*, Case No. 25-28 of 2017 (Competition Commission of India)

³⁶ Sherman Antitrust Act 1890

³⁷ Treaty on the Functioning of the European Union 1957 art 102 [1957]

³⁸ Competition Law Review Committee, 'Report of Competition Law Review Committee' (*Ministry of Corporate Affairs, Government of India* 2019) <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> accessed 6 March 2023

Part 3 - FSA's Use of Data to Pursue Anti-Competitive Practices

3.1 Data - A Value Proposition for FSAs

a. Data informs product/service design to make them attractive

With services and products being offered online, businesses have extensive opportunities to collect data from their consumers. Businesses leverage such data to design, price, and market their product or services.³⁹ Big data analytics is a powerful tool that allows organisations to analyse large and complex datasets to uncover hidden patterns, correlations, and insights that can help them make better decisions and improve their operations. The insights and knowledge drawn from such data play a major role in the competitiveness and growth of organisations in the digital market.⁴⁰

³⁹ Dhruv Grewal, John Hulland, et al. 'The Future of Technology and Marketing: a Multidisciplinary Perspective' (2020) 48 Journal of the Academy of Marketing Science <<https://doi.org/10.1007/s11747-019-00711-4>> accessed 5 March 2023

⁴⁰ Moore M and Tambini D (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (1st edn, Oxford University Press 2018)

In digital markets, data is a competitive asset. Through access to data, firms can restrict the entry of new entrants if the data is not shared and cannot be replicated. Data, if used for commercial purposes, can allow firms to undertake product innovations, enhance efficiency, forecasting and informed decision-making, and when held within walled gardens ensures that other entities without access to such data are unable to access similar advantages.

b. E-Commerce enables collection of non-service specific data

Zomato and Swiggy have access to large-scale data collected from restaurant partners and customers enlisted on their platforms. In order to avail the services of Zomato and Swiggy, the customer needs to register or create an account on the platform. While creating an account, Zomato collects personally identifiable information such as name, email address, postal code, gender, mobile phone number, and profile picture. In addition to the information provided by a customer, Zomato automatically collects information about the usage of Zomato, device information, stored information, location information, preferences and other information. Similarly, Swiggy⁴¹ collects information about the device used to access Swiggy, preferred languages, device motion information, installed applications on the device and other such information.⁴² Thus, Swiggy and Zomato have access to information that allows them to understand both food-related and non-food-related consumer behaviour. Platforms can use this data to elevate the demand for their services by strategically catering to consumer needs, therefore, allowing for market concentration even if not market tipping.⁴³ For instance, data is used by food delivery platforms to identify restaurants that can deliver on time, and for which delivery time can be calculated quickly, to improve serviceability. This requires a breakdown of the time taken by the delivery partner to travel from the current location to the restaurant and then from the restaurant to the next customer location. These companies leverage historical data along with real-time signals to come up with their own maps to achieve the desired efficiency.⁴⁴

⁴¹ Zomato, 'Privacy Policy' (*Zomato*, 22 April 2020) <<https://www.zomato.com/policies/privacy/>> accessed 6 March 2023

⁴² Swiggy, 'Privacy Policy' (*Swiggy*, 2 February 2022) <<https://www.swiggy.com/privacy-policy>> accessed 6 March 2023

⁴³ Martens (n 12)

⁴⁴ Pattnaik A, "How Food Delivery Companies Leverage Location Data to Improve Customer Experience" *Medium* (24 December 2019)<<https://towardsdatascience.com/how-food-delivery-companies-leverage-location-data-to-improve-customer-experience-58470406e7ed>> accessed 6 March 2023

c. Data is used to generate revenue

The data can also be used to generate additional revenue for the firms as it forms key input for digital advertising and can also be sold to third parties. The increased revenue can be further used to undertake innovations and increase the consumer base. Swiggy is said to have doubled its order value following the use of artificial and machine learning models after it leveraged the terabytes of data it generates every week.⁴⁵

In the FSA market, big data analytics is used for the following:⁴⁶

1. Search and Discovery

2. Delivery Assignment

3. Last-Mile Delivery

4. Optimising Delivery Cost and Time

5. Cloud-Kitchen location

6. Real-time Geofencing

7. Location-based Advertising

8. Discounts/Offers

9. Real-time Traffic Monitoring

d. When data is concentrated, market power also gets concentrated

In the case of digital platforms, a small number of players have access to large amounts of data that allows them to accumulate data and generate insights, thereby providing a competitive advantage. When the platform is not just a facilitator but also competes with restaurants (as it does by setting up its own cloud kitchens), it may

⁴⁵ Sandhya Michu, 'Swiggy Uses AI and Data Science to Grow Its Order Value by over 200%' *Express Computer* (27 August 2018) <<https://www.expresscomputer.in/news/how-swiggy-is-disrupting-food-delivery-with-ml-ai/27989/>> accessed 6 March 2023

⁴⁶ Raval A, "Swiggy Uses AI and Data Science to Grow Its Order Value by over 200%" *Express Computer* (24 December 2019) <<https://www.expresscomputer.in/amp/news/ai-and-data-science-models-are-at-the-heart-of-all-the-systems-that-we-build-at-swiggy/44566/>> accessed 6 March 2023

negatively affect the openness to competition in the market.⁴⁷ While the accumulation of products in an offline market is governed by the Essential Commodities Act, 1955,⁴⁸ to protect the interests of consumers, hoarding of data by big tech platforms in digital markets is not regulated. There have been calls to discard notions of individual **'data ownership'** and adopt **'data stewardship'**⁴⁹ to promote sharing of data, avoid data hoarding and facilitate optimal use of data.⁵⁰ In the EU, a draft law has been proposed to give consumers control over their data and see who can access their data and on what terms.⁵¹ Such a step has been taken to avoid data hoarding by companies.

Similar steps have been taken in New York City wherein the restaurants had raised concerns about data hoarding by food delivery platforms. As per the Bill titled 'Data on orders placed through third-party food delivery services' (Introduction number 2311 of 2021)⁵² delivery platforms such as DoorDash, UberEats and Grubhub will be required to share customer data with the restaurant partners. Addressing data privacy concerns raised by food delivery platforms, the Bill provides an option to the customer to opt out of such sharing of data. DoorDash has sued New York City citing the Bill as a blatant invasion of privacy of customers pursuant to which the city has put a hold on the execution of the Bill.⁵³

3.2 Impact of Data Pooling on Competition

The use of data by a firm enables better decision-making and the use of predictive modelling. However, if its use is restricted by a few market players it can lead to dominant market positions. There is an established consensus on data being used as a

⁴⁷ Cox K, 'EU's New Digital Strategy Targets Data-Hoarding Tech Firms' *arsTECHNICA* (21 February 2020) <<https://arstechnica.com/tech-policy/2020/02/facebook-google-would-have-to-share-more-data-under-new-eu-plan/>> accessed 6 March 2023

⁴⁸ Essential Commodities Act 1955

⁴⁹ Data stewardship may be construed as a collection of data management methods covering acquisition, storage, aggregation, and deidentification, and procedures for data release and use. Sara Rosenbaum, 'Data Governance and Stewardship: Designing Data Stewardship Entities and Advancing Data Access' (2010) 45(5) HSR <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2965885/>> accessed 7 March 2023

⁵⁰ United Nations, 'Data Strategy of the Secretary-General for Action by Everyone, Everywhere with Insight, Impact and Integrity' (*United Nations*, 2020) <https://www.un.org/en/content/datastrategy/images/pdf/UN_SG_Data-Strategy.pdf> accessed 6 March 2023

⁵¹ 'EU Looks to End Data Hoarding by Companies' *Economic Times* (24 February 2022) <<https://cio.economictimes.indiatimes.com/news/government-policy/eu-looks-to-end-data-hoarding-by-companies/89787955>> accessed 7 March 2023

⁵² Data on orders placed through third-party food delivery services, 2021 <<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4951001&GUID=4CB11989-5925-418B-9627-B2AED230D67F#:~:text=Summary%3A,that%20establishment%20requests%20the%20informatio>> accessed 6 March 2023.

⁵³ Jessica Bursztynsky, 'DoorDash sues New York City over new data-sharing law' *CNBC* (15 September 2021) <<https://www.cnb.com/2021/09/15/door-dash-sues-new-york-city-over-new-data-sharing-law.html>> accessed 6 March 2023.

competitive asset and its effect on competition through collusion, exclusion of other market players and abuse of dominant position.⁵⁴

Data pooling occurs when firms agree to share digitised information about a given market. It is beneficial for firms to establish “**data commons**” and have access to all the data. It is both the size of data and prospects of interoperability that result in dynamic market efficiencies. Such practices, however, carry risks as sharing of business data facilitates transparency between firms potentially leading to tacit collusion and reduced investments in R&D. A restricted use of pooled data can also be an entry barrier as potential entrants might be restricted in terms of market information and its multifold benefits by the use of predictive modelling. The use of pooled data in conjunction with designed pricing algorithms may also allow firms to price discriminate based on the personal characteristics of an individual consumer. A limited capacity for judging innovative pricing schemes can enable them to extract maximum price relative to consumers paying capacity. The anti-competitive effects of data pooling on the whole market can easily nullify added benefits to the firms.

Data pooling however, requires strategic investment in a common technology, which can be built around the datasets provided by the parties or by a third party.⁵⁵ As an example of data pooling in the food delivery market, Swiggy and Zomato have together made a strategic investment in a company called Urban Piper, acquiring 5% each of the shares in Urban Piper. In the following paragraphs, we explain how this move further strengthens the Swiggy-Zomato duopoly and creates further barriers to entry.

