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Doctrine of Abuse of Dominance in the Digital Age

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Abstract: Law of abuse of dominance forbids a dominant firm from misusing its position against competing firms. This doctrine is the foundational concept of harm, to analyze the adverse effect of a firm's behavior, on the anticompetitive effects ultimately causing competitive harm. A formalistic and effect-based approach has been historically used to analyze this harm. However present digitalization focuses the inclination on effect-based approach. The uniqueness of digital markets and digital products is making it difficult for authorities to challenge the assessment of such harm. Two common abusive conducts refusal to deal and tying and bundling have been identified by authorities. This study explores the evolution of doctrine of abuse of dominance and the role played by theories of harm and economic theories on its modification over time. It further discusses the conduct of refusal and tying of the digital markets and the challenges it poses for assessment. The research suggests that peculiarity of digital products and markets assess the actual effect of firms' conduct in a more judicious way, to categories harm. A collaborative approach can be explored for the emerging new avenues of harm to competition. Protection of consumer interests must alone remain the guiding factor for any policy made for digital markets, and that alone shall accord justifications for taking enforcement actions.

Keywords: Formalistic analysis; effects-based analysis; competition laws; theory of harm; abusive conduct in digital market; anti-competitive conduct; refusal to deal

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1. Introduction

Dominance of a firm is an acknowledged fact under the competition laws. Various factors may lead to a firm achieving a dominant position like innovative business practices, novel business models, and its aggressive competitive practices. Digital markets are the prefect place where anti-competitive practices may manifest themselves in unimaginable ways.[1] These markets pose a significant challenge for the enforcement of abuse of dominance competition tools. They are feared to project "kind of harm" that the doctrine on abusive behaviors by firms intends to prevent. Analyzing the "harm" can theoretically be difficult, due to possibility of errors leading to incorrect judgements. The concept of abuse of dominance has been prevalent in different jurisdictions. In EU[2], India[3] and South Africa[4] it is termed as abuse of dominance, in US as monopolization[5], in Japan as private monopolization[6], relative practices in Mexico[7], misuse of market power in Australia[8] and in Brazil as anticompetitive conduct.[9] Provisions dealing with doctrine of abuse of dominance are similar in most jurisdictions, they differ in implementation, however. Plausible reasons

1 https://one.oecd.org/document/DAF/COMP/GF(2020)4/en/pdf
2 Article 102 TFEU
3 Competition Act 2002, section 4(1)
4 Competition Act (No.89 of 1998), section 8
5 Section 2 Sherman Act
6 Act on the Prohibition of Private Monopolisation and the Maintenance of Fair Trade (Act No. 54 of 14 April 1947)
7 Federal Economic Competition Law
8 Section 46, Competition and Consumer Act 2010
9 Law 12.529/2011, Article 36.

for different terminologies and scope of the law of dominance are difference of significance accorded, and viewpoint held by authorities, interpretation difference by judicial bodies and different values and beliefs.

Some behaviors of firms are illegal under "law on abuse of dominance", it is however not expressly stated which or what conducts specifically fall under this category. It thus leaves the topic open to be ascertained through established legal standards (Elhauge 2023). The introduction of the concept of anti-competitiveness is the initial step towards formulating this criterion helping to distinguish which conduct must be regarded as condemnable (Maurice E. Stucke 2012). Formalistic approach, while is advantageous to competition law authorities, may lead to errors of over enforcement.[10] A theory of harm helps explain why a particular conduct shall be in contravention of competition law, how that conduct causes harm to competition and why it should be prohibited (Yan 2024). Refusal to deal implies denial to a certain input by dominant firm to its competitors having the effect of foreclosure of competition (Orbach and Grace 2018). Tying and bundling is a common phenomenon in digital markets. The possibility of modularity and linkages with other products in the form of hardware, software or web-based services) makes to be sold digital products being tied or otherwise bundled.[11]

This research aims to study the various aspects contributing to the formulation of law on abuse of dominance like theories of harm, economic theories, and the consequence effects on the law itself. The research analyses the effect of abuse of dominance practice on competition in digital markets, and the challenges faced by competition law authorities in detecting such conduct

