Indian Journal of Law and Technology

Volume 17 | Issue 2 Article 3

2021

The Growing Necessity of Interim Measures to Preserve Competition in Rapidly Changing Digital Markets

Dr Tilottama Raychaudhuri

Ramya Chandrashekhar

The Growing Necessity of Interim Measures to Preserve Competition in Rapidly Changing Digital Markets

Dr. Tilottama Raychaudhuri and Ramya Chandrashekhar***

Abstract *On March 9, 2021, the CCI granted interim relief to Fab Hotels and Treebo by overturning their de-listing from certain platforms and directing their re-listing, to safeguard their presence in the relevant market during the pendency of competition law proceedings.*[1] *In the background of rapidly changing digital markets, the protection afforded by interim orders assumes immense significance. It is important that the CCI activates its power of granting interim orders, conferred under Section 33 of the Competition Act, 2002, and uses this tool effectively to prevent irreparable injury to competition, pending outcomes of the investigations directed by it. This article analyses why the CCI has granted interim reliefs sparingly since the very inception of the law and examines the need for using this power pro-actively in fast-paced, digital markets, where it may be impossible for the competition regulator to restore an industry to its competitive status quo ante.*

* *Dr. Tilottama Raychaudhuri is Associate Professor of Law at the West Bengal National University of Juridical Sciences, Kolkata.*

** *Ramya Chandrashekhar is Assistant Professor of Law at the School of Law, CHRIST (Deemed to be University), Delhi NCR.*

1 *In re: Federation of Hotel & Restaurant Associations of India and Another v. MakeMyTrip India (P) Ltd* 2021 SCC OnLine CCI 12 ("The *FabHotels and Treebo case*"). See pp 12-14 for a detailed analysis along with the latest developments of this case.

Part I

I. Introduction

"*(The) long run is a misleading guide to current affairs. In the long run, we are all dead*"

—John Maynard Keynes[2]

In the years to come, the greatest challenge faced by competition law authorities will be to stop large digital companies from rapidly taking over the market and driving out competition beyond the point of no return. Traditionally, the philosophy shared by antitrust regulators has been that avoiding false positives (good conduct judged to be bad) is more beneficial to the economy than avoiding false negatives (anti-competitive conduct judged to be good) - the former being more difficult to correct, latter being capable of correction by market forces.[3] Consequentially, the granting of interim orders to restrain possible anti-competitive conduct pending investigation has been a tool used sparingly by competition authorities and comes with its set of caveats. With the emergence of digital markets and continuously evolving technologies, under-enforcement of the law may now become costlier, and the damage to the market, irreparable.[4] The only solution for law

---

2 JM Keynes, *A Tract on Monetary Reform* (Macmillan and Co 1924) 89 See also Beranek, William and David R Kamerschen. 'Examining Two of Keynes's Most Popular Statements—Wasteful Public Spending can be Acceptable, and, in the Long Run We are all Dead—Yields Some Surprising Implications' (2016) 61(2) The American Economist 263–67.

3 Tilottama Raychaudhuri, 'Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence' (2020) CCI Journal on Competition Law and Policy 1, 15. See also Committee for the Study of the Digital Platforms, Market Structure and Antitrust Subcommittee Report, (George J Stigler Center for the Study of the Economy and the State The University of Chicago Booth School of Business 15 May 2019) p. 8 <https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf> accessed 7 March 2022.

4 Tilottama Raychaudhuri (n 3).

enforcers will be to move swiftly. However, in a world of legal rules where every firm has a right to defend itself, there are limits on how fast the law can move to stop market distortion. Recent developments in Europe and India show that in absence of timely action, there is clear danger of markets tipping beyond the point of recovery. Hence, using the tool of interim measures is vital, as it can make a crucial difference in the regulation of rapidly evolving digital markets.[5]

In principle, the power to grant interim relief is an effective enforcement tool at the disposal of the court, to prevent a party from suffering irreparable damage during the pendency of the proceedings.[6] Without such a remedy, a party could effectively lose its right even before the court renders its final decision, and the entire case could get reduced to a mere mechanical exercise. Under Section. 33 of the Competition Act, 2002 ("Competition Act") the Competition Commission of India ("CCI") has the power to issue interim orders during the pendency of an inquiry into a matter.[7] However, despite the explicit conferral of this power upon the CCI, there are very few instances of the power to grant interim relief being exercised in the history of Indian competition jurisprudence.[8] There have been several cases wherein the parties have invoked Section 33 of the Competition Act, praying for an interim order. In most cases, the CCI has not acquiesced to the party's request and this tool has remained largely unused. On March 9, 2021, in the case of *In Re: Federation of Hotel & Restaurant Association of India and Another v. Make MyTrip India Private Limited and Others* (the "*Fab Hotels and Treebo* Case"),[9] the CCI issued an order under Section 33 of the Competition Act, pending investigation of the matter by the Director-General. The case pertained to the delisting of FabHotels and Treebo from the online portals of MakeMyTrip and Go-Ibibo (collectively referred to by

---

5 Commissioner Vestager, 'Digital Power at the Service of Humanity', Conference on Competition and Digitisation, Copenhagen, November 29, 2019.

6 See, John Leubsdorf, 'The Standard for Preliminary Injunctions' (Jan 1978) Harvard Law Review, 525-566.

7 The Competition Act 2002, s 33. "*Where during an inquiry, the Commission is satisfied that an act in contravention of Sec. 3(1), Sec. 4(1) or Sec. 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary*". See also Alec J Burnside and Adam Kidane, 'Interim Measures: An Overview of EU and National Case Law' (2018) Concurrences: Antitrust Publications & Events, e-Competitions Antitrust Case Laws e-Bulletin 1.

8 Pranjal Prateek and Radhika Seth, 'The CCI's Power to Issue Interim Relief: Lost in the Interim' (*Bar and Bench*, 1 November 2020) available at <https://www.barandbench.com/columns/ccis-power-interim-relief-lost-in-the-interim> accessed on 7 March 2022.