3.3 Swiggy, Zomato and Urban Piper

In April 2022, Swiggy and Zomato made strategic investments in a company called Urban Piper. Urban Piper is the only company in which both Swiggy and Zomato have a common investment. Urban Piper is a software service that provides three solutions:⁵⁶

- A dashboard for restaurants to manage their menus and orders across different platforms such as Swiggy and Zomato and facilitates integration on the payments front and the food platform front

⁵⁴ Antonio Capobianco, Pedro Gonzaga, & Anita Nyeso, 'Algorithms and Collusions : Background note by Secretariat' (2017) DAF/COMP <[https://one.oecd.org/document/DAF/COMP\(2017\)4/en/pdf#:~:text=This%20background%20note%20describes%20how,even%20require%20any%20human%20interaction.](https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf#:~:text=This%20background%20note%20describes%20how,even%20require%20any%20human%20interaction.)> accessed 5 March 2023

⁵⁵ Bjorn Lundqvist, 'Data Collaboration, Pooling and Hoarding under Competition Law' (2018) Stockholm Faculty of Law Research Paper Series <<https://dx.doi.org/10.2139/ssrn.3278578>> accessed 5 March 2023

⁵⁶ 'UrbanPiper: POS Integrations To Manage Online Orders' (*UrbanPiper: POS Integrations To Manage Online Orders*) <<https://www.urbanpiper.com/>> accessed 4 March 2023

- A suite of tools for restaurants to set up their own food delivery
- A point of sale service for restaurants to manage their sales online and offline

Though there are several players which provide services like Urban Piper, such as Pet Pooja etc., Urban Piper claims to process about 20% of online food orders.⁵⁷ This is a significant volume. Urban Piper has also strategically made the call to have both Swiggy and Zomato on board with them. Not having either one in their suite of investments, would have raised a furore on data-sharing practices by the other. This is because there is no statutory stipulation for a Chinese wall on data flow from Urban Piper to its investor company.

However, both Swiggy and Zomato which compete with each other wanted to know if the other company is going to invest in UrbanPiper or not. “From day one, we were very clear, if one of the companies (Swiggy or Zomato) is not interested to invest in UrbanPiper and then we will not do the deal with any one of them,” said Gupta. “The idea is to create a better ecosystem for each other to grow.”

Source: Morning Context ⁵⁸

Figure 3.1

Why is this common hold over Urban Piper dangerous from a data point of view?

- All restaurant data coming to Urban Piper, whether signed on by Swiggy or Zomato can flow back to Swiggy and Zomato.
- All restaurant data coming to Urban Piper who are not signed on by Swiggy or Zomato, having their own website and delivery can also flow back to Swiggy and Zomato.
- All restaurant data from sales made in the off-line mode can also flow back to Swiggy and Zomato.

⁵⁷ Rajiv Singh, ‘Saucy & SaaSy: Meet The Pied Piper Of Restaurants’ *Forbes India* (16 August 2022) <<https://www.forbesindia.com/article/take-one-big-story-of-the-day/saucy-saasy-meet-the-pied-piper-of-restaurants/79001/1>> accessed 4 March 2023

⁵⁸ Harveen Ahluwalia, Sowmya R., Akansha Sarma, ‘A Swiggy-Zomato Joint Investment’ *The Morning Context* (22 April 2022) <<https://themorningcontext.com/internet/a-swiggy-zomato-joint-investment-a-web3-friend-for-dream11>> accessed 4 March 2022

This means that:

- Swiggy and Zomato have the potential to have access to all restaurant data that flows in through Urban Piper. When both entities in a duopolistic market have access to large-scale data they may be incentivized to cartelise.
- Swiggy/Zomato may prefer restaurants using Urban Piper in a customer's search results, but there is no way of knowing this since preferencing algorithms are non-transparent.
- Swiggy/Zomato can use this data to gain advantageous entry into alternate markets such as grocery delivery, rapid delivery/courier, hyper-local delivery etc in which both companies already have developed a stronghold.

The common investment in Urban Piper by both Swiggy and Zomato is therefore an add-on to the list of similar investments undertaken by the two platforms.⁵⁹

⁵⁹ Sarkar G, 'Zomato Vs Swiggy: Will M&A Spree Solve Profit Puzzle For Food Delivery Giants?' *Inc42 Media* (27 July 2022) <<https://inc42.com/features/zomato-vs-swiggy-will-ma-spree-solve-profit-puzzle-for-food-delivery-giants/amp/>> accessed 6 March 2023

Part 4 - Abuse of Access to Large-Scale Data by FSAs

4.1 Data Masking

Zomato and Swiggy are platform intermediaries that connect consumers with restaurants. While Zomato and Swiggy have access to end-consumer data, such data is not provided to the restaurants that are serving the consumers.⁶⁰ Zomato and Swiggy utilise customer information to build relationships with the customers, draw consumer patterns and behaviour, therefore, inform their business strategy. However, a similar opportunity is not available to the restaurants as Zomato and Swiggy do not share any information with the restaurants. This leads to restaurant partners not being aware of critical information such as the location of delivery of food, to whom the food is being delivered and in how much time. When delivery of food is delayed by the FSAs, it impacts the quality of the food and the restaurant is provided negative ratings by the consumers. Even though the restaurants are responsible for the performance of services to end-users (consumers), they do not have access to any information about the consumers.

⁶⁰ Tandon S, 'The Revolt against Food Delivery Apps' *Livemint* (21 August 2019) <<https://www.livemint.com/companies/start-ups/the-revolt-against-food-delivery-apps-1566324255842.html>> accessed 6 March 2023

In an interview with one of the members of NRAI, the interviewee raised the issue of data masking,

“

These are my customers and if you lay completely 100% singular claim on the ownership of that data, then we have a problem.... What is the point of you (aggregators) having the data of my consumers?

”

The privacy policy of Swiggy (as updated on 3rd February 2022) stipulates that information of the consumer may be shared with the restaurant with whom the consumer may choose to order.⁶¹

Disclosure and Distribution of your Information

We may share your information that we collect for following purposes:

With Service Providers: We may share your information with our vendors, consultants, marketing partners, research firms and other service providers or business partners, such as Payment processing companies, to support our business. For example, your information may be shared with outside vendors to send you emails and messages or push notifications to your devices in relation to our Services, to help us analyze and improve the use of our Services, to process and collect payments. We also may use vendors for other projects, such as conducting surveys or organizing sweepstakes for us.

With Partner Restaurants/Merchant: While you place a request to order food through the Swiggy Platform, your information is provided to us and to the restaurants/merchants with whom you may choose to order. In order to facilitate your on-line food order processing, we provide your information to that restaurant/merchant in a similar manner as if you had made a food order directly with the restaurant. If you provide a mobile phone number, Swiggy may send you text messages regarding order's delivery status.

Figure 4.1: Privacy policy of Swiggy

⁶¹ Swiggy, 'Privacy Policy' (Swiggy, 3 February 2022) <<https://www.swiggy.com/privacy-policy>> accessed 6 March 2023

Similarly, the privacy policy of Zomato also provides for sharing of information with the restaurant partners.⁶²

Information Shared with Restaurants

When you make a restaurant reservation or execute online food ordering transaction through our Services, your information is provided to us and to the restaurants with whom you choose to reserve. In order to facilitate your reservation and online food order processing, we provide your information to that restaurant in a similar manner as if you had made a reservation or food order directly with the restaurant. If you provide a mobile phone number, restaurants or Zomato may send you text messages regarding your reservation or order's delivery status. Some restaurants also require you to provide credit or debit card account information to secure your reservation. When you make a restaurant reservation or online food ordering transaction through our Services and/or make a payment to a restaurant through our Services, we may also share with restaurants additional information, such as information about your dining preferences and history or information that we collect from third-parties.

Figure 4.2: Privacy policy of Zomato

The issue of data masking has been raised in the town hall meetings organised by NRAI. In the town hall meeting held on 7th October 2022, Anurag Katriar, founder of Indigo Hospitality stated,

“

..We have yielded our complete pipeline in the hands of aggregators-right from discovery to delivery is totally controlled by them and slowly the business which was ours have become theirs. Theirs to an extent that they don't share the data of our customers with us.. How can a customer ordering burger, butter chicken from your outlet is your customer-how can a middle man claim the sole owner of that data-they are not ordering-zomato or swiggy does not have a produce- they are only fulfilling the orders given by us. So in a nutshell what happened is we yielded complete control-we lost the profitability.”

⁶² Zomato, 'Privacy Policy' (*Zomato*, 22 April 2020) <<https://www.zomato.com/policies/privacy/>> accessed 6 March 2023

⁶³ Choudhury D, 'Top Bureaucrat Tells Zomato, Swiggy to Let Users Decide on Data Sharing' *Moneycontrol* (13 June 2022) <<https://www.moneycontrol.com/news/business/exclusive-top-bureaucrat-tells-zomato-swiggy-to-let-users-decide-on-data-sharing-8678691.html>> accessed 6 March 2023

Though the privacy policies of both entities provide for sharing of information with the restaurant partners, restaurant partners have repeatedly complained about the refusal by Swiggy-Zomato to share information with them. Zomato and Swiggy have time and again refused to share the data of customers with restaurant partners stating data privacy concerns.⁶⁴

The decision to not share customer data under the garb of protecting the interests of customers has been met with resentment from restaurant partners as they believe that Swiggy/Zomato hoard customer information. Such hoarding of data reduces a restaurant's propensity to offer personalised services and achieve higher customer satisfaction. The use of data science and analytics to study consumer data collected by food delivery platforms makes it a valuable commodity as it leads to the optimisation of services over time.⁶⁵

Restaurant partners have also challenged the hoarding of data by Swiggy/Zomato to be anti-competitive in the case of the National Restaurant Association of India v Zomato Limited and Others.⁶⁶ The restaurant partners have alleged that the data Swiggy/Zomato possess strengthens their market positioning, dissuading new players from entering the relevant market.

In a meeting held by the Department of Consumer Affairs in June 2022 to address an inordinately high number of pending consumer grievances against Swiggy/Zomato, NRAI once again raised the issue of customer information not being shared by Swiggy/Zomato that impacts the ability of restaurants to serve the consumers. Pursuant to such arguments raised by NRAI, the Department of Consumer Affairs advised that the customer data can be shared with the restaurants provided that prior approval of the customer had been taken.⁶⁷ However, it is not clear whether the Swiggy-Zomato duopoly has taken steps to action this.