2. Formalistic Versus Effects-Based Analyses

Two approaches, namely formalistic approach and effect-based approach have been prevalent, since earlier times in determining abusive behaviors by firms holding dominant positions. Formalism also known as "form based" approach refers to "decision making constrained by rules, excluding considerations from the process of decision making" (Lindeboom 2022). Formalism can be classified into sociological formalism and analytical formalism. Social formalism states that those involved in drafting laws declare some knowledge, which does not fit in their parameters of prepositions, as "extra" and exclude it from inclusion into law. This has the effect of making law a closed domain. The result is that certain knowledge is regarded "extra-legal" and not considered in legal reasoning (Luhmann 1992). Analytical formalism is about micro level legal reasoning and legal philosopher Andrei Marmor. This approach is also known as mechanical, deductive, automatic or apolitical (Kennedy 1973). But as explained by Marmor, "there is nothing mechanical about solving so-called easy cases whatever those maybe" (Dworkin 1986). He asserts that applying a rule to fact can never be "mechanical" and for evaluation, choices will always have to be made (Garner and Antonin 2012). Schauer regards formalism "as choices of decision-makers constrained by rules" Rules, according to him are "devices that mediate between purpose and certain decisions", furthering the purpose of law applied. In the absence of rules, says Schauer, "decision-makers could decide on the basis of all relevant considerations of the individual case". The effect of applying rules is that one cannot consider any relevant fact that may be relevant to the case in hand. This is the restrictive side of application of rules only. "Formalism is therefore identical to "ruleness" and "rule-based decision-making" (Schauer 1988). It however does not imply that decisions shall be made in a mechanical manner. An argument in support of formal methods in deciding cases, is that it shall make it simple to decide (as one as to just apply the rule and not apply mind in considering any other factor). But this is not a correct analysis of the effect of application of form-based approach. Decisions cannot be made by just sticking to the rule specified for a particular case, assessment of the facts surrounding the case, evaluation of evidence presented shall have to be made in any case and then a choice will have to be made as to the right course of action. Rules can thus become reasons for a particular decision (Schauer 1988). This makes "formalism" not an absolute in practice. It is contended that at times, owing to the specific facts of a particular case, restricting rules alone for deciding may result in erroneous judgements or judgements that do not make any sense. One decision is thus inclined naturally to look for other considerations that can help him in giving a judgement that does not just put an end to the dispute in question but also makes sense.

Formalism in judicial decisions is known as Legal Formalism. Formalism is used specifically in reference to substantive legal tests. "Naked horizontal price-fixing agreement being declared as unreasonable restraint of trade (in U.S. antitrust law), [12] and the rule that restrictions of competition by object are by definition appreciable (in EU competition law)" [13] are examples of substantive legal test. It is important to note, that a "rule" is never applied in isolation from the purpose underlying its creation. When courts apply naked prohibition on horizontal price fixing agreements, they know the objective such Rule purports to achieve. Moreover, not all legal tests are formalistic, and legal formalism is not always a substantive legal test. Substantive legal tests themselves can be formalistic in degree. For example, under EU competition laws, the test applied to price discrimination by dominant undertaking itself "includes all things considered.[14] " Formalism as a theory only aims at providing conceptual clarity. It does not dictate or provides as to how the Courts must decide. An important question that one may ask is What significance does the formalistic approach have under competition law? How is competition law benefited by adopting form based reasoning or formalistic approach to decision making? Formalism is said to have a liberating effect. Liberating effects in the sense that decision makers are freed from the burden of considering other relevant considerations associated with a particular case and has to decide the case as per the prescribed rule. But formalism can also be constraining. It may not allow decision makers to consider considerations that may otherwise be helpful in deciding a case. Whatever the criticisms, formalism remains a widely accepted approach for deciding competition law cases.

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10 Ibid,1

11 Ibid.1

12 *United States v. Trenton Potteries , (1927) 273U.S. 392*

13 Expedia Inc .v. Autorité de la concurrence and Others , (2012) EU795,para.37.

14 Post Danmark A/S v. Konkurrencerådet,(2012) EU 172,para.26

Effect based approach does not function on pre-decided rules to decide cases but analyses each case as against the prevailing circumstances surrounding that case. While formalism shall consider some conducts per se anticompetitive, effect-based approach shall require proving of actual harm.

A case of abuse of dominance is not considered per se illegal. But since dominant position can easily be exploited (under certain circumstances) by firms to their advantage, often at the cost of other competing firms, it is advisable to consider each case on its own merits. The two approaches of formalistic and effect based have its own strengths and limitations. Abuse of dominance is an anticompetitive conduct that causes harm to competition. Having said so, what are the anticompetitive conduct under the law of abuse of dominance? It is interesting to mention here that analysis depends on the application of legal standards (Elhauge 2003). The particular case in hand is decided by applying the legal standards along with the analysis of information collected and relevant facts obtained relating to the case (Beckner and Steven 1999). The law on abuse of dominance aims at preserving competition, and to that extent the concept of ant competitiveness acts as a guiding criterion for determining what shall be condemnable and what not (Stucke 2012). "Ant competitiveness" is the litmus test of ascertaining the harmful effects of a unilateral act by a dominant firm enjoying a position of dominance. The concept of ant competitiveness is studied along with the concept of competitive harm to elaborate on the logic as to how a unilateral act of any dominant firm may have adverse effects on the competition.