9 The *Fab Hotels and Treebo* case (n 1).

the CCI as "MMT-Go").[10] In this matter, the CCI granted interim relief to FabHotels and Treebo, by directing MMT-Go to relist these entities on their platforms.[11] This case brought into focus the importance of granting interim reliefs to safeguard competition in digital markets in India.[12] With the dynamic development of the digital sector in the country, the consequence of delays in judicial decision-making can be severe.[13] Therefore, to maintain the competitive fabric of the market, the power to grant interim relief becomes a vital tool in protecting entities that become victims to potential anti-competitive behaviour by a market player.[14]

In light of the above, this article examines the significance of Section 33 of the Competition Act and the need for the CCI to exercise its power to grant interim relief in an efficacious manner, especially in fast-growing digital markets. Part I of this article contains the introduction. Part II traces the evolution of the law relating to the grant of interim reliefs, under the MRTP Act, 1969 and the Competition Act. Part III elucidates the landmark decision of the Supreme Court in *CCI v. SAIL*[15] and the three-prong test for the granting of interim orders, laid down in this case. Part IV traces the aftermath of the *CCI v. SAIL*[16] decision and analyses the recent order of the CCI in the *Fab Hotels and Treebo* case. Part V examines the nuances of digital markets and elaborates on the concerns relating to the need for using interim measures in digital markets. In Part VI, the authors examine the latest developments on this issue in the European Union. Finally, in Part VII, the authors consolidate the analysis made in the preceding parts, identify reasons for the infrequent grant of interim orders by the CCI and provide recommendations for improving the mechanism relating to the grant of interim reliefs in Indian competition law.

---

[10] It is interesting to note that the CCI has recognised MMT-Go as a dominant platform in para. 107 of this decision. However, in its earlier decision in the matter of Sonam Sharma v. Apple, 2013 SCC OnLine CCI 25: 2013 Comp LR 346 (CCI), the CCI observed that the Indian competition law does not recognise the concept of 'Collective Dominance' of entities.

[11] The Fab Hotels and Treebo case (n 1).

[12] ibid.

[13] See Prateek and Seth (n 8).

[14] ibid.

[15] *Competition Commission of India v. Steel Authority of India Limited and Another* (2010) 10 SCC 744. ("*CCI v. SAIL*")

[16] ibid.

Part II

II. Interim Injunctions Under The MRTP Act, 1969 & Competition Act, 2002

A. The MRTP Act, 1969

The Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") was the first legislation enacted by the Government of India to prevent concentration of economic power in the Indian market. The primary purposes of the MRTP Act were (i) keeping a check on the concentration of economic power, (ii) controlling the growth of monopolies in the Indian market economy, and (iii) the preventing of various trade practices which could be detrimental to public interest.[17] The MRTP Act came into force on June 1, 1970, and subsequently underwent a plethora of amendments and modifications before it was finally repealed by the introduction of the Competition Act in 2002.[18]

The MRTP Act, as originally enacted, did not contain a provision for the granting of interim relief. In June 1977, a High-Powered Expert Committee on Companies and MRTP Acts headed by Justice Rajindar Sachar was constituted, popularly known as the 'Sachar Committee.'[19] The Sachar Committee submitted its report in August 1978.[20] The Sachar Committee in Chapter XXII of its Report, recommended the inclusion of '*certain provisions, with a view to checking…unfair trade practices, so as to ensure adequate protection of the interests of the unwary consumers*.'[21] In this regard, in Paragraph 22.14 of the Sachar Committee Report, a recommendation was made to vest the MRTP Commission with the '*power to grant injunctions*'. The Report stated that by the time the proceedings before the MRTP Commission were concluded, a party to a dispute could suffer irreparable harm unless given immediate relief. The Report also recommended that the

---

[17] The Monopolies and Restrictive Trade Practices Act 1969, Statement of Objects and Reasons, <https://www.mca.gov.in/Ministry/actsbills/pdf/The_Monopolies_and_Restrictive_Trade_Practices_Act_1969.pdf> 1-2, accessed 7 March 2022. For a detailed discussion on the evolution of the law, See, Pradeep S Mehta, 'Competition Law Regime in India: Evolution, Experience and Challenges' Horizons, Concurrences, 149.

[18] See Mehta (n 17).

[19] See HK Paranjape, 'The MRTP Amendment Bill: A Trojan Horse' (1984) 19(17) Economic and Political Weekly.

[20] The contents of the report can be accessed from the website of the Ministry of Corporate Affairs, <https://www.mca.gov.in/bin/dms/getdocument?mds=9FnTF0a4evi6AJeJYg-7wqw%253D%253D&type=open> accessed 7 March 2022.

[21] Report of the High-Powered Expert Committee on Companies and MRTP Acts, August 1978, para 22.14, 277

MRTP Commission should be authorised to grant temporary as well as permanent injunctions. For this purpose, it suggested that Section 12 of the MRTP Act be suitably amended to vest the power to grant injunctions with the MRTP Commission.[22]

Subsequently, by virtue of the MRTP (Amendment) Act, 1984, Section 12A was inserted into the MRTP Act, which gave the MRTP Commission the power to grant temporary injunctions during the pendency of an inquiry. By vesting such a power with the MRTP Commission, it was ensured that parties to proceedings were unable to indulge in anti-competitive practices during the pendency of the proceedings or the inquiry procedure.[23] The relevant provisions of the Code of Civil Procedure, 1908 were to apply to the MRTP Commission at the time of granting a temporary injunction under Section 12A.[24]

There are limited cases on the adoption of interim measures by the MRTP Commission. The issue of granting interim relief came up in 1991 in the case of *Milton Plastics v. Union of India*.[25] Here, an interim order passed by the MRTP Commission was set aside by the Bombay High Court on grounds of procedural irregularity. Shortly thereafter, a more significant order was passed by the Bombay High Court in the case of *MP Ramachandran v. Union of India and Others*,[26] where the court emphasised the need to view procedural technicalities less stringently and pass interim orders with "*greater vigour and vitality, when the injunction is intended to project and protect the public interest*."[27] This case pertained to the Ujala Blue advertisement dispute, wherein, after a detailed analysis of the power to grant interim orders under the MRTP Act, the Court upheld an interim order. The Court stated that injunctive reliefs granted by the MRTP Commission have to be viewed from the larger perspective of public benefit and consumer interest. However, apart from a few cases, the grant of interim reliefs did not assume much significance during the years of the MRTP Commission.