⁶⁴ National Restaurant Association of India, 'NRAI TownHall 8.0 - Protecting Dine-In Margins' (*YouTube*, 7 October 2022) <https://www.youtube.com/watch?v=K_D2JbsYuGo> accessed 6 March 2023

⁶⁵ Catalyst Research, 'Diners, Drive-Ins, and Data Dives: Data Sharing Between Delivery Platforms and Restaurants' *Catalyst Research* (2021) <<https://datacatalyst.org/wp-content/uploads/2021/07/Diners-Drive-Ins-and-Data-Dives-July-2021.pdf>> accessed 6 March 2023

⁶⁶ *National Restaurants Association of India v Zomato*, Case No. 16 of 2021 (Competition Commission of India)

⁶⁷ Ministry of Consumer Affairs, Food & Public Distribution, 'Press Release' (*PIB Delhi*, 13 June 2022) <<https://pib.gov.in/PressReleaseSelfFramePage.aspx?PRID=1833570>> accessed 10 March 2022

4.2 Data Analytics as A Service to Restaurants

Analytics is the practice of using data to generate useful insights that can help organisations make better fact-based decisions with the ultimate aim of driving strategy and improving performance. It integrates capabilities in data management, technology, systems and automation, applications and institutional skills to enable organisations to identify existing issues and predict future trends, opportunities and threats.⁶⁸ Swiggy and Zomato provide dashboard analytics to their restaurant partners through their customer-facing apps. Thus Swiggy and Zomato take data from restaurants, commodify the data and sell it back to restaurants, allowing restaurants to use this data to devise their strategy. Swigglytics is a chargeable service and is known to provide the following features:⁶⁹

a. Tracking of Sales

Swigglytics has a customisable software development kit for real-time data and analytics that helps restaurants analyse their sales and improve upon the weak areas of business.

b. Identifying the Area

Swiggy dashboard allows platforms to study the delivery requests in an area. This helps restaurants to plan their sales on the basis of such analytics.

c. Coupons and Discounts

The feature tracks customer behaviour and informs restaurants to introduce coupons and discounts to attract more customers.

d. Performance Analysis

The analytics helps the restaurants identify the steps that helped the restaurant in expanding the business. It also helps the restaurant in tracking customer feedback and reflecting on areas that require improvement.

⁶⁸ David Wong, 'Data is the Next Frontier, Analytics the New Tool' (2012) Big Innovation Centre <<https://www.bi.uk/collection-items/data-is-the-next-frontier-analytics-the-new-tool>> accessed 10 March 2023

⁶⁹ 'Swiggy Dashboard – For Better Data Organization' (*Swiggy Dashboard – For Better Data Organization*, 7 February 2020) <<https://www.indifi.com/blog/swiggy-dashboard-for-better-data-organization/>> accessed 10 March 2023.

The platforms have access to huge datasets that allow them to generate market insights.⁷⁰ Through the analytics dashboards they provide services to the restaurant partners. Since the restaurants do not have access to the data directly, the restaurants rely on analytics services to provide them with data insights. Such high reliance on platforms compels them to pay high commissions to platforms.

4.3 Private Labels/ Cloud Kitchens

Platform aggregators act as an intermediary between service providers/suppliers of goods and end users/consumers.⁷¹ At times these aggregators also manufacture/produce their own products and sell on their platforms in direct competition with the service providers/sellers listed on the platform. Platforms that act as sellers in their own marketplaces have the potential to drive customers towards their own products away from the third-party sellers listed on the platform by utilising their unique placement as platform operators.⁷² These platform operators that provide multiple services, combine data generated in one service with those of other services. Such aggregation increases the value of the dataset and strengthens the market position of the platform operator.⁷³

In 2017, Swiggy entered the cloud kitchen market through Swiggy Access which allowed restaurants to host delivery-only kitchens.⁷⁴ Swiggy launched its own cloud kitchen '**Bowl Company**' in January 2017,⁷⁵ raising concerns of anti-competitive behaviour. Since then, Swiggy has launched several of its own cloud kitchens namely Breakfast Express, SoulRasa, Homely, Stuffed, and others in multiple cities.

⁷⁰ Albertson M, "DoorDash Uses Real-Time Data to Drive Business, Help Merchants" *Silicon Angle* (11 July 2019) <<https://siliconangle.com/2019/07/11/door-dash-uses-real-time-data-drive-business-help-merchants-awssummit/>> accessed 7 March 2023

⁷¹ Geoffrey Parker, Georgios Petropoulos, & Marshall W., 'Digital Platforms and Antitrust' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608397> accessed 7 March 2023

⁷² Dash A and others, 'When the Umpire Is Also a Player' (2021) Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency <https://www.cse.iitd.ac.in/~abhijnan/papers/dash_sponsored_rec_bias_FAacT21.pdf> accessed 7 March 2023

⁷³ OECD, 'Analytical Note on the G7 Inventory of New Rules for Digital Markets', (2022) OECD <<https://www.oecd.org/competition/analytical-note-on-the-g7-inventory-of-new-rules-for-digital-markets.pdf>> accessed 9 March 2023

⁷⁴ Salman SH, 'Swiggy's Cloud Kitchens Now Service 1.5 Million Monthly Orders' *Livemint* (20 November 2019) <<https://www.livemint.com/companies/news/swiggy-s-cloud-kitchens-now-service-1-5-million-monthly-orders-11574235229476.html>> accessed 7 March 2023

⁷⁵ 'Swiggy Launches Its Cloud Kitchen- 'The Bowl Company'' *Ciol* (19 January 2017) <<https://www.ciol.com/swiggy-launches-its-cloud-kitchen-the-bowl-company/>> accessed 7 March 2023

a. Use of Data to set up cloud kitchens

“*That’s the value of creating kitchens for delivery platforms. We have the visibility of all the market dynamics. We can look at a location, comb through the data and know what kind of restaurants and food supplies would work there. Over time, you come to realize the neighborhood and their collective behaviour*”⁷⁶

Chief Executive of Prosus Ventures⁷⁷ duly reflects the usage of data by Swiggy to direct its business strategy. Access to data collected from consumers and restaurants is appropriated by Swiggy to draw consumer behaviour and patterns. Such consumer patterns can be exploited to trace demands across dishes and regions. Once identified, Swiggy establishes its own cloud kitchen in a high-demand area and offers a dish that is in demand. Swiggy has the leverage of data from consumers and restaurants that it then analyses to inform its business strategy.

To draw a parallel, Amazon, which started as a marketplace, now sells its own products under private labels such as AmazonBasics and Solimo. Amazon, by appropriating the business information of third-party sellers (listed on Amazon) started selling products at a deep discount in demand under its private labels. Amazon, in addition to general information on the orders, had access to information on goods that a customer clicked on but did not buy, price changes that induced a customer to buy, responses of customers to product images and other granular information.⁷⁸ This allowed Amazon to strategically invest in the production of products that are high in demand or are underserved and then sell at a price that a customer is most likely to buy at.⁷⁹

Masking of data from restaurants coupled with the use of data for strategic placement of cloud kitchens to compete with the restaurants provides a competitive advantage to Swiggy against the restaurant partners listed on the platform.

⁷⁶ Manish Singh, ‘India’s Swiggy Bets Big on Cloud Kitchens’ *Techcrunch* (20 November 2019) <https://techcrunch.com/2019/11/19/swiggy-cloud-kitchen-india/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQA-AAJIMBnN7HTPwGyoELDeKX2EBKTPgXqiCZAQDIGhB4cbbS9oivlqSNHW5eQeA1Mk_XF-acGr8aTUCrAR7tsWI4xJh6OnjrNI-Qr-DO2gqRsJN-bAbF8N8QEsHKPzfr0vEcq9tTID8-Xsk_pO0Lruk8JyDdkl_S691KDdDssqo8aX3> accessed 7 March 2023

⁷⁷ Prosus Ventures had made a major investment in Swiggy. Prosus, ‘Performance Review’, (*Prosus*, 2021) <https://www.prosusreport2021.com/images/uploads/2021/06/Prosus2021_-Performance_review.pdf> accessed 7 March 2023

⁷⁸ Lina M. Khan, ‘The Separation of Platforms and Commerce’ (2019) *Columbia Law Review* <<https://www.jstor.org/stable/26632275>> accessed 19 February 2023

⁷⁹ ‘Amazon Private Label Brands’ *Marketplace Pulse* (18 March 2019) <<https://www.marketplacepulse.com/amazon-private-label-brands#copying-products>> accessed 10 March 2023

b. Self preferencing of Own Cloud Kitchen

When the platform operator starts acting as a retailer on its own platform by offering products, there is a potential to indulge in self-preferencing against other products listed on the platform. In Amazon's case, it was established that the algorithms suggested Amazon's product as the default product for any search.⁸⁰ Additionally, Amazon would show prominent ads and pop-ups to direct customers to Amazon's own products.

Similarly, Swiggy has been alleged to have indulged in self-preferencing. In July 2017, a Tumblr blog post titled '**Swiggy, a house of cards**' (said to be written by the members of Swiggy's sales team), accused the startup of upselling the Bowl Company (Swiggy's cloud kitchen brand) so that the end consumer sees Bowl Company first.⁸¹

Furthermore, self-preferencing is not limited to the ranking of private labels/cloud kitchens in the search list. The platforms may resort to multiple methods to push private labels/cloud kitchens on the platform.

i. Delivery time

In an experiment run by the research team (details provided on page 46), we found that in a general search the cloud kitchen of Swiggy was not on top of the list. However, when filtered by delivery time, the same was generally on the top 10 of the list. Strategic placement of cloud kitchens by appropriating consumer and restaurant partners' data allows Swiggy to deliver faster and indulge in self-preferencing.

ii. Discounts & commissions

The unique placement of Swiggy both as an operator and a retailer provides the benefit of non-payment of commission to the platform operator. This allows Swiggy to offer discounts in their cloud kitchens at all times. Discounts direct consumers to prefer those cloud kitchens over other restaurants listed on the platform.