4. Dimensions of Theory of Harm

Conduct in question and Factual scenario at hand are two dimensions of theory of harm. Different conducts involve different theories of harm. Competitive harm is premised on conduct which is potentially abusive. Abusive practices by dominant firms can be categorized into different types at certain levels. One abusive conduct can entail more than one kind of harm. If in case two types of abusive conduct produce the same kind of competitive harm, there can still be different mechanisms through which that harm materializes. This implies that it can be expected that one theory of harm may be identical to types of abusive conduct.

Similarly, the theory of harm may vary according to individual case in hand. The reason being that each fact may present its own set of findings which may not relate to the other cases that may occur in future or those which might have already occurred in future. It may happen that a case may show findings that were previously not known (this may happen if a particular theory of harm was not developed at the time). It also happens that findings in a case decided today may fall in contradict to findings laid down in a case decided earlier on the same type of conduct (this may happen when owing to new theories of harm being evolved or existing one being modified).

Theory of harm is susceptible to change. With evolving economic understanding, both the classifications of abuse of dominance and the assessment of its implications have undergone transformation (Kovacic 2003). Any existing theory of harm is typically based on precedents decisions made in the past. The theory of harm so formulated serves as a guiding framework in ascertaining what is anticompetitive or what causes competitive harm. For example, based on the prevailing theory of harm the businesses can analyze whether any business conduct of theirs falls into the category of abuse of dominance and thus entail competitive harm. This provides at least some clarity. The changes to the theory of harm are constrained by past decisions. If the theory of harm changes completely it shall have the effect of making past decisions invalid. For this reason, it is expected that theory of harm of any time remains both logically sound and internally consistent at modifying harm theories so as to be explanatory in themselves, (b) could be replicated (Ezrachi 2017) This implies that theory of harm(like fact finding) could at least be applied by all stakeholders each time(helping them to ascertain when their conduct may fall in the category of causing competitive harm).

3. Legal Views

Harm under competition is understood as an adverse effect on competition. Under competition laws, understanding of this "harm" is termed as "theory of harm". It helps in explaining the reason, particular conduct is held to be in contravention to competition law. By studying the theories, it can be ascertained under what circumstances a firms can be termed as harmful for competition, justifying it to be prohibited.

The theories are a deductive analysis of practicality. They act as a bridge between "the abstract legal objectives and the factual scenario" (Yan 2019). The purpose of applying a law is to achieve desired outcomes. It is here where the theory of harm comes into play. The theory, in competitive harm analysis helps in demonstrating "How a business activity could cause anticompetitive harm, such that it should be deemed illegal?". It provides a justification for the actions taken up by the competition law authorities in declaring certain business conduct as prohibited.

There are two elements to the theory of harm namely identification of facts from a range of given circumstances and extracting the legal principles and the associated jurisprudence. When analyzing a case, decision makers must analyze information as gathered, which helps in making findings as to the relevant facts. This process is costly, and the outcome may be imperfect (as based on information gathered). To get a feasible outcome, the decision maker makes some presumptions (factual). These presumptions are made based on economics. With the help of half-baked information received concerning the case, attempt is made to ascertain what legal standards can be applied. This itself required an analysis of respective facts in question as each fact has a separate implication. Example: when determining the shares held in a market by any firm, it becomes important to analyze the legal significance of this number. Market share matters because it indicates market power. But it is the only indicator for this purpose. Such circumstances require legal reasoning for making judgements. It is important to note here that legal reasoning herein shall not be in isolation to economics, which shall underpin the legitimacy and sensibility of such reasoning (Yan 2019). Though theories explaining causation and effect of harm exist, they only serve as analytical outlines, they do not suggest the outcome.

5. Theory of Harm and Economic Theories

Study of economics and its principles contribute substantially in the development of the theory of harm. Economic theories have influenced competition laws and helped in defining the goals and objectives of abuse of dominance legal framework. (One

example is Article 102 TFEU). Economic theories, namely Ordoliberalism, The Harvard School and Chicago School have influenced competition laws and thereby the theory of harm.

Ordoliberalism is an economic theory developed in Germany. It is also sometimes referred to as German Neoliberalism. The theory was developed by German scholars and economists associated with Freiburg School. Ordoliberals propounded for a social market economy. They were against excessive concentration of power either in private or public and held that competition was the best way to avoid it. But the theory was not simply laissez faire. The theory advocated for a strong role of state. The state has the duty to provide a basic framework for fair competition and establish mechanisms to protect the interest of weak sections of society. The state must take active measures to foster competition. States' active participation is necessary to prevent the emergence of monopolies resulting in strong economic power which ultimately transforms into political power. Ordoloberalism is said to be the theoretical framework behind Article 102 of EU competition law. The objective enshrined in Article 3(f) of the EEC (Treaty of Rome) of putting a mechanism by which the competition in internal market should not be disturbed is said to resonate with the Ordoliberal thought. Later it became an important feature of EU competition law.