B. The Competition Act, 2002

The Competition Act received the assent of the President of India on January 13, 2003, and came into force on March 31, 2003, repealing the earlier law.[28]

---

22 ibid, 280-281.
23 HK Paranjape (n 19).
24 The Monopolies and Restrictive Trade Practices Act 1969, s 12A (2).
25 1991 SCC OnLine Bom 443: (1992) 94 Bom LR 9.
26 *MP Ramachandran v. Union of India,* 1992 SCC OnLine Bom 82: (1992) 94 Bom LR 105.
27 ibid at para 14.
28 The Competition Act 2002 (12 of 2003).

The provision vesting the power to issue interim orders has been laid down in Section 33 of the Competition Act. As originally enacted, Section 33(1) empowered the CCI to grant a temporary injunction restraining any party who has acted, and continues to act, or is about to act, in contravention of Sections 3(1), 4(1) or 6, from carrying on such act until the inquiry procedure pending before the CCI has been concluded, or further orders have been passed, without any notice to the opposite party. In addition to this, in terms of Section 33(2), the CCI was also empowered to issue an order of temporary injunction to restrain any party from importing any goods that are likely to result in the contravention of Sections 3(1), 4(1) or 6, from importing such goods until the conclusion of the inquiry procedure, or the passing of further orders in this regard, without any notice to the opposite party. Similar to the language of Section 12A of the MRTP Act, Section 33(3) stated that the relevant provisions of the Code of Civil Procedure, 1908 were to apply to the CCI at the time of granting a temporary injunction.

Subsequently, on December 12, 2006, the Standing Committee on Finance (2006-2007) submitted its forty-fourth report and introduced the Competition (Amendment) Bill, 2006.[29] By virtue of the draft bill, it was proposed that Sections 33(2) and 33(3) be omitted and that the language of Section 33(1) be altered.[30] This was recommended largely due to the shift from a 'complainant' approach to a broader 'informant' approach, which was also ushered in by the proposals of the Standing Committee.[31] Therefore, by virtue of the Competition Law (Amendment) Act, 2007, Section 33 now reads–"*if the CCI is satisfied, during an inquiry, that an act in contravention of Sec. 3(1), Sec. 4(1) or Sec. 6 has been and continues to be, or is about to be committed, it can pass an order temporarily restraining such act until the conclusion of the inquiry procedure or further orders being passed in this regard, without any notice to the opposite party.*"[32]

In addition to Section 33, the Competition Commission of India (General) Regulations, 2009 ("2009 General Regulations") also deals with the power

---

[29] The contents of the report can be accessed from the website of the Ministry of Corporate Affairs, <https://www.prsindia.org/sites/default/files/bill_files/bill73_2007050873_Competition_Bill__2006_standing_committee.pdf> accessed 7 March 2022.

[30] Ministry of Company Affairs, Standing Committee on Finance (2006-2007), Forty-Fourth Report, December 2006, 107.

[31] ibid pp 103. The shift in terminology from 'complainant' to 'informant' was made in view of the broader change in the role of the CCI as an inquisitorial body, in place of its earlier role as an adversarial adjudicatory body to ultimately give CCI a '*better regulatory role*'. For a detailed understanding of this change and for discussions relating to it, see Ministry of Company Affairs, Standing Committee on Finance (2006-2007), Forty-Fourth Report, December 2006, 24-26.

[32] The Competition Act 2002, s 33.

of the CCI to grant interim orders. According to Regulation 31, the party against whom an interim order under Section 33 has been made, shall be heard as soon as possible, and the final order in the concerned matter shall also be passed by the CCI within 90 days of the interim order, as far as possible.[33]

It is pertinent to note that it may not be feasible for CCI to restore the competitive conditions in favour of the aggrieved party after the conclusion of the investigation process. Therefore, the power to grant interim relief during the pendency of the inquiry procedure is crucial to '*promote and sustain competition in markets*' - one of the objectives of the Competition Act - as enshrined in its Preamble.[34]

Part III

III. The Three-Prong Test For Interim Orders in *CCI* v. *SAIL*

A. *CCI* v. *SAIL*[35]

The most significant development in the jurisprudence of granting interim relief under Section 33 of the Competition Act, is the case of *Competition Commission of India v. Steel Authority of India Limited and Another*. This landmark judgment of the Supreme Court of India was delivered on September 9, 2010.[36]

In this case, the informant i.e., Jindal Steel & Powers Limited alleged that the Steel Authority of India Limited ("**SAIL**") abused its dominant position in the market and deprived other participants of fair competition by *inter alia*, entering into an *exclusive supply agreement* with the Indian Railways for the supply of rails. Therefore, it was alleged that SAIL has engaged in anti-competitive behaviour by violating Sections 3(4) and 4(1) of the Competition Act. The CCI, satisfied that a *prima facie* case existed against SAIL, directed the Director-General to investigate the matter in terms of Section 26(1) of the Competition Act. This order was appealed by SAIL before the Competition Appellate Tribunal (the "COMPAT") which stayed

---

[33] The Competition Commission of India (General) Regulations 2009, reg 31.

[34] The primary objectives of the Competition Act, as mentioned in its preamble are (i) prevention of practices having an adverse effect on competition, (ii) *promoting and sustaining competition in markets*, (iii) protecting the interests of consumers, and (iv) ensuring freedom of trade carried on by other participants in markets, in India.

[35] *CCI v. SAIL* (n 15).

[36] ibid.

the proceedings and investigation undertaken by the Director-General.[37] The order of the COMPAT was appealed before the Supreme Court. Among other issues, the question relating to the stage and manner of exercise of the power to pass temporary orders, vested in the CCI under Section 33 of the Competition Act, was raised.