⁸⁰ Khan (n 70)

⁸¹ Kashyaap S, 'Are Swiggy's Ambitious Plans Turning Its Partner Restaurants into Rivals?' *Yourstory* (5 September 2019) <<https://yourstory.com/2017/07/swiggy-partner-restaurants-bowl-company>> accessed 7 March 2023

Swiggy also charges commissions as high as 25-30%⁸² that makes it difficult for restaurant partners to bear the discounts and pay the commissions. While Swiggy's own cloud kitchens don't have to pay commissions, the restaurant partners don't have a choice and must cough up commissions, which are currently as high as 28% of the order value.⁸³

Where an enterprise acts as a platform operator and uses it to provide products, the anti-competitive conduct can be assessed by employing “**margin squeeze theory of abuse**”. A margin squeeze occurs when an integrated service provider provides services/goods at such a narrow margin to a rival that the rival cannot effectively compete.⁸⁴ In this case, Zomato and Swiggy are integrated service providers wherein they provide the platform as services to the restaurant partners at such high commissions that there is little margin for the restaurant partners. This limits the ability of restaurant partners to effectively compete with the cloud kitchens operated by these platforms. The test to be employed is whether the vertically integrated dominant undertaking (in this case Swiggy/Zomato) would have been able to offer its retail services (cloud-kitchen products) to end-users profitably if it had first been obliged to pay its own wholesale prices (in this case commission for the platform).⁸⁵

In the case of *NRAI v Zomato*, allegations of engaging in anti-competitive practices and violation of Section 3 and 4 were made against Swiggy and Zomato for setting up cloud kitchens and engaging in self-preferential practices.

The CCI has also acknowledged the tendency of platforms to introduce their private labels or operate their own cloud kitchen brands that create an incentive for platforms to engage in preferential treatment to improve its own position against its competitors on the platform.⁸⁶

⁸² Kritti Bhalla, 'This is Why it Costs More to Order Online on Zomato and Swiggy than to Dine-In' *Business Insider* (11 July 2022) <<https://www.businessinsider.in/business/news/this-is-why-it-costs-more-to-order-online-on-zomato-and-swiggy-than-to-dine-in/articleshow/92798769.cms>> accessed 8 March 2023

⁸³ Ramasubramanian (n 20)

⁸⁴ OECD, 'Margin Squeeze', (2009) OECD Policy Roundtable <<https://www.oecd.org/daf/competition/46048803.pdf>> accessed 28 February 2023

⁸⁵ Bostoen F, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (2018) 6 *Journal of Antitrust Enforcement* 355 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075237> accessed 7 March 2023

⁸⁶ Standing Committee on Finance, Ministry of Corporate Affairs, 'Anti-Competitive Practices by Big Tech Companies' (2023) Lok Sabha Secretariat, New Delhi <https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf> accessed 10 March 2023

“

.... On the sellers' side, this may allow it to use such data to introduce its own private label or boost its own sale or that of its 'preferred sellers'... In the food services segment, the issue of launching of own cloud kitchen brands in high demand food categories in hyper-local markets was pointed out to be a consequence of such cross-usage of data...

”

In an interview, a member of the NRAI raised a similar concern,

“

...So these aggregators, try to run their own kitchens, which are on the strength of data they collected of our restaurants, and they knew that where there is more sale of Biryani, pasta (kaha Biryani bikti hai, kaha pasta bikta hai) and they put up kitchens of their own

”

Similar allegations of food delivery platforms utilising data obtained from partner restaurants to compete with them have been raised in the United States against DoorDash, GrubHub and UberEats. It has been suggested that the food delivery platforms should be disallowed from leveraging data to establish 'ghost kitchens'. This can be achieved through the prevention of vertical integration and purpose limitation.⁸⁷ It has been suggested by policy researchers that the data collected by the platforms shall have a defined purpose and platforms shall be restricted from using data to drive their own restaurant partners from the market.⁸⁸

There is a need to adopt a similar approach of purpose limitation on the use of data by FSAs in India too so that the platforms do not leverage data collected from customers and restaurant partners to compete against the restaurant partners.

⁸⁷ Nick Gondek, 'Are GrubHub and DoorDash the Next Vertical Monopolists?' (*Chicago Policy Review*, 21 June 2021) <<https://chicagopolicyreview.org/2021/06/21/are-grubhub-and-door-dash-the-next-vertical-monopolists/>> accessed 20 February 2023

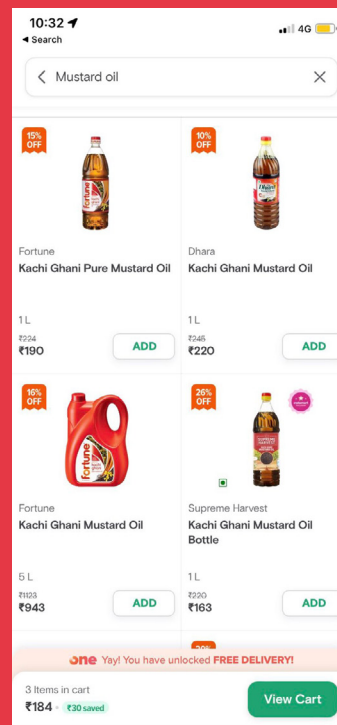
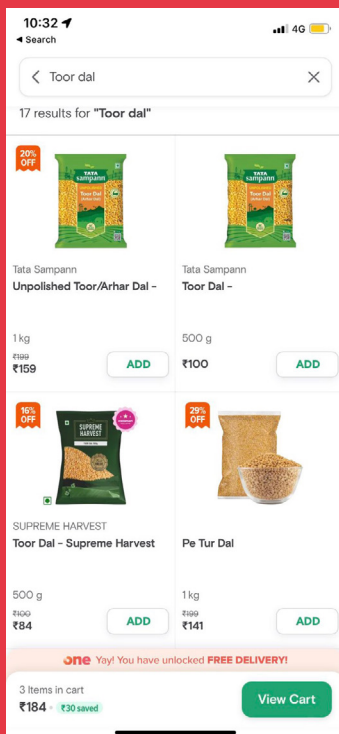
⁸⁸ Gondek (n 79)

Internal Experiment to Assess Self-Preferencing Practices by Swiggy

In an experiment run by the research team to assess self preferencing practices of Swiggy, the team assessed the placement (in terms of ranking) of Breakfast Express, Bowl Company, Stuffed, and Soul Rasa against its competitors for breakfast, lunch and dinner in Indiranagar, Bangalore. The team found that prima facie Swiggy no longer indulges in self-preferencing by ranking its own cloud kitchens over other restaurants.

Swiggy has been evidenced to move away from the cloud kitchen business model and is now aggressively pursuing horizontal markets such as grocery delivery and dineout. In November 2022, Swiggy had shut down its cloud kitchen (Bowl Company) operations in Delhi. In March 2023, Swiggy sold Swiggy Access (cloud kitchen vertical of Swiggy) to Kitchens@. As the economics did not prove to be beneficial for Swiggy, the platform diverted its attention toward grocery delivery.

In the grocery delivery platform of Swiggy i.e. Instamart, Swiggy pushes its own private label (Supreme Harvest) by placing the products at a prominent place at lower prices.



With the shift in business strategy, self preferencing practices have also shifted to the alternative market (grocery delivery). However, the presence of its own cloud kitchens continues to create a conflict of interest in its role as an intermediary and a competitor.

4.4 Gaining an Advantageous Entry into other Markets

The conventional understanding of competition in markets is that the interplay of factors such as network effects and economies of scale enable incumbent firms to enjoy an entrenched position, making it difficult for new entrants in the market to pose a formidable competition. However, Thomas Eisenmann et al. developed an antithetical concept to this understanding, known as platform envelopment. Platform envelopment is the strategic entry of a dominant firm in one market into another, by bundling or tying of its products in the earlier market and the target market.⁸⁹

Even a dominant firm in market B may be vulnerable to losing its dominance in the market due to the entry of a dominant player from an adjacent market A into market B. In terms of the harm it creates on consumers and other players in the market, platform envelopment is similar to the traditional concepts of tying and bundling.⁹⁰ Envelopment has been acknowledged as a way of creating entry barriers and foreclosing competition.⁹¹

While food delivery remains both Zomato's and Swiggy's primary market area, both these companies have ventured into other horizontal markets as well. Section 4(2) (e) of the Competition Act regards the use of dominance in one relevant market to enter another market as an abuse of dominance.⁹² However, players like Swiggy and Zomato have expanded into multiple other markets without attracting penalties by the regulator. This has resulted from the difficulty to prove the dominance of either of these platforms.

Horizontal envelopment may be internal or external.⁹³ Internal envelopment is when products and services in the enveloped markets are available within the core platform. Swiggy has mostly engaged in internal envelopment with all its services accessible exclusively on its core application. On the other hand, Zomato has chosen a mixed strategy of internal and external envelopment, with some services [such as Zomato Pro] being available on its core application, while its business to business (“**B2B**”) services and acquired grocery delivery services, Blinkit available outside

⁸⁹ Eisenmann T, Parker G and Alstyne MV, 'Platform Envelopment' (2011) 32 Strategic Management Journal 1270 <<https://onlinelibrary.wiley.com/doi/10.1002/smj.935>> accessed 20 February 2023

⁹⁰ Gregor Langus and Vilen Lipatov, 'Does Envelopment through Data Advantage Call for New Regulation?' (2021) CESifo Working Papers <https://www.cesifo.org/DocDL/cesifo1_wp8932.pdf> accessed 20 March 2023

⁹¹ 'Roundtable on Conglomerate Effects of Mergers - Background Note' (Organisation for Economic Co-operation and Development, 24 May 2020) <[https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf)> accessed 20 March 2023

⁹² Competition Act 2002, s 4(2)(e)

⁹³ Sebastian Hermes and others, 'A Taxonomy of Platform Envelopment: Economy of Platform Envelopment: Revealing Patterns and Particularities' (2020) AMCIS 2020 Proceedings <<https://core.ac.uk/download/pdf/326836082.pdf>> accessed 22 March 2023

the core platform. From a consumer's perspective, these forms of horizontal envelopment result in higher convenience and reduced costs, especially when the services offered in the different markets are hosted on a single application. However, this kind of horizontal envelopment, when carried out by large players, pushes out firms from the enveloped market, thus making the market concentrated and anti-competitive.⁹⁴ In their seminal paper on platform envelopment, Conderelli and Padilla elaborate on how privacy policy tying acts as an effective method to foreclose competition by dominant firms. By tying the privacy policies of two separate markets the firm is able to get data from both the platforms without need for additional consent. Due to network effects, this enormous amount of data that the platform gets access to in itself creates an entry barrier that other firms might not be able to break through.