Harvard School introduced the concept of workable competition. The concept did influence the EU competition laws. The concept of workable competition served as the tool for integration of EU market. It laid the bedrock for open and contestable market structure seen in integration of EU markets. The concept resonated with the ordoliberal thought by integrating economic analysis with legal order, helping to find answer as to how public intervention can be made in private market (Yan 2019).

Chicago School promoted the concept of free market and advocated that the objective of any anti-trust policy is to ensure consumer welfare. The school talked about welfare from the perspective of efficiencies: productive efficiency and allocative efficiency. The school did not consider concentration bad, rather it held it to be a method by which efficiency can be achieved. Unilateral conducts like refusal to deal, vertical foreclosures and exclusive dealings were per se legal or justifiable by efficiencies. Concentration according to them helped detect collusion. From an extreme perspective it can be said that the school was against any form of government intervention and for this reason held anti-trust laws bad (Peeperkorn and Vincent 2014). On a less extreme approach the school suggested that focus of anti-trust laws must be on cartels and horizontal mergers (thus refrained from abuse of dominance enforcement). The school held cartel agreements to be highly unstable and temporary and thus supported a lenient approach (Posner 1979). Any theory of harm developed must clearly establish the nexus between the legal test applied and the economic harm caused by it. Merely proving that a particular conduct cause's harm shall not suffice, for many conducts may cause harm but not every harm may be in contravention to competition law. An important point herein is to understand that proving actual harm is not required, that a particular conduct has the potential of causing harm shall suffice (Yan 2019).

6. Theory of Harm and Associated Risks

Application of economic theories in antitrust cases involves "Risks", in other words it entails the occurrence of errors. Two kinds of risks or errors are associated with anti-trust enforcement (Lambert and Alden 2015). Firstly, when there is no harm to competition because of conduct in question, harm is affirmed. This is a case of excessive enforcement intervention. Secondly, not affirming harm when harm has occurred to competition. This is a case of lax enforcement. The former is termed as Type 1 error and the latter as a Type 2 error. [15]

The occurrence of type I errors is more prevalent. It is because in deciding antitrust cases by Courts and enforcement agencies are involved, both of which are criticized of having an in hospitable approach towards competition activities (Easterbrook 1984). Economic theories are being applied in antitrust laws to reduce the possibility of occurrences of these risks. It is so because study of economic theories gives a better understanding of anti-competitiveness of any business activity and that too with accuracy. It is because economic theories themselves have their limitations. Limitations of being continuously being revived (as by preachers of different schools). Thus, they may not be able to give an accurate version of what shall constitute an anti-competitive conduct in any given case (as the decision maker may have applied a particular thought propagated by a particular school). However, the use of economic theories in deciding antitrust cases is nevertheless beneficial for courts and enforcement agencies as they accord justifiability of their enforcement actions (Yan 2019). Economic theories are, however, not without flaws. They have their own false positives and negatives. An important task when applying an economic theory to antitrust case, faced by antitrust agencies, is striking a balance between economic accuracy and legal certainty (Sherwin 2005). Economic theories and tools are not accurate in themselves. As a result, they have to be applied with certain presumptions, extensive analysis with imperfect information (Sibony 2012). Concerns relate to over-enforcement and unnecessary encroachment by competition authorities ultimately causing consumer as well as economic harm. Daniele Condorelli and Jorge Padilla suggest a method to deal with the two types of errors (Condorelli and Jorge 2020).

Cases wherein the occurrence of type 1risk is unlikely, conduct must be declared as per se illegal. Cases where the likelihood of both types of errors is prominent, and the effects of type 2 error, consumer harm stays substantial, and conduct must be declared as anticompetitive subject to rebuttable assumption. That is the dominant firm shall be free to prove that the conduct in question did produce some efficiencies. Cases where the chances of occurrences of both types of errors is there, with the chances of type 1 error that is potential efficiencies higher, conduct again must be judged as legal, but the judgment shall be subject to be rebutted. The effect must be presumed procompetitive subject to infringement being proved by the concerned authorities causing harm to the consumers. When the possibility of type 1 error is relatively high, the conduct must be declared legal.

7. Abusive Conduct in Digital Markets

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[15] Ibid,1

Dominance understood as "the ability of firms to unilaterally raise prices above, or quality below, the competitive level". [16] It is usually defined in terms of market power (Easterbrook 1984).