To evaluate whether a particular case warrants the grant of interim relief, the Supreme Court, in this case, propounded a ***three-prong test*** that needs to be satisfied before passing an interim order:[38]

(i) that the CCI is satisfied that there exists a *prima facie* case in the matter such that the activities which contravene Sections 3(1), 4(1) or 6 of the Competition Act, have been, are being, or shall continue to be, committed. Such *prima facie* view must be of a *higher degree* than that required under Section 26(1) of the Competition Act[39] (the *prima facie* stage);

(ii) that it is necessary to pass an interim order,[40] that is to say that there exist definite reasons having nexus to the necessity for passing such an order[41] (the *necessity* stage); and

(iii) that it is apparent that there is every likelihood that the party seeking interim relief shall suffer irreparable and irretrievable damage, or that there shall be an appreciable adverse effect on competition, if interim relief is not granted by the CCI (the *likelihood* stage).[42]

Moreover, the Supreme Court also specified certain procedural formalities and safeguard measures to be followed by the CCI, in respect of its power of granting interim reliefs under Section 33 of the Competition Act, read with Regulation 31 of the 2009 General Regulations. The Supreme Court stated that:

1. The power under Section 33 can be exercised by the CCI only *after* it has formed a *prima facie* opinion with respect to the information provided by the informant, and has directed for an investigation to be undertaken in terms of Section 26(1).[43] In terms of Regulation 18(2) of the 2009 General Regulations, the inquiry stage is deemed to

---

37 *Steel Authority of India Limited and Another v. Jindal Steel & Power Limited*, 2010 SCC Online Comp AT 5.
38 *CCI v. SAIL* (n 15) 31(4).
39 ibid 31(4)(a).
40 ibid 31(4)(b).
41 ibid75.
42 ibid 31(4)(c), p 73.
43 ibid 21.

commence when a direction is given to the Director-General to undertake an investigation according to Section 26(1) of the Competition Act. Therefore, the jurisdiction of the CCI to exercise its power under Section 33 and pass an *ex parte* order can only be invoked by a party on or after the commencement of the inquiry stage.[44]

2. In the event of any prejudice to public interest, or violation of the provisions of the Competition Act, owing to any conduct of any person/enterprise or an association of persons/enterprises, the CCI shall be within its jurisdiction to pass *ex parte ad interim injunction orders* under Section 33. Additionally, the parties shall be afforded a chance to be heard, soon after the passing of the interim order. This shall be sufficient to comply with natural justice principles.[45] When the applicant is able to satisfy the CCI that an order granting a temporary injunction is called for in the interest of free market and trade, the CCI in its discretion may pass such an order *ex parte*, or otherwise.[46]

3. As *ex parte* restraint orders can have far-reaching consequences, such orders should be passed in exceptional circumstances.[47] The power under Section 33 must be exercised by the CCI sparingly and under compelling circumstances.[48]

4. While granting an *ex parte* interim order, the CCI must record its due satisfaction as well as its reasoned opinion on not to issue a notice to the other side.[49]

5. A final order on the concerned matter should follow an interim order as expeditiously as possible, within a maximum of 60 days.[50]

Part IV

IV. The Aftermath of CCI v. SAIL

A. Application of the Three-Prong Test by the CCI

Notwithstanding the judgement of the Supreme Court in *CCI v. SAIL* laying down detailed guidelines on interim measures, the CCI has seldom made

---

44 ibid 70-71.
45 ibid 53.
46 ibid 75.
47 ibid 72.
48 ibid 72.
49 ibid75.
50 ibid 82.

use of its power to grant interim relief.[51] A few cases where the granting of interim reliefs has been considered by the CCI, are discussed below:

In 2015, in the case of *Fast Track Call cabs (P) Ltd v. CCI and ANI Technologies (P) Ltd*, the CCI rejected an application by an informant seeking interim relief against Ola Cabs.[52] The CCI reiterated the three-prong test laid down in *CCI v. SAIL*[53] and observed that the fulfilment of the first prong i.e., the establishment of a *prima facie* case, by itself does not entitle the informants to interim relief under Section 33 of the Competition Act. The informant is required to fulfil the second and third prongs as well, and demonstrate that the balance of convenience tilts in his favour; and that in the absence of interim relief, irreparable loss shall be caused to him. Or, it must be proved that there shall be an appreciable adverse effect on competition ("AAEC") in the market.[54] As these two prongs could not be satisfied, the CCI refused to grant interim relief to the informants. On appeal, the Competition Appellate Tribunal upheld the decision of the CCI.[55]

In contrast, in *Nuziveedu Seeds Ltd v. Mahyco Monsanto Biotech (India) Ltd*,[56] a seven-member panel of the CCI, by a majority of 6:1 decided in favour of passing an order under Section 33 of the Competition Act. The CCI first examined whether there existed a *prima facie* contravention of Sections 3(4) and 4 of the Competition Act in the instant case, and ruled that the higher standard required for passing an interim relief to the applicant had been met. Subsequently, it proceeded to analyse whether, in the absence of interim relief, irreparable and irretrievable harm shall be caused to the Informants. The CCI answered this in the positive, as it involved the interests of not just the Informants, but also dependant farmers as well as the entire ecosystem of BT cotton cultivation in the specified areas. The CCI reasoned that they shall suffer irreparable harm if an interim order is not passed. Thereafter, the CCI elucidated the tests given by the Apex Court in *CCI v. SAIL*[57] and stated that although powers vested in it under Sec. 33 of

---

[51] Abir Roy, 'Competition Commission of India Exercises its Interim Powers: Sets its Enforcement Priority of Ensuring Timely Intervention in Dynamic Markets' (*Sarvada Legal*) <https://competitionlawsarvada.legal/2021/03/13/competition-commission-of-india-exercises-its-interim-powers-sets-its-enforcement-priority-of-ensuring-timely-intervention-in-dynamic-markets/> accessed 7 March 2022.

[52] *In Re: Fast Track Call Cab Private Limited v. ANI Technologies Private Limited* 2015 SCC OnLine CCI 140.

[53] *CCI v. SAIL* (n 15).

[54] *CCI v. SAIL* (n 15) 12.

[55] *Fast Track Call Cabs Private Limited v. CCI and ANI Technologies Private Limited* 2016 SCC OnLine Comp AT 89, 15-16.