Both Swiggy's and Zomato's methods of entry into and envelopment of other markets raise serious competition concerns in the secondary markets.

4.4.1 Zomato's horizontal expansions

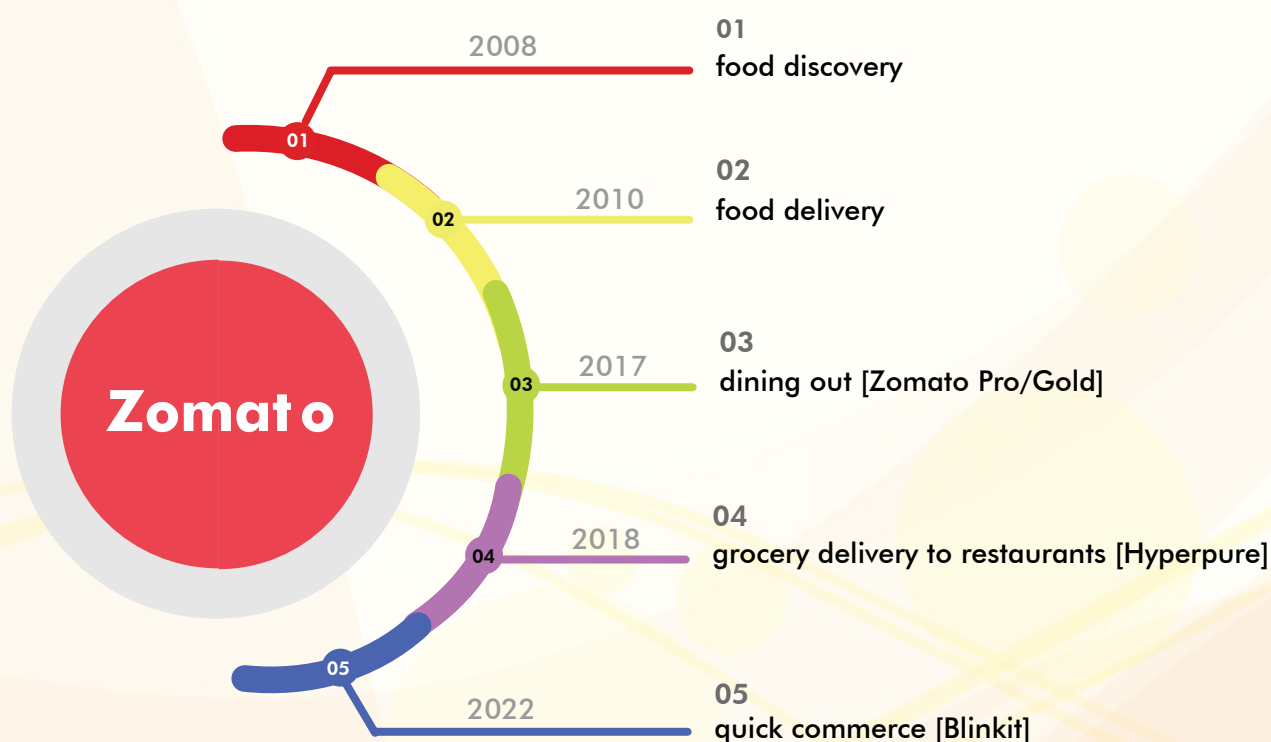


Figure 4.3: Zomato's horizontal expansions

⁹⁴ Conderelli D and Padilla J, 'Harnessing Platform Envelopment in the Digital World' (2019) 00 Journal of Competition Law & Economics 1 <<https://www.condorelli.science/ENVELOP.pdf>> accessed 22 March 2023

Zomato started out as a restaurant discovery service in the Delhi-NCR area in 2008. As a restaurant discovery platform [named Foodiebay], Zomato serviced around 2 million customers in the 2009-2010 period.⁹⁵ It was only in 2010 that it ventured into the food delivery market, before it captured a mammoth share of the market within a short period of time. When it entered the food delivery market in 2010, it already had access to data of millions of customers who had availed its food discovery and ordering services.

As mentioned above, the Competition Act considers the entry by a player in one market into another anti-competitive only if the said player was dominant in its primary market. There is sparse information available on the market share of Foodiebay in 2010, and hence any assumption regarding its dominance in the said market is purely speculative. What is relevant here, is the fact that Zomato had access to the data of millions of customers before it entered the delivery market, thus giving it zero to minimal customer acquisition cost. While it is evident that Zomato had leveraged its position in one market to enter another, its illegality in the Indian context is dependent upon whether Foodiebay was dominant in the relevant market. This contention was also raised by the complainant before the CCI in the Rohit Arora case,⁹⁶ but without grounding it in Section 4(2)(e). Perhaps due to the lack of legal foregrounding of the argument, the Commission did not get into this question. Moreover, the effects of leveraging data in one market to enter another were also not extremely significant in this context and at that time period. This, however, is not the case in 2023. Currently, Zomato, along with Swiggy, own the lion's share of the food delivery markets, having wiped out other competitors as well as restaurants from self delivery services. Having a clear duopoly in the food delivery sector, both these players continue to enter other markets, disrupting competition.

As of 2022, Zomato offers services in B2B supplies through Hyperpure and Dining Out services through Zomato Pro/Gold Memberships.⁹⁷ Besides these, it has also acquired Blinkit, a quick commerce platform, in what it terms a **“natural extension to [its] core food delivery business.”**⁹⁸

⁹⁵ Goyal D, 'Foodiebay – Second Innings' (*Zomato*, 13 November 2010) <<https://www.zomato.com/blog/foodiebay-second-innings>> accessed 7 March 2023

⁹⁶ *Rohit Arora v Zomato*, CCI, Case No. 54 of 2020 (Competition Commission of India)

⁹⁷ Zomato, 'Zomato Annual Report 2021-22' (*Zomato*, 2022) <https://b.zmtcdn.com/investor_relations_documents/zomato_annual_report_2022_1659701415938.pdf> accessed 7 March 2023

⁹⁸ Zomato (n 94)

4.4.2 Swiggy's horizontal expansions

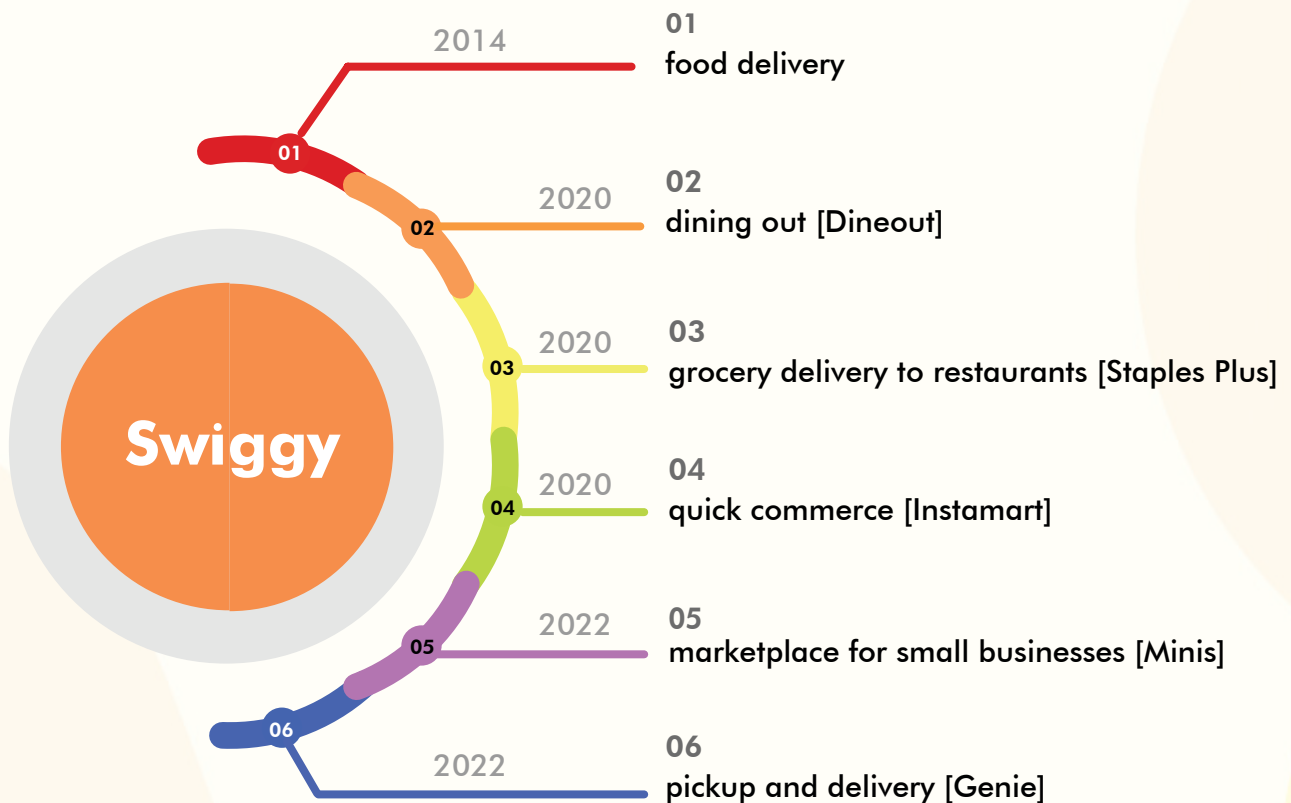


Figure 4.4: Swiggy's horizontal expansions

In major cities such as Bangalore, besides food delivery, Swiggy offers quick commerce services [Instamart], pick up and delivery [Genie] and dining out services [Dine-out]. In the pickup and delivery market, it competes with Dunzo, and in the dining-out market, with Zomato Pro/ Gold.