Whatever the definition accorded to dominance by legislations of various countries, the economic rationale behind the harm related with the doctrine of abuse of dominance largely remains to be the same that is market power. The UK's guidance equates on abuse of a dominant position to "substantial market power."[17] When ascertaining whether a certain firm is dominant or not the first step is usually to analyze its market power in respect to the market it functions in. When analyzing dominance of a firm functioning through digital markets the first problem encountered is how to define a market? What is the relevant market for any firm in the digital market? This is because digital markets are multisided. Should one market alone be defined or multi markets be defined? This question is important because as per the economic principles a firm can have dominance only in one market.[18] Further dominance traditionally has been associated with market power, which in turn has been linked to pricing. But in digital markets price alone does not prove to be an effective criterion for determining dominance (like for example consumers can access digital platforms at zero prices also). Focus must therefore be shifted to parameters other than pricing alone, like (a) product features valued by consumers (b) Different dimensions of competition and associated trade-offs like price versus quality. Non pricing parameters also impact on the geographic scope, parameters like language constraints and cultural values must also be considered.[19] Though markets are multi-sided, attempts must be made to come up with a single definition. Platforms like online hotel booking can be regarded as a single market, as they deliver a like service (finding a match) to diverse groups of consumers,[20]

The next step after ascertaining the relevant market would be to identify the indicator that denotes that dominance is enjoyed by a certain firm. A firm becomes dominant in two situations: first there happens to be a lack of suitable alternatives in the market that could act as a potent substitute to the product of the firm and second there is restricted or no easy entry of potential competitors. This limited substitutability allows the firm to make decisions independent of market forces. This was exactly the case in the famous Microsoft Case. Deciding upon the question of whether Microsoft is in the relevant market, the European Commission held that there were few alternatives available to the direct consumers of Microsoft, also the final consumers had to incur very low switching cost. The arrival of new competitors had no impact on its profit earnings. Traditionally elasticity of demand has been the criteria to determine the substitutability of a product but for digital markets this alone shall not prove to be the correct criteria, and other factors too will have to be considered like data collection policy, service quality etc.

The possibility of high entry barriers is also an indicator of dominance (though indirect). High pricing is a popular criterion to determine entry barrier, but other factors also play a role like a new market regulation to which the existing firm may be exempted or infrastructures. It can be challenging to identify what exactly the constant entry barrier in digital markets. Firms in these markets benefit from large-scale operations thus enjoying cost advantages, like high fixed costs and low variable costs. Any entrant into the market may thus have to incur higher costs than the existing firms. Though after some time the new entrant shall be able to overcome the impediment of these costs as the firms shall be able to attract consumers, but the growth shall nevertheless be slowed down. Take the example of situation wherein due to loyalty towards a brand, the fixed costs are high because of which entering such a market by a new entrant may become difficult or not profitable at the very first instance.[21]

Another factor to be considered while determining indicator of entry barrier is the characteristics of network effects. To what extent do they exist or to how strong they are depending on market conditions, but it does help in analyzing the possibility of entering a new competitor. Consumers are hesitant to opt for different providers, either because of significant costs associated with switching from one provider to the other or restricted portability of data or just because of individual habit, or reluctance to new software network effects can pose significant barrier to entry. Data Collection is another potential factor. Existing firms are baled to gather large data of their consumers and can use it to enter new markets or influence consumer choice (by providing targeted goods and service), a facility that may act as a disadvantage to the new entrant. The fact that digital markets are multisided has also raised question about the feasibility of considering market shares as an indicator of dominance. If the market under consideration happens to be a platform, it shall have to be first analyzed whether it is multisided and then the market share of the firm in question shall have to be assessed. It is also possible in digital markets that sometimes firms which may not have good market share may still be enjoying a substantially large consumer base because of its service quality or innovative style of doing business, appealing the consumer tastes.

The application of anti-competitiveness criteria has been helpful (until now) for jurisdiction for analyzing abusive behaviors by firms as the criteria is in consonance with the objective of competition law, that is preservation of competition. [22] A more logical method of ascertaining adverse effects of any business conduct is however the concept of competitive harm (which rests on analyzing the effect of a particular business conduct).[23] What shall constitute harm under competition law so as to be termed as competitive harm, depends on the prevalent economic theory at the time. Economic theories have evolved over the years and have widened the dimensions of competition laws. It is evident from the fact that today competition laws are considered as guardians of consumers, focusing on consumer welfare, rather than just watchdog of markets. Most common types of abuse of dominance cases, analyzed till now, can be put under refusal to deal and tying and bundling.

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16 https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf

17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf

18 https://www.oecd.org/en/publications/development-co-operation-report-2018_dcr-2018-en.html

19 https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal

20 https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf

21 U.S. V. Microsoft(2001)

22 https://digitalfreedomfund.org/wp-content/uploads/2020/05/4_-DFF-Factsheet-Theories-of-harm-in-competition-law-cases.pdf

23 https://pure.rug.nl/ws/portalfiles/portal/81067423/Complete_thesis.pdf

7.1 Refusal to Deal

Refusal to deal: This doctrine focusses upon the aspect of the availability of a certain factor, whether technology or distribution network is denied by a dominant firm to its competitors. Foreclosure of inputs required to compete are collectively termed as input of convenience or as defined by BARAK ORBACH, as Essential Facilities (Orbach and Grace 2018). This foreclosure can be of two types: (1) Input Foreclosure (2) Customer Foreclosure. When access to an input necessary to compete is foreclosed for its rivals by the dominant firm it is known as input foreclosure, while when foreclosure is in respect to distribution network, preventing consumers from selling to the consumers, it is known as Customer Foreclosure (Easterbrook 1984). Refusal to deal can be conditional, that is when purchaser has to agree to certain conditions like exclusivity, unconditional or at times it can also be constructive refusal.