[56] *Nuziveedu Seeds Limited v. Mahyco Monsanto Biotech (India) Ltd* 2016 SCC OnLine CCI 48, 25.

[57] *CCI v. SAIL* (n 15).

the Competition Act are to be used sparingly by it, however, upon consideration of the foregoing aspects, it is necessary and appropriate for the CCI to intervene in the matter and safeguard the interests of the parties. It also weighed the balance of convenience and held that it tilted towards granting the interim relief sought. Given the circumstances of the case, the CCI found it appropriate to provide a provisional remedy to the informants in light of the clauses which were invoked by the opposite parties who were dominant players in the relevant market.[58] The CCI found the instant clauses to be *prima facie* anti-competitive and held that if an interim relief is not granted to the informants, they shall suffer irreparable harm.[59]

Again, in the case of *G Krishnamurthy v. Karnataka Film Chamber of Commerce (KFCC)*,[60] the CCI employed its power to issue an interim order to prevent the opposite parties from hindering, obstructing or causing an adverse effect on the release of '*Dheera*,' a dubbed movie of the informant intended to be broadcasted in the State of Karnataka.[61] The CCI observed that the informant was successful in making out a favourable case for issuing the interim order prayed for.[62]

The case of *INSA v. ONGC*[63] is another matter wherein the applicant made a prayer for interim relief. The CCI, after setting out the test for granting interim relief as laid down in *CCI v. SAIL*[64], analysed whether the factual circumstance justified the exercise of its power to grant temporary relief to the applicant.[65] It held that while all the conditions provided in the judgment of the Supreme Court in *CCI v. SAIL*[66] were fulfilled in the instant case, the undertaking of the opposite party to not invoke, until further orders of the CCI, Clause 14.2 of the Special Contract Conditions (which gave the opposite party the prerogative to terminate the arrangement between the parties in a unilateral manner), sufficiently addressed the concern of the applicant.[67] Hence, it did not issue an order under Sec. 33.[68]

---

58 ibid 22-23.
59 ibid.
60 *G Krishnamurthy v. Karnataka Film Chamber of Commerce* 2018 SCC OnLine CCI 77.
61 ibid.
62 IBID 19.
63 *Indian National Shipowners' Association. v. Oil and Natural Gas Corporation Limited* 2018 SCC OnLine CCI 48. ("INSA v. ONGC")
64 *CCI v. SAIL* (n 15).
65 *INSA v. ONGC* (n 63).
66 *CCI v. SAIL* (n 15).
67 *INSA v. ONGC* (n 63).
68 Saba, 'CCI Reiterates Principles for Granting Interim Order under Section 33 of the Competition Act' (*SCC Online*, July 4, 2018) <https://www.scconline.com/blog/post/2018/07/04/cci-reiterates-principles-for-granting-interim-order-under-section-33-of-the-competition-act/> accessed 7 March 2022.

B. Interim Orders in the Digital Market: The Fab Hotels and Treebo Case of 2021

In the *Fab Hotels and Treebo Case*, the CCI passed a detailed order on the grant of interim measures; the first of its kind pertaining to digital markets.[69] The CCI also, for the first time, invoked Section 33 in the form of a '*mandatory injunction*.' This involved ordering the opposite party to perform an overt act, instead of a '*prohibitory order*,' i.e., restraining the opposite party from undertaking a certain activity.[70] This case marks a milestone in the jurisprudence of the grant of interim reliefs by the CCI and is discussed briefly, below.

1. *Brief Facts*

In 2018, MMT-Go delisted FabHotels and Treebo from its online portal owing to an exclusive agreement with OYO. The Federation of Hotel and Restaurant Associations of India ("FHRAI") in the capacity of an informant, intimated the CCI that MMT-Go was involved in predatory pricing, was charging exorbitant commissions and was engaging in activities that denied market access to other players.[71] It also stated that the vertical integration of MMT-Go and OYO resulted in, *inter alia*, price and non-price abuses, causing AAEC in the relevant market to the detriment of FabHotels and Treebo. The CCI, on being *prima facie* satisfied that there is a case for investigation against MMT-Go under Section 4 of the Competition Act, and that there is a case for investigation against MMT-Go as well as OYO under Section 3(4), ordered a detailed investigation in terms of Section 26(1).[72]

2. *The decision of the CCI*

On the aspect of '*Determination of Relevant Market'*, the CCI stated that both the entities MMT-Go and OYO operate in different relevant markets. However, the two entities are vertically related to each other. It stated that OYO operated in the '*market for franchising services for budget hotels in India,*' and was a *prima facie* significant player in that market, though not a dominant one. It further stated that MMT-Go operated in the '*market for*

---

[69] The *Fab Hotels and Treebo* case (n 1).

[70] Mohini Parghi, 'CCI on Interim Measures in Digital Markets' (IndiaCorpLaw, 3 April 2021) <https://indiacorplaw.in/2021/04/cci-on-interim-measures-in-digital-markets.html/> accessed 7 March 2022.

[71] The Fab Hotels and Treebo case (n 1) 3.

[72] On being satisfied of a *prima facie* case, the CCI passes an order under s 26(1) of the Competition Act 2002 directing the Director-General to initiate an investigation into the matter before it.

online intermediation services for booking hotels in India,' and was a *prima facie* dominant player in that market. On perusal of the preliminary facts and records placed before it, the CCI prima facie found that the Agreement, in terms of which MMT-Go '*agreed to not list the closest competitors of OYO on its platform*', was in contravention to the provisions of the Competition Act. Consequently, FabHotels and Treebo prayed before the CCI for the grant of a temporary injunction in the form of an interim relief directing MMT-Go to relist them on its online platform. The CCI recapitulated the three-prong test laid down by the Supreme Court in *CCI v. SAIL*,[73] and, on being satisfied that each of the tests was suitably established and fulfilled, granted interim relief to the applicants.