Swiggy launched Instamart in 2020. Anchored by dark stores,⁹⁹ Instamart provides convenience-based delivery of groceries and other products. At the time of its launch, the market already had major players in Blinkit, Jio Mart and Big Basket. Within a short span of time, Instamart had sailed through the difficulties in consolidating a significant market share in an already competitive market. Today, it holds 30 percent of the quick commerce market and is still growing.¹⁰⁰ Having been one of the two market leaders in the food delivery industry, Swiggy had an unfair advantage over other quick commerce platforms. Since Instamart is integrated into the Swiggy app, it has close to zero customer acquisition costs. By leveraging its position in the food delivery market, it was able to enter and entrench itself in the second market.

⁹⁹ Dark stores are physical warehouses that generally only fulfil online orders.

¹⁰⁰ Saha, 'Torn between Growing Competition and Tatas' Ambitions, \$3.2B BigBasket Is at a Crossroads' *The Ken* (24 January 2023) <<https://the-ken.com/story/torn-between-growing-competition-and-tatas-ambitions-3-2b-bigbasket-is-at-a-crossroads/>> accessed 8 March 2023

For digital platforms, expanding from one business to another is facilitated by economies of scope and scale. In Swiggy's case, for instance, stepping into grocery delivery when it has an entrenched position in the food delivery market means that it will not have to shell significant incremental expenses on the delivery fleet, logistics and the like. Economies of scope thus enable players to have reduced costs as a multi-product corporation than what it would have been as a stand-alone entity.¹⁰¹

4.4.3 Bundling as a strategy for horizontal expansions

The CCI defines bundling as a **“strategy whereby a seller bundles together many different goods / items for sale and offers the entire bundle at a single price.”**¹⁰²

In major cities such as Bangalore, Swiggy today offers food delivery services, quick commerce, dine-out, meat delivery and genie- all in the same application. A customer cannot access any of these services independently outside the Swiggy application. If a customer purchases Swiggy One, which started out as a premium membership that provided free delivery, they can also avail additional discounts on Dine Out, free delivery for quick commerce and avail discounts for its pickup and delivery services, thus clearly setting a case of bundling. Zomato has adopted the same model with Zomato Pro, but in expanding into its B2B market and grocery delivery market, it has adopted a non-bundled model. Though Zomato acquired Blinkit, it is unclear why Zomato has not integrated Blinkit's services into the Zomato app.

Literature suggests that platform envelopment through horizontal and vertical market entries can be pro-competition. In fact, Eisenmann's paper on platform envelopment places it as a positive way for firms to overcome entry barriers and establish it in a new market rather than as a manner in which dominant platforms in one market may spread their dominance across other markets. However, this does not rule out the anti-competitive potential of envelopment. For players that undertake envelopment, entry and deep discounting in the new market may be sustainable in the long run due to the deep pockets that they have accumulated in the original market. By continuing their exploitative strategy in the horizontal markets and by years of accumulated advantage over data through network effects, and economies of scale and scope, these platforms have now succeeded in limiting the pool of competition in their non-primary markets as well. On the other hand, for players that exist only in one market, keeping up with the low price structures and other market-capturing prac-

¹⁰¹ Fletcher A, 'Digital Competition Policy: Are Ecosystems Different?' (OECD, 9 November 2020) <[https://one.oecd.org/document/DAF/COMP/WD\(2020\)96/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf)> accessed 9 March 2023

¹⁰² *Shri Sonam Sharma v Apple Inc. USA*, Case No.24 of 2011 (Competition Commission of India)

tices might be difficult.¹⁰³ Unless the CCI keeps a tight rein on such practices, small players and kirana stores in markets such as quick commerce will succumb to the cannibalization of the larger players, just as it happened in the case of restaurants in the food delivery market.

4.5 Data in Digital Platforms: CCI's Approach

In five out of 32 cases where digital platforms were the subject of anti-competition proceedings before CCI, informants said or talked about data dominance. In eight cases, the CCI referred to it. But data dominance has never been at the heart of what the informant said or what the Commission found. Among the 32 cases against digital platforms, one case each was against Swiggy and Zomato, and one against both. Among these, data as a relevant factor was raised only in two cases.

In *Rohit Arora v. Zomato*,¹⁰⁴ the informant alleged that Zomato had a competitive advantage while entering the market by having accumulated millions of user data from its restaurant discovery services, resulting in zero customer acquisition costs. However, it did not have a substantial discussion on this allegation. Therefore, the Commission also did not discuss the issue. In *NRAI v. Zomato*,¹⁰⁵ the informants also averred that the data possessed by these platforms strengthen their market positioning, which dissuades other players from entering the market. In this case too, the CCI did not address the question of data dominance.

In *Harshita Chawla v. WhatsApp Inc. & Ors.*,¹⁰⁶ the informants alleged that the UPI-enabled digital payment market deals with customer-sensitive data. With the given volume of data, national security and data privacy can be compromised if the anti-competitive activities of the opposite parties (Whatsapp and Facebook) are left unchecked and unregulated, which can lead to national-level damage. Further, this can be used for targeted advertising. In this case, the Commission pointed out that Facebook and WhatsApp do, without a doubt, deal with sensitive customer data that could be misused and could raise antitrust concerns, among other data protection issues. However, in the present case, the informant has only alleged that WhatsApp and Facebook have access to data that is being used for targeted advertising. There is no concrete allegation or specific information to support the informant's competi-

¹⁰³ Condorelli (n 86)

¹⁰⁴ Rohit Arora (n 88)

¹⁰⁵ National Restaurants Association of India (n 58)

¹⁰⁶ *Harshita Chawla v WhatsApp Inc.*, Case No. 15 of 2021 (Competition Commission of India)

On the other hand, in *Matrimony v. Google LLC*,¹⁰⁷ Google argued that for the application of Section 4 of the Act, there had to be a sale of goods or services, but the online search services provided by Google were free and hence would not attract the provisions of Section 4 at all. The CCI categorically disagreed with this contention made by Google. It held that users provided indirect consideration to Google by contributing to the collection of “**big data**” every time they availed of its search services, which enabled Google to attract advertisers. Moreover, each time users clicked on advertised links provided by Google, ad-based revenue was generated for the company. For the first time in this case, the Commission acknowledged the economic importance of big data.

Further, in the *FHRAI v. MMT* case,¹⁰⁸ though the informant did not allege any data dominance by MMT, the DG remarked that:

“*MMT-Go possesses large inventory data along with high consumer outreach, which creates network effect and thus, provides it with competitive advantage. Thus, by virtue of vertical integration causing exclusion of key players and network effects, MMT -Go has been able to create entry barriers in the market. (Para 31)*”

The Commission also observed that:

“*recent reports and studies (national as well as international) strengthen this conviction by showing how a few large platforms can control on-line distribution because of a variety of factors, including strong network effects in the digital environment, and their ability to access and accumulate large amounts of data. These characteristics equip these large platforms with such market power that their actions can influence and affect competition among business users significantly. (Para 307)*”

¹⁰⁷ *Matrimony.com Limited v Google LLC*, Case No. 07 and 30 of 2012 (Competition Commission of India)

¹⁰⁸ *Federation of Hotel & Restaurant Associations of India v MakeMyTrip India Pvt. Ltd.*, Case No. 14 of 2019 (Competition Commission of India)

In XYZ v. Alphabet Inc,¹⁰⁹ the Commission, acknowledging the data dominance Google had, stated in one instance that:

“

Google would not only have the ability to collect data but also incentive to use this data for its other verticals, viz., creating consumer profiles and monetizing the same through search advertising services, other paid services offered by Google, identifying and enter into new markets, etc.,

”

Hence, while the Commission has acknowledged the potential of data as a contributing factor in assessing dominance, it has stopped itself from delving deeper into this question, and establishing dominance based on data alone. This could be due to two reasons: the lack of explicit recognition of data dominance under the Competition Act, and the nascency of the application of data dominance even in foreign jurisdictions. However, there is nothing in the Competition Act that prevents the CCI from entering into questions of data dominance.

¹⁰⁹ XYZ v. Alphabet Inc, Case No 7 of 2020 (Competition Commission of India)

Part 5 - Regulation of Data Abuses: Existing Structure and Recommendations

5.1 Policy Initiatives to Regulate Data as a Tool to Pursue Anti-Competitive Practices

Though the law does not recognise or regulate the use of data as a tool to pursue monopolistic practices, certain recent policy measures have attempted to curb the abuse of data dominance. These are:

a. ONDC: In 2021, the Department of Promotion of Industry and Internal Trade [“**DPIIT**”] set up the Open Network for Digital Commerce [“**ONDC**”], based on open-sourced network protocols. Open networks such as the ONDC transcend the platform-centric model which restricts the interaction of the buyers and sellers within the bounds of the platform, and sets out to democratise e-commerce such that all sellers can be connected with all buyers, thus breaking open closed seller groups in respect to a specific platform. ONDC allows for interoperability, enabling sellers and buyers to transact with each other regardless of the platforms they use.¹¹⁰

¹¹⁰ ‘Open Network for Digital Commerce’ (Consultative Paper, January 2022) <<https://www.medianama.com/wp-content/uploads/2022/03/ONDCStrategyPaper.pdf>> accessed 23 March 2023

Built-in features of ONDC like algorithmic transparency and portability of ratings and reviews of sellers give an upper hand to sellers and restaurants vis-a-vis existing platforms. This is because ONDC protocol requires sellers to transparently state their algorithmic preferencing criteria and even be subject to audits to make platforms remain accountable to these disclosures. ONDC protocol also disallows platforms to prefer their closed group of vendors while broadcasting a query for a product or service. Thus to some extent, ONDC helps to disrupt oligopolistic tendencies. However, ONDC protocols don't make it compulsory for buyer apps or seller apps to disclose their data, which will still be held within walled gardens of the respective apps.