Analyzing refusal to deal becomes particularly complex in the context of digital markets. For example, if a firm is dominant upstream and it refuses to share input with a competing firm downstream, refusal under such circumstance may not be always for exclusionary purposes. Firm may take such decisions to gain efficiency. In digital markets this theorem may not work as a firm may be dominant either only upstream or downstream or it may be that downstream firm is a competitor in multiple markets. If dominant firm is obligated by enforcement authorities to share an important input, incentives to manufacture its substitutes may be killed. There shall be no incentive for rival firms to innovate. Analysis of cases of refusal to deal thus becomes complicated. Enforcement action taken against such dominant firm, intending to prohibit any adverse effect on competition in general as well as consumers, may in effect cause corollary damage to competition. It is suggested that rather than focusing on harm caused by any refusal to deal conduct, what economic sense if any such conduct makes must be focused on.

In products relating to technology, certain standards are adhered to boost innovation and interoperability. The refusal to share a patent or licensing under restrictive conditions may be viewed as a form of foreclosure but is a way of adhering to the standards required. Firms in digital markets may issue injunctions for rivals preventing them from using a particular technology. Such cases are typically resolved through contract litigation rather than being classified as refusal to deal cases under competition law.

Indispensability of input plays a crucial role in cases of refusal to deal. When analyzing an act of foreclosure by conduct of any firm, indispensability of the input is investigated. If an input has easily available substitutes, or can be duplicated, the conduct of the firm contested as having the effect of foreclosure shall not sustain. For example, in the EU, refusal to deal cases are generally evaluated with respect to whether an input is "objectively necessary to compete. Data is considered an indispensable input in digital markets. Data is useful to establish networks, identify potential consumers (e.g. through digital advertising), provide enhanced quality products at personalized pricing, launch of a new product and implement various other business strategies. It is argued that one needs to have a database if one wishes to compete in digital markets. Data for various purposes is maintained as datasets (which are collection of individual data points), it is unclear at what point does a dataset become indispensable. Secondly the insights can provide through a particular data and cannot be obtained from any other source. It is a known practice that data can be purchased from third parties. For example, can the data showing certain demographic patterns be similar when produced by a search engine or an online shopping platform (Katz 2019).

Further data may not always be input. For example, when it is used to improve quality, or add on features. Thus, we can conclude what Slivinski said, "It is also important to distinguish between data that is "nice to have" from data that is "must have" (Sivinski, Alex and Lars 2017).

The French Supervising Authority held that CEGEDIM SANTÉ had abused its dominant position in the market for medical information databases.24 Cegedim Sante, a digital data flow management company for healthcare sector had two data bases, (1) One Key and (2) its own software, Customer Relation Management Software. These databases were used by pharmaceutical laboratories for managing appointments of patients. Another Competitor, Euris, had a medical data base of itself by the name of NetReps. Cagedim refused to grant licenses to any laboratory using NetReps, while it continued to grant licenses to medical databases created by other competitors. Cgedim justified its action against Euris as it was already pursuing a legal action against it. The authorities considered Whether One Key was an essential facility? In other words, whether access to databases was an indispensable input? The authorities held that access to database was not an indispensable input as it could easily be reproduced by other competitors, though not equivalent to it. But the existence of alternatives ruled out the possibility of One Key being an indispensable input.

Cagedim though absolved of any liability under refusal to deal, was however held liable for "discrimination" regarded as an aspect of law on abuse of dominance under France and EU under specific circumstances. The act on part of Cegedim of restricting the access, having the effect of pushing out Euris from the market, did tantamount to abuse of dominant position held by Cagedim. Accordingly, Cgedi was fined €5 767 000.

Identifying a case of refusal of deal in digital markets is complex, suggesting a remedy is rather challenging. Refusal to deal has remained a core strategy by dominant firms to maintain their dominance, by denying rivals access to core platforms.25 The case of Aspena [26] and Trinko [27] is being referred to analyzing the challenges of detecting refusal cases. In Aspen case two features were highlighted:

Discontinuation by the monopolist of such pre-existing business dealing effectively suggesting willingness on part of the monopolist to let go of short-term profits. This being done in to realize an anticompetitive end.[28] These were termed as "essential component" of the refusal-to-deal doctrine,[29] this approach raises barriers when fighting anticompetitive conduct by modern tech

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24 https://www.edpb.europa.eu/news/national-news/2024/commercial-prospecting-french-sa-fined-cegedim-sante-eur-800-000_en