3. *Subsequent Developments*

Pursuant to the decision of the CCI on March 9, 2021, OYO approached the High Court of Gujarat by way of a writ petition, challenging the interim order passed by the CCI. It argued that it was not afforded a due opportunity to present its case in the matter before the CCI. The Single Bench of the Gujarat High Court stayed the order passed by the CCI until the final disposal of the petition before it.[74] Subsequently, the matter went in appeal before a Division Bench of the Gujarat High Court in the case of *Casa2 Stays (P) Ltd v. Oravel Stays (P) Ltd (OYO)*.[75] On June 14, 2021, the Division Bench disposed of the writ petition and also set aside the order of the CCI, passed by it on March 9, 2021, This was done on the ground of '*lack of opportunity of hearing*' before the CCI being afforded to Oravel Stays Private Limited, the original petitioner before the CCI. It further directed the CCI to provide a due opportunity of hearing to OYO, in accordance with law, and to thereafter decide the case on merits.[76]

Although there is a stay on the order of the CCI granting interim relief to FabHotels and Treebo at present, the law on the matter of interim injunctions has remained unchanged. Subsequent cases have also followed the test laid down in *CCI v. SAIL*.[77] For instance, in *TT Friendly Super League Assn v. Suburban Table Tennis Assn*,[78] the CCI enumerated the judicial dicta laid

---

[73] *CCI v. SAIL* (n 15).

[74] *Oravel Stays Private Limited (OYO) v. Competition Commission of India,* MANU/GJ/0470/2021.

[75] *Casa2 Stays Private Limited v. Oravel Stays Private Limited (OYO) & Ors*., Special Civil Application Number 5085 of 2021.

[76] *Casa2 Stays Private Limited v. Oravel Stays Private Limited (OYO) & Ors.* (n 75) para 5 pp 5.

[77] *CCI v. SAIL* (n 15).

[78] *TT Friendly Super League Assn v. Suburban Table Tennis Assn* 2021 SCC OnLine CCI 67.

down in *CCI v. SAIL*.[79] The CCI, on being satisfied that the opposite party was involved in anti-competitive behaviour in a manner that frustrated the cause of promoting table tennis as a sport, and that the continuance of such behaviour could potentially hinder the purpose of the Competition Act, ruled in favour of passing an interim order against the opposite party, restraining them from restricting or dissuading players, coaches or clubs from joining or participating in the tournaments organised by the several association or federations that are purportedly not *per se* recognised by it.[80]

Again, in the case of *Nishant P Bhutada v. Tata Motors Ltd*,[81] the CCI elucidated the three-prong test laid down by the Supreme Court in *CCI v. SAIL*[82] and held that the informants had failed to meet any of the parameters laid down by the Apex Court and accordingly refused to pass an order of interim injunction granting the several prayers sought by the Informant. Similarly, in the case of *Asianet Digital Network (P) Ltd v. Star India (P) Ltd*,[83] the CCI ruled against the issuance of an order granting a temporary injunction to the Informants on the ground that the Informants have '*not been able to project any higher level of prima facie case warranting a positive direction as sought…at the interim stage*.'[84] The CCI also stated that it was not satisfied that the Informants would suffer irreparable harm in the absence of an interim order. It set out the test laid down by the Apex Court in *CCI v. SAIL*[85] and concluded that it was not inclined to interfere in the instant matter by issuing any interim directions.[86]

The CCI also passed interim orders in the cases of *CREDAI-NCR v. DTCP*,[87] on August 1, 2018, and in *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India*,[88] on June 3, 2021. In both these cases, the CCI looked into the test laid down in *CCI v. SAIL*[89] and having been satisfied with each parameter, proceeded towards the issuance of an interim order.

---

79 *CCI v. SAIL* (n 15).
80 *TT Friendly Super League Assn v. Suburban Table Tennis Assn* (n 78) PARA 35 PP 12.
81 *Nishant P Bhutada v. Tata Motors Ltd* 2021 SCC OnLine CCI 66.
82 *CCI v. SAIL* (n 15).
83 *Asianet Digital Network (P) Ltd v. Star India (P) Ltd* 2022 SCC OnLine CCI 5.
84 *Asianet Digital Network (P) Ltd v. Star India (P) Ltd* (n 83) para 22, p 8.
85 *CCI v. SAIL* (n 15).
86 *Asianet Digital Network (P) Ltd. v. Star India (P) Ltd* (n 83) para 22 p 8.
87 *Confederation of Real Estate Developers Assn of India v. Govt. of Haryana* 2018 SCC OnLine CCI 66.
88 *Confederation of Professional Baseball Softball Clubs v. Amateur Baseball Federation of India* 2021 SCC OnLine CCI 30.
89 *CCI v. SAIL* (n 15).

Part V

V. THE Need for Proactive Use of Interim Measures in Digital Markets

A. The Fast-Growing Digital Sector

The judgment of the Supreme Court in *CCI v. SAIL*[90] was delivered in 2010 and, as elucidated above, the CCI has, till date, followed the parameters laid down in this case. However, the market in India has undergone rapid digitisation in recent years, necessitating a re-look at the law relating to interim measures in digital markets. The pandemic has accelerated the process of digitisation, with more and more consumers shifting towards online platforms, globally. This has resulted in enhanced market power of tech companies.[91] Today, competition laws all over the world are grappling with ways to deal with regulation of competition in the digital economy. The term "digital economy," however, is not a new concept. It was first used by Don Tapscott decades back in 1995, in his New York Times bestseller titled "*The Digital Economy: Promise and Peril in the Age of Networked Intelligence*".[92] The competition law challenges associated with the digital economy are manifold. At the outset, the term is difficult to define with precision, as it includes within its fold various markets such as platform markets, social networking sites, payment sites and search engines, to name a few.

Digital markets differ from traditional markets in various ways, and competition laws, in their current form, are not equipped to deal with these new markets. For example, transaction platforms thrive on network effects and big data. They can use price leveraging tactics on both sides of the markets that they operate on, unlike firms which operate on one side of the market and have a unidirectional price structure. Platform markets have the advantage of reaching out to a wider number of people in a much shorter time frame, which makes it easier for them to gain market power. However, it is important to note that such market power may or may not amount to dominance, as it may be easier for a firm to capture more customers by aggressive competitive practices in the nascent stages of building its network, till the market settles in favour of a particular enterprise. Thus, market leadership is

---

[90] ibid.