b. FDI Policy on E-Commerce: Changes to the FDI policy made in 2019 prohibit e-commerce entities from selling their own products on the marketplace run by them.¹¹¹ Both Swiggy and Zomato have foreign investments and are hence expected to comply with the FDI policy. However, Swiggy still continues to run its cloud kitchens on the platforms, and has so far, not been penalised by the appropriate authority.

c. Categorisation and Regulation of SIDIs: On December 19, 2022, the Standing Committee on Finance adopted the Fifty Third Report on Anti-Competitive Practices by Big Tech Platforms. The report recognised anti-competitive practices weighing down digital platforms, including self-preferencing, bundling and tying, and data usage, among others. The Committee recommended the enactment of a separate Digital Competition Act, in what is the first official acknowledgement that the current Competition Law regime is insufficient to deal with anti-competitive concerns exclusive to digital markets. The structure and content of the proposed Act seem to be more or less in line with the European Union's Digital Markets Act [**"DMA"**], which regulates gatekeepers of big data. The Committee recommended identifying **"leading Big Tech players,"** or Systemically Important Digital Intermediaries [**"SIDI"**] and subjecting them to ex-ante regulations. While the Committee stopped short of defining what would constitute a SIDI, it hinted towards a similar approach as taken by the EU: using revenues, market capitalisation and users as the parameters to identify a SIDI. This approach is effective to the extent that it removes **"dominance"** as a precondition to investigate abuses. Resultantly, all the big players in the various digital markets will be subject to the law, as long as they fulfil the thresholds set by the law.

¹¹¹ 'Review of the policy on Foreign Direct Investment (FDI) in e-commerce' (Press Note No. 2, 2018 series, Department of Industrial Policy and Promotion) <pn2_2018.pdf (dpiit.gov.in)> accessed 22 March 2023

Some of the key anti-competitive practices that the proposed Act is expected to address are steering, self-preferencing by platforms, bundling and tying, cross-use of personal data across platforms, and deep discounting [non-exhaustive]. For effective actualisation of the Act, the Committee also recommended the formation of a separate Digital Markets Unit within the CCI. Since the EU legislation has only been in operation for a few months,¹¹² there is no evidence on whether such a structure is sufficient to address data-related abuses in digital platforms. Currently, a Committee has been set up by the Union Government to draft a Digital Competition Act for the country.¹¹³ It remains to be seen whether the Committee will emulate the model set out by the DMA or take a differential approach keeping in mind India's competition jurisprudence and market realities.

5.2 Market Responses against Anti-competitive Practices

a. Alternate platforms: While the FSA market is still dominated by Swiggy and Zomato, smaller alternatives that do away with some of their abusive practices, have sprung up in recent years. Applications such as Thrive, DotPay and Peppo, allow restaurants to be discoverable on their platforms, without having to pay exorbitant commissions. Besides charging only a small percentage of their order values, these platforms also provide restaurant partners access to customer data, and give them options to set up their own delivery infrastructure.¹¹⁴

b. Co-operative models: Platform co-operatives are digital platforms that are collectively owned and run by producers/ sellers/ service providers themselves. Such a model ensures a higher share of the revenue for these parties without an intermediary platform squeezing out high commissions or hoarding data, which is later used

¹¹² The Act entered into force on November 1st, 2022. However, most provisions, including those related to the identification of gatekeepers, will only be applicable from May 2nd, 2023.

¹¹³ 'Constitution of the Committee on Digital Competition Law- regd' (Order by the Ministry of Corporate Affairs, 6 February 2023) <<https://images.assettype.com/barandbench/2023-02/7e93ae0c-05b9-4565-9b5b-a9a6103ac6ff/Order.pdf>> accessed 20 March 2023

¹¹⁴ Tarini Sood, 'Could food delivery platforms like Thrive be the end of the Zomato and Swiggy duopoly?' *India Food Network* (8 June 2021) <<https://www.indiafoodnetwork.in/foodstory/trends/could-food-delivery-platforms-like-thrive-be-the-end-of-the-zomato-and-swiggy-duopoly-753913>> accessed 8 March 2023; Priyanka Sahay, 'Restaurants look for alternatives as Swiggy, Zomato serve them raw deal' *MoneyControl* (25 May 2021) <<https://www.moneycontrol.com/news/business/restaurants-look-for-alternatives-as-swiggy-zomato-serve-them-raw-deal-6932471.html>> accessed 8 March 2023

to benefit the platform and harm the sellers. While this model is yet to find widespread grounding in India, mobility apps such as Namma Yatri¹¹⁵ run by auto drivers in Bengaluru,¹¹⁶ and RezoY run by restaurant owners in Kerala¹¹⁷ have presented an alternative model to check the dominance of big tech players without the support of third-party platforms. Though platform co-operatives do not grow rapidly due to limited access to large-scale venture capital, they foster an equitable competitive environment through better revenues to stakeholders such as drivers/ hoteliers etc. The Drivers Cooperative in New York for instance, has slowly, and consistently, added on more passengers and drivers onboard due to its lower passenger fares and higher driver revenues.

5.3 Recommendations

As seen above, the power of data is being increasingly recognised in antitrust practices. A trifecta approach that includes legal and policy measures, private market responses and public/government innovations is needed to address the challenge holistically, without having a chilling effect on innovation or competition. Even as India looks forward to the large-scale adoption of ONDC and platform co-operatives, a law that regulates competition in digital markets and the use of data to pursue anti-competitive practices is critical. Lastly, the following measures will supplement measures that are already in the pipeline to mitigate antitrust effects resulting from access to large-scale data by digital platforms:

a. Improve the technical capacity of CCI: The law requires the Competition Commission to have a Chairperson and between two to six other members.¹¹⁸ Under Section 8(2) of the Competition Act, such persons who have adequate experience in areas including **“international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy”** may be appointed to the Commission upon recommendation by the Central Government. The new amendment to the Act passed in March 2023¹¹⁹ has included technology as one of the areas in which experience shall be counted. However, it is not mandatory to have one such member.

¹¹⁵ The Namma Yatri application has been developed and is run by Juspay, a payments platform. However, the application merely hosts the drivers and the customers, and does not extract commission charges or operate in the traditional ‘middleman’ role, like Uber and Ola.

¹¹⁶ Yamini CS, ‘Bengaluru auto unions to launch mobile app Namma Yatri to challenge aggregators: Report’ *Hindustan Times* (7 October 2022) <<https://www.hindustantimes.com/cities/bengaluru-news/bengaluru-auto-unions-mobile-app-namma-yatri-in-challenge-to-aggregators-101665116854972.html>> accessed 23 March 2023

¹¹⁷ Neethu Joseph, ‘To combat Swiggy, Zomato etc, Kochi restaurant owners launch app’ *The NewsMinute* (1 February 2021) <<https://www.thenewsminute.com/article/combat-swiggy-uber-eats-etc-kochi-restaurant-owners-launch-app-142569>> accessed 23 March 2023

¹¹⁸ Competition Act 2002, s 8

¹¹⁹ Competition Amendment Bill 2023, s 9

A significant number of high-value cases that come up before the CCI related to digital platforms and the like, are left to retired bureaucrats without specialised training or experience in digital markets to adjudicate. The inclusion of members with specialised knowledge in technology will equip the Commission with expertise to better address competition issues in digital markets.

The CCI has been facing a resource crunch and it is reported that nearly 30% of open positions remain unfilled.¹²⁰

b. Data Privacy Practices to Regulate Competition: Lack of a law that governs the flow of data across platforms or services paves a path for the accumulation of data by platforms or service providers. With the introduction of super apps that allow a platform to provide multiple services in a single application, access to multiple datasets has become easier for a single platform. There is a need for stronger data privacy practices that govern the flow of data. Along with the prerequisite of the consent of data principals to share data, there is a need for the law to pre-define the purpose of collection and restrict the use of data in specific sectors. The draft data protection law issued in December 2022,¹²¹ is not reassuring of healthy data privacy practices, since it provides sweeping powers to big tech to collect data for any legitimate purpose under the concept of “**deemed consent.**”

c. Data to also be considered in reporting related party transactions: Related party transaction wherein there is a transfer of resources, services or obligations between related parties, regardless of whether a price is charged has to be disclosed as per the Companies Act¹²² and SEBI (LODR).¹²³ It is recommended that whenever there is a flow or sharing of data within related parties, the same be reported as a related party transaction. Such a disclosure will inform the extent of data available to an entity and bring accountability since data is a commodity that strengthens the market power of an entity.

d. Enabling Platform Co-operatives: Besides direct regulatory interventions that restrict anti-competitive data practices, competition can also be furthered by enabling market stakeholders to set up their own co-operative entities. Players such as

¹²⁰ Menaka Doshi, 'CCI's resource woes: India's antitrust agency squeezed by staff vacancies, workload' *Economic Times* (9 March 2023) < <https://economictimes.indiatimes.com/news/india/india-antitrust-agency-squeezed-by-staff-vacancies-and-workload/articleshow/98508824.cms?from=mdr> > accessed 20 March 2023

¹²¹ Digital Personal Data Protection Bill 2022, s 8

¹²² Companies Act 2013, s 188

¹²³ SEBI (Listing Obligations and Disclosure Requirements) Regulations, reg 23

restaurants and drivers are the first casualties of anti-competitive practices by big tech firms. Creating an enabling ecosystem for such players to set up their own platform cooperatives will level the playing field. Since co-operatives are not expected to grow at the same rates as big tech platforms, they get limited funding from investors. Making co-operatives eligible for tax-exempt grant funds and running platform cooperatives on a PPP model will help bring more players into the market without having to wield the regulatory big stick.

e. Digital Record Keeping: The landscape of anti-competitive practices being followed by FSAs (and by extension e-commerce platforms) is constantly changing. For instance, in March 2023, Swiggy announced one month of zero commission partnerships with new restaurant partners,¹²⁴ while Zomato at the same time was increasing its commissions chargeable on restaurant partners by 5%-6% upto 28% of the order value.¹²⁵ The duopoly players are both loss making companies and are still evolving their business and market strategies, meaning that terms of use for users and restaurant partners, algorithms that optimise search results are constantly changing without leaving any record or digital footprint of historical practices for posterity. As per the Competition Act, the burden of proving that anti-competitive practices have been pursued and have affected, falls upon the party making the allegation, and is post-facto i.e after the anti-competitive practice has been pursued and the damage suffered by the smaller players. This is particularly poignant in the case of self-preferencing of Swiggy/Zomato cloud-kitchens. The experiment we conducted (see page 46) also could not prove self-preferencing of cloud kitchens, because the platforms no longer preference their cloud kitchens. Though the cloud-kitchen preferencing did harm restaurants in the past, as alleged by NRAI in its complaint before the CCI the NRAI now has no way of proving this, thus weakening its case before the CCI.