25 https://som.yale.edu/sites/default/files/2023-05/TAP_Refusal_to_Deal_Paper_7.1.pdf

26 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

27 Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398 (2003)

28 Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013)

29 ibid

companies. A classic example of this difficulty is the case of Facebook's API policy in New York v. Facebook[30], Inc. Facebook was accused of following "open first and closed later approach" Facebook allowed app developers to use its platform, availing benefits of large user base. But once it attained monopoly, it conditioned access to its platform imposing restrictions on platforms using its platform from integrating with any other social platform. This it did by changing its API policy. The District Court did not hold Facebook's conduct as one of refusal to deal and showed skepticism as to the possibility of any doctrine as conditional dealing. This is in sharp contrast to the decision on Aspen case wherein the monopolist conduct was not just held exclusionary but also the monopolist was held to have acted in a predatory and anticompetitive way without any justification of efficiencies. Similarly, unlike Tinko case, wherein there was statutory compulsion to refuse to deal with third parties, digital platforms invite input from third-party developers (e.g., app developers on iOS). Removal or alteration to access to APIs or any feature of platform can be termed as a" unilateral termination" of business dealings, attracting findings on refusal deal as laid down in Aspin case and not those held in Trinko.

Amazon's Audible controlled about 90 percent of the audiobook distribution market vertically.[31] Audiobooks were distributed through Audible only. The Audible listeners had to use either the Audible app or the Apple Books app. They also had to use DRM only, which did not allow users to exit the audible ecosystem. E book purchased by consumers could be used exclusively on Audible platform or its partners. Purchaser's network effects and market share of Audible enabled it to execute unfavorable contract terms, demanding low royalty rates, or "easy exchange".[32] Amazon, because of its market position was able to restrict access and through exclusive contracts, maintain monopoly in audible market.

Here again if we try to apply the ruling of the Tinko case we find that there is dissimilarity between the two in respect to the markets in question. While in Tinko case Verizon's unwillingness to cooperate with rivals was owing to the statutory compulsion cause, Amazon's insistence on use of DRM during acquisition of Audible may show a prior committed to collaboration. Then Amazon's intent to remove DRM could indicate Aspen intent. Further allowing use of DRM free audiobooks did not amount to creation of any "brand new" good or service infrastructure.[33] No intense research and development were required to allow interoperability of audiobooks. Additionally, Audiobooks represent a clear example of a non-rivalry good in a digital ecosystem.

The creation of a digital market like the audiobook ecosystem interoperable hardly requires extensive R&D and even if it is possible at low cost. These facts when analyzed against Trinko case stand different to each other, but the situation shall not be the same with every digital market. Sometimes locking technical features into a good or service is essential for the development of the service and interoperability or cooperation with rivals may incur heavy costs.

7.2 Tying and Bundling

Tying and Bundling is one such doctrine under Competition Law that has been significantly modified due to digitalization. The doctrine originally dealt only with collective sale of two or more products. In recent digitalized markets, the doctrine has been applied to integration of software into an operating (Holzweber 2018).

System and displaying one's goods on priority in ranking of search engines. The Microsoft Case depicts the evolution of the concept with the advent of digital economy. In Microsoft case the integration of Microsoft Window's Media Player with Internet explorer was subjected to judicial review. The EU Courts opined that integration of two software's equated contractual tying. A consumer though is purchasing only one product, in effect he is receiving two products, which is same as curarizing a consumer to enter into multiple contracts. What enables firms to do so is the fact that they are dominant in one market and can leverage that position to sell a product in another market otherwise not demanded also not consented for by the consumer. In the Google Shopping case[34] once again tying and bundling practice was held to be anticompetitive. It was held in this case it was held that placing one's won services at a favorable position is illegal, for it affects the choice making capacity of the consumer. The consumer is goaded to choose those services which are placed first or to say ranked first, then the other. This practice was termed as positional bias making consumers bias towards services positioned at lower ranks in search engines. Tying and bundling were explained through intuitive leverage theory by the Chicago School of Thought.[35] This school described it as a second monopoly wherein one dominant firm uses its position to capture the market in another firm, thus monopolizing two markets at the same time. However later, this theory was questioned by another theory which came to be known as, on monopoly profit theorem. This theorem held that a monopoly can derive profits from its monopoly position only once and that tying and bundling may be resorted to by firms for other purposes like evasion of price regulation, to achieve price discrimination, enhance goodwill and like.[36] Recent economic literatures have declared the one monopoly theorem as highly restrictive. Scholars like Kaplow and Elhauge emphasized that one monopoly profit theorem was based on neoclassical price theory and was therefore surmised on assumptions like fixed competitiveness in all markets and perfect consumer awareness. All of which is not a practical depiction of real market situations. They held that Chicago school overlooked the long-term effects of tying and bundling which sometimes may have chilling effect on competition.