[91] See Rajesh Mehta and Govind Gupta, 'Big Tech in the Era of Techopoly' (*Financial Express*, 26 January, 2021) <https://www.financialexpress.com/industry/technology/big-tech-in-the-era-of-techopoly/2176986/> accessed 7 March 2022.

[92] Don Tapscott, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence* (1st edn, McGraw-Hill Education 1995).

unstable in the early stages of building a network and the same should not be construed as dominance, following the traditional tests for market power.[93]

Assessment of anti-competitive behaviour in digital markets is a challenge for competition authorities, and a time-consuming exercise. Take, for example, the first conundrum which is with respect to the definition of relevant market. Early cases like the Ola and Uber disputes (which continued for years pending final investigation) illustrate this difficulty.[94] Since 2015, the CCI has been faced with complaints against these app cab-aggregators whose business model was new to our country and changed the landscape of traditional modes of commuting. Ola and Uber are classic examples of platform markets – the companies do not own the vehicles, but simply use the Internet and an application to connect drivers to the customers. A number of allegations were made against these companies, including those of predatory pricing and other forms of anti-competitive behaviour. However, the CCI rejected the complaints in almost all these cases, due to its inability to reach a finding of dominance in the relevant market and closed its investigations. The COMPAT, while ordering investigation into the matter,[95] highlighted the need to examine platform markets by stating that

> "*Aggregator based radio taxi service is a relatively new paradigm of public transport in Indian cities which has revolutionized the manner in which we commute and work… Therefore, it cannot be said definitively that there is an abuse inherent in the business practices adopted by operator such as respondents but the size of discounts and incentives show that there are either phenomenal efficiency improvements which are replacing existing business models with the new business models or there could be an anti-competitive stance to it. Whichever is true, the investigations would show*".[96]

Unfortunately, due to the reluctance of the CCI to pass interim orders, this state of affairs continued in the app cab market for many years. This changed via the Supreme Court order of 2019,[97] wherein the Apex Court made clear that competition law ought to look beyond traditional market definitions in order to assess dominance in platform markets. In digital markets, delays like this can result in irrevocable changes to the competitive fabric of the market.

---

[93] Tilottama Raychaudhuri, 'Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence' (2020) CCI Journal on Competition Law and Policy, 1-27.

[94] *Meru Travel Solutions (P) Ltd v. ANI Technologies (P) Ltd* 2018 SCC OnLine CCI 46

[95] *Meru Travel Solutions Pvt. Ltd. v. Competition Commission of India & Uber India Systems Pvt. Ltd.*, Appeal No. 31 of 2016 (COMPAT)

[96] ibid para 18.

[97] *Uber India Systems (P) Ltd v. CCI* (2019) 8 SCC 697.

The CCI, in the case of *FabHotels & Treebo*, identified that there is a growing trend in the Indian consumer market towards shifting to online modes for shopping and booking requirements.[98] The CCI also highlighted the tremendous change in distribution mechanism in markets across the globe with the emergence of online distribution channels which are developing at an extraordinary pace.[99] Therefore, it became increasingly critical for digital service providers such as FabHotels and Treebo to obtain visibility in the relevant market and stay relevant in order to survive.[100]

In this case, the CCI elaborated on the quick accumulation of market power by digital platforms. The CCI observed that "*Recent reports and studies (national as well as international) strengthen this conviction by showing how a few large platforms can control online 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*."[101] Importantly, the CCI clarified that Section 33 of the Competition Act now needed to be applied keeping in mind newer markets, stating that:

> "*It would not be in the interest of justice to let the market suffer because of the alleged delay, if any, on the part of any party… the provisions of Section 33 of the Act have to be read and understood in the context of the markets which are dynamic in nature, more so in the context of digital markets.*"[102]

In the wake of the *FabHotels & Treebo*, the grant of interim measures has received renewed focus in Indian competition law.[103]

Part VI

VI. Interim Measures in the European Union

A. The Evolution of the Law relating to Interim Measures in Europe

The tests prescribed for the grant of interim measures in European competition law are somewhat similar to those in Indian law. Recent years have

---

98 The *Fab Hotels and Treebo* case (n 1) 99.
99 ibid.
100 ibid.
101 The *Fab Hotels and Treebo* case (n 1) para 112.
102 The *Fab Hotels and Treebo* case (n 1) para 96.
103 Sean Doherty and Aditi Sara Verghese, 'Competition Policy in a Globalized, Digitalized Economy, Platform for Shaping the Future of Trade and Global Economic Interdependence' (2019) World Economic Forum 1, 4, 14, 16.

witnessed a rapid increase in the use of interim measures in European competition law, particularly in digital and technology-driven markets. In this section, the authors trace the evolution of the law relating to interim measures in the European Union and then demonstrate how application of the European standards of granting interim measures could be considered in India.

In the history of the European Union, a legal provision for undertaking protective measures to safeguard competition between different market players was introduced and incorporated for the first time, in the Treaty establishing the European Coal and Steel Community, 1951 ("ECSC Treaty").[104] Article 66(5) of the ECSC Treaty provides for the power of the 'High Authority' to '*take or cause to be taken such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties*...'.[105] However, Regulation 17/62,[106] which was the first regulation that was made (detailing the implementation and administration of competition law provisions), did not contain any specific mention regarding the power to award interim measures for safeguarding competition.

Nonetheless, in the case of *Camera Care Ltd v. Commission of the European Communities*,[107] ("*Camera Care*") the decision of the European Commission to take interim measures was upheld by the Court of Justice of the European Union.[108] In course of time, a few other cases regarding directions by the European Commission, for adopting interim orders, also came to the fore. It is interesting to note that the situation in Europe was similar to India, in so far as the number/frequency of cases regarding the grant of interim measures was concerned. The European Commission remained hesitant in granting such measures in cases where Articles 101 or 102 of

---

[104] Treaty of Paris setting up the European Coal and Steel Community (ECSC Treaty), April 18, 1951. A Summary of the ECSC is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0022/> accessed 7 March 2022.