To overcome this challenge, it is recommended that e-commerce platforms are mandated to retain, as a form of record keeping, all prior versions of algorithms, terms of use and privacy policies in order to enable complainants' demand for such information at a future point of time. The term for such record keeping should be contemporaneous with the period of limitation for such legal action.

¹²⁴ 'Swiggy Launchpad Offers 0% Commission For Partners New to Swiggy' (*Swiggy*, 17 March 2023) <<https://blog.swiggy.com/2023/03/17/swiggy-announces-swiggy-launchpad-with-0-commission-for-new-restaurant-partners/>> accessed 17 March 2023

¹²⁵ Sowmya Ramasubramanian, 'Zomato Seeks Higher Commission from Restaurants As Food Delivery Business Slows' *Yourstory* (27 February 2023) <https://yourstory.com/2023/02/zomato-asks-for-higher-commission-from-restaurants-food-delivery-slows?utm_pageloadtype=scroll> accessed 28 February 2023

Annexure I








List of cases analysed

SI No.	Cause Title	Relevant market	Relevant Section	Whether Dominant	Abuse of Dominance	Decided/ Undecided
1	Umar Javeed and Ors v. Google LLC (2022)	Search engine	Sec 4	Dominant	Abuse of dominant position	Decided
2	Rohit Arora v. Zomato Private Limited (2022)	FSA	Sec. 3&4	Not dominant	No Abuse	Decided
3	NRAI v. Zomato (2022)	FSA	Sec. 3&4	Prima Facie Dominant	Prima Facie Abuse	Undecided
4	AIOVA Sellers Association v. Amazon Sellers & Ors. (2022)	E-commerce	Sec 3	NA	NA	Undecided
5	News Broadcasters & Digital Association v. Alphabet, Inc. and Ors. (2022)	Search engine	Sec. 4	Prima Facie Dominant	Prima Facie Abuse	Undecided
6	Meru Travel Solutions Private Limited vs Uber India (Delhi NCR case) (2021)	Cab Aggregator	Sec. 3 & 4	Not Dominant	No Abuse	Decided
7	Updated Terms of Service and Privacy Policy for WhatsApp Users vs. WhatsApp LLC and Ors. (2021)	OTT chat	Sec. 3 & 4	Prima Facie Dominant	Prima Facie Dominant	Undecided
8	Prachi Agarwal v. Urbanclap Technologies India Private Limited (2021)	Salon service	Sec. 3&4	Not Dominant	No Abuse	Decided
9	Baglekar Akash Kumar v. Google LLC (2021)	Search engine	Sec 4	Not Dominant	No Abuse	Decided
10	Together We Fight Society v. Apple Inc (2021)	Search engine	Sec 4	Prima Facie Dominant	Prima Facie Abuse	Undecided
11	Kshitiz Arya v. Google LLC (2021)	Search	Sec 4	Prima Facie Dominant	Prima Facie Abuse	Undecided
12	Harshita Chawla v. WhatsApp Inc. and Ors (2020)	OTT chat	Sec 4	Dominant	No Abuse	Decided
13	Prachi Agarwal v. Bundl Technologies (2020)	FSA	Sec.4	Not Dominant	No Abuse	Decided
14	Satyen Narendra Bajaj v. PayU Payments Private Limited and Ors (2020)	FinTech	Sec. 3&4	Dominant	No Abuse	Decided
15	In Re XYZ v. Google (2020)	Search engine	Sec 4	Dominant	Abuse of dominant position	Decided
16	RKG Hospitality Pvt v. Oravel Stays Pvt. Ltd (2019)	Hotel Aggregator	Sec 4	Not Dominant	No Abuse	Decided
17	Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Ors. (2019)	Search engine	Sec 4	Prima Facie Dominant	Prima Facie Abuse	Undecided
18	Federation of Hotel and Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. and Ors.(2019)	Hotel Aggregator	Sec. 3 & 4	Dominant	Abuse of dominant position	Decided
19	Meru Travel Solutions Pvt Ltd vs ANI Technologies (2018)	Cab Aggregator	Sec. 3 & 4	Not Dominant	No Abuse	Decided
20	Samir Agarwal v. ANI Technologies (2018)	Cab Aggregator	Sec. 3 & 4	Not Dominant	No Abuse	Decided
21	Satyen Narendra Bajaj v. PayU Payments Private Limited and Ors (2020)	FinTech	Sec. 3&4	Dominant	No Abuse	Decided

SI No.	Cause Title	Relevant market	Relevant Section	Whether Dominant	Abuse of Dominance	Decided/ Undecided
22	Justickets Pvt. Ltd. vs. Big Tree Entertainment Pvt. Ltd. and Ors (2017)	Other	Sec. 3 & 4	Not Dominant	No Abuse	Decided
23	Fast Track Call Cab Pvt Ltd and Ors vs ANI Technologies Pvt. Ltd. (2017)	Cab Aggregator	Sec. 3 & 4	Dominant	No Abuse	Decided
24	Vilakshan Kumar Yadav and Ors. v. ANI Technologies Private Limited (2016)	Cab Aggregator	Sec 4	Not Dominant	No Abuse	Decided
25	Confederation of Real Estate Brokers' Association of India Anmol v. Magicbricks.com Times Centre and Ors (2016)	Real Estate Aggregator	Sec.4	Not Dominant	No Abuse	Decided
26	Mega Cabs Pvt Ltd vs ANI Technologies Pvt Ltd. (2016)	Cab Aggregator	Sec. 3 & 4	Not Dominant	No Abuse	Decided
27	Rishabraj Logistics Limited v. Orix AutoInfrastructure (2016)	Cab Aggregator	Sec 3	Not Dominant	No Abuse	Decided
28	Taj Pharmaceuticals Ltd. and Ors. v. Facebook and Ors. (2015)	Social Media	Sec 4	Not Dominant	No Abuse	Decided
29	Cloudwalker Streaming Technologies Private Limited v. Bennett, Coleman and Co. Ltd.(2015)	Other	Sec 4	Not Dominant	No Abuse	Decided
30	Meru Travel Solutions Private Limited v. Uber India (Kolkata case) (2015)	Cab Aggregator	Sec. 3 & 4	Not Dominant	No Abuse	Decided
31	M/s Albion InfoTel Limited v. Google LLC. (2014) and Vishal Gupta v. Google LLC (clubbed)	Search engine	Sec 4	Prima Facie Dominant	Prima Facie Abuse	Undecided
32	Ashish Ahuja vs. Snapdeal .com (2014)	E-commerce	Sec. 3 & 4	Dominant	No Abuse	Decided
32	Matrimony v. Google (2012)	Search engine	Sec. 3 & 4	Dominant	Abuse of dominant position	Decided

Annexure II

Swiggy's Investment Portfolio

Company Name	Company Brief	Acquired/ Invested	Acquisition/ Investment Amount	Acquired/ Invested in (Month,Year)	Purpose of Acquisition/ Investment
	Booking Service	Acquisition	\$120 Mn	May 2022	To Get Into Restaurant Listing
	Bike-Taxi Startup	Investment	\$125 Mn	April 2022	To Scale Up last Mile Delivery
	Restaurant Management	Investment	Undisclosed	April 2022	To Improve Operations
	AI Stratup	Acquisition	Undisclosed	February 2022	To Improve Customer Experience
	Milk Delivery	Acquisition	Undisclosed	September 2022	To Deliver Products Beyond Food
	On-Demand Delivery	Acquisition	\$6.44 Mn	August 2022	To Target Premium Segment
	Gourmet Food Startup	Acquisition	Undisclosed	December 2022	To Strengthen Supply Business

Zomato's Investment Portfolio

Company Name	Company Brief	Acquired/ Invested	Acquisition/ Investment Amount	Acquired/ Invested in (Month,Year)	Purpose of Acquisition/ Investment
	Grocery delivery	Acquired	\$568 Mn	June 2022	Scaling Up Quick Commerce
	Restaurant Management	Invested	\$5 Mn	April 2022	To Improve Operations
	Food Robotics	Invested	\$5 Mn	March 2022	Automate Food Preparation For Restaurants
	Logistics Startup	Invested	\$75 Mn	December 2021	Scale Up Logistics
	Adtech Startup	Invested	\$14.43 Mn	January 2022	Customer Acquisitions
	Hyperlocal Discovery	Invested	\$50 Mn	November 2021	Diversify Business
	Healthtech	Invested	\$200 Mn	December 2021	Healthy Food Play
	Food delivery	Acquired	\$350 Mn	March 2020	Increase Market Share
	Cloud Kitchen	Invested	\$15 Mn	June 2018	Expand Operations, Outlet
	Meal Delivery	Invested	Undisclosed	September 2017	To Offer Healthy Meals
	Hyperlocal Delivery	Invested	Undisclosed	September 2015	Last Mile Delivery

Source: Inc42¹²⁵

¹²⁵ Gargi Sarkar, 'Zomato Vs Swiggy: Will M&A Spree Solve Profit Puzzle For Food Delivery Giants?' Inc42 (27 July 2022) <<https://inc42.com/features/zomato-vs-swiggy-will-ma-spree-solve-profit-puzzle-for-food-delivery-giants/>> accessed 23 March 2023