Tying and bundling is a common phenomenon in digital markets. Circumstances when occurrences of tying and bundling can become common are:

- It provides additional benefits when markets are not monopolized, and entry barriers are prevalent.

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30 New York et al. v. Meta (originally Facebook Inc.), No. 20-3589 (D.D.C.)

31 CD Reiss v. Amazon.com, U.S. District Court for the Western District of Washington, No. 2:24-cv-00851.

32 https://www.theguardian.com/books/2020/nov/26/audible-adjusts-terms-after-row-over-easy-exchanges-that-cut-royalties-amazon

33 Ibid 15

34 Google shopping case Case AT.39740, European Commission Decision of 27 June 2017 https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

35 https://www.justice.gov/archives/atr/antitrust-economics-tying-farewell-se-illegality

36 Supra

- In cases where a complement product is sought to be used along a monopoly product, tying and bundling can be resorted to by firms to deny sale of such complement product (which can also be sold as a standalone product) by rivals, forcing them at times to exist the market.
- It can prove profitable when there exist strong network effects, denying rivals of any network effects.

While tying and bundling is common to digital markets, detecting them is not an easy task. It is because it is so common to establish linkages between digital products that drawing a line between tying and bundling conduct and a normal business course becomes challenging. The existing law on tying and bundling presupposes the existence of two different products, having distinct features to each other. Digital products constitute non rival products, meaning that consumption of one product shall not affect that of the other. Certain questions will have been answered before a conclusion of typing of a product is made like whether adding a new feature to a digital product constitutes bundling? Finding answers to these questions should be necessary to prevent the chance of over-enforcement. For example, confusing combination of inputs used to make final product, as tying of a product. Digital Markets are characterized by winner taking it all features which enables temporary monopolies to convert into permanent monopolies, making tying and bundling a lucrative strategy for firms. Uniqueness of digital markets and interpretability and linkage features of digital products make detecting tying cases a challenge for competition law authorities. This opaque gives rise to the possibility of the occurrence of errors like identifying a tying case when the case is just of combination of inputs necessary to make final product. Newer strategies of tying and bundling have evolved in digital markets. One such strategy is consumer biasness. Consumer biasness has become the deciding factor for tying and bundling conduct in Microsoft and Google Shopping case. In these cases, a new theory, self-referencing evolved which declared positioning of one's own services at a preferential position amount to nudging the consumer to buy a particular product over the above (Holzweber 2018).

It is interesting to note that that tying and bundling may not in every case have an anticompetitive effect, but left unchecked, shall have the effect of foreclosing competition. Networking effects have been the focal point of discussion of the theory of harm associated with tying cases; however, networking effects may also be seen as positive externalities that is proving benefits to third parties without getting reflected in market price. Network effects may act as both facilitators (as in concentrated markets) as well as incentivize the act of tying and bundling (Jeon 2021).

8. Suggestions

Complexes associated with digital markets suggest that there is need to modify the abuse of dominance enforcement tools as existing today. This modification shall not be possible in isolation and competition authorities shall have to study the intricacies of not just competition laws of different jurisdictions but also of other streams like commerce, economics, labor laws, international laws etc. A collaborative approach is must to tackle the difficulties of discerning the technological world. Most importantly the focus of these modifications must be to ensure that any attempt of innovation is curbed in the disguise of over enforcement. Openness must be adopted when exploring new dimensions to competition law and policies. For example, including innovative business strategy also into the definition of market power when considering the market power of any firm, over and above price dimension. As said a collaborative approach shall be required, participation of all stakeholders shall be required. Respective governments can come up with their guidelines on some issues of competition. Lessons in this regard can be learnt from Germany which came up with its guidelines on "what shall constitute market power in digital markets". As technology is changing fast, and digital transactions are becoming complex, analyses of abusive business practices and their consequent harms can be time taking process. The objective of competition laws is not just to protect competition but also to prevent consumer harm. Governments and authorities, having taken cognizance of the matter, are including the provision of granting interim reliefs. UK for instance has introduced interim remedies to provide short-term relief.

9. Conclusions

The strategy of tying and bundling is not without its benefits. Backed by economies of scale, the strategy can enhance the value of the product and increase consumer welfare. Tying can also be adopted as a business model wherein at least one product is being sold at zero price. The structure to determine tying cases is presently provided in Article 82 EC, the Commission: (i) products tied are distinct products (ii) it is going to cause anticompetitive effects (iii) any offsetting efficiency is also taken into consideration. In digital markets, market definition is crucial for determining whether goods can be termed as separate. In Microsoft case, it has been accordingly held that tied products must be in separate markets. But separate market test also does not suffice the purpose of declaring tying cases anticompetitive, for products being situated in separate markets do not necessarily imply market power to gain leverage. What can be concluded is that an effect-based analysis shall be an appropriate methodology. But this too comes with its limitations. Effect based analysis shall imply deeper understanding of the economics of the market, making it resource intensive.

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