[105] Treaty of Paris setting up the European Coal and Steel Community 1951, art 66(5).

[106] Regulation 17 (First Regulation implementing Arts 85 & 86 of the Treaty establishing the European Economic Community), Official Journal of the European Communities 204/62, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31962R0017&from=EN/> accessed 7 March 2022.

[107] Order of the Court of 17 January 1980. *Camera Care Ltd v. Commission of the European Communities*. Competition - Interim measures. Case 792/79 R, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CO0792>.

[108] Order of the Court of 17 January 1980. *Camera Care Ltd v. Commission of the European Communities* (1980), Case 792/79 R, <https://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d6ea81985f5f1542dd8206e07c24b9e331.e34KaxiLc3qMb40Rch0SaxyLbN50?text=&docid=90631&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=122075>accessed 7 March 2022.

the Treaty on the Functioning of the European Union ("TFEU") were contravened. In 2001, the European Commission imposed interim measures in the *IMS Health* case.[109] However, this decision was appealed by IMS to the Court of First Instance (now the General Court) which suspended the interim measures, pending final investigation.[110]

The limited grant of interim measures by the European Commission may be attributed primarily to the following reasons:

(i) *Firstly*, the European Commission recommended that third parties approach courts within their domestic jurisdiction, or the National Competition Authorities (NCAs), praying for grant of interim reliefs in competition matters, instead of issuing such measures directly.[111]

(ii) *Secondly*, the authority to grant interim orders or direct the adoption of interim measures, was not explicitly accorded to the European Commission, and thus lacked a clear legislative foundation. Therefore, the European Commission used the tool of interim measures sparingly.[112]

To address these lacunae, the provisions relating to interim measures were codified under Article 8(1) of Regulations 1/2003.[113] By virtue of Article 8(1), the European Commission was conferred with the power to grant interim orders in antitrust matters.[114] Article 8 of Regulation 1/2003 provided for 'Interim Measures' and laid down a two-prong test for a party seeking interim relief. As per the terms of Article 8(1), the applicant has to prove a case of urgency by establishing two factors:

(i) serious and irreparable damage to competition; and

---

[109] Case COMP D3/38.044 (2001) – NDC Health/IMS HEALTH: Interim measures <https://ec.europa.eu/competition/antitrust/cases/dec_docs/38044/38044_15_5.pdf>accessed 7 March 2022.

[110] See Hogan Lovells, Commission seeks interim measures for the first time in 18 years at <https://www.lexology.com/library/detail.aspx?g=370cad49-e608-47c6-93e2-322e9938bdc5> accessed 7 March 2022.

[111] Giulio Preti, 'European Commission Slaps Interim Measures Against Broadcom: The Perfect Test-Case?' 2020 King's Student Law Review, Commercial & Financial Law Blog, available at <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/04/06/european-commission-slaps-interim-measures-against-broadcom-the-perfect-test-case-giulio-preti> accessed 7 March 2022.

[112] ibid.

[113] Council Regulation (EC) No 1/2003 of December 16, 2002 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF> accessed 7 March 2022.

[114] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty, art 8(1).

(ii) the existence of a *prima facie* case of infringement of the provisions of the European antitrust laws.[115]

It is noteworthy that the conditions contemplated by the European Regulation are similar to the requirements under Section 33 of the Competition Act in India. On a perusal of the text of these two tests, it is evident that the *first prong* of the test given in Article 8(1) of Regulation 1/2003 i.e., the checking of whether there exists any "*serious and irreparable damage to competition*," corresponds, in part, to the *third prong* of the test propounded by the Supreme Court of India in *CCI v. SAIL*[116] i.e., "*the likelihood that the applicant shall suffer irreparable and irretrievable damage, and that there shall be appreciable adverse effect on competition if interim relief is not granted*." Similarly, the *second prong* of Article 8(1) of Regulation 1/2003 i.e., testing whether there is "*a prima facie case of infringement*" corresponds, in text and in principle, to the *first prong* of *CCI v. SAIL*[117] i.e., "*prima facie case of contravention of Sec. 3(1), Sec. 4(1) or Sec. 6 of the Competition Act*". In effect, the European law is less stringent as it does not contemplate a separate "necessity" stage.

In addition to these two stages of checking, Article 8 also clarifies the time period within which the interim measure, if and as granted by the European Commission, shall remain valid. In terms of Article 8(2), a decision to grant interim measures shall only remain in operation for a limited period of time, as specified, based on the facts and circumstances of the case, and shall also be subject to renewal to the extent "necessary and appropriate." However, even after the explicit introduction of provisions relating to the grant of interim measures in 2003 making the law less stringent, such measures were used sparingly by the European Commission. It is quite astonishing that the power of using interim measures was not considered by the Commission, even in multi-year investigations like the *Google Shopping Case*.[118]

B. The *Broadcom Case* – Reawakening the Use of Interim Measures in Newer Markets

The provision enshrined in Article 8(1) of Regulation 1/2003 has recently been invoked by the European Commission in the landmark *Broadcom Case*.[119]

---

[115] ibid.
[116] *CCI v. SAIL* (n 15).
[117] ibid.
[118] Case AT. 39740, Google Search (Shopping) Commission Decision of 27 June 2017.
[119] European Commission Press Release, 'Antitrust: Commission Imposes Interim Measures on Broadcom in TV and Modem Chipset Markets' (16 October 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109> accessed 7 March 2022.

Almost two decades after the *IMS Health* case, the European Commission issued interim measures against Broadcom for alleged abusive conduct in the market for the supply of chipsets for TV set-top boxes and modems. On October 16, 2019, the EC directed Broadcom, the world's largest developer of chips for video and broadband services, to cease the application of certain portions of the distribution agreements entered into by it which contained "*exclusivity-inducing provisions*" with immediate effect.[120] The EC also directed Broadcom to refrain, in the future, from entering into such agreements, or agreements with an equivalent *object* or *effect*. The EC also directed it to refrain from adopting such measures or practices which were in the nature of punishment or retaliation and possess an equivalent object or effect.[121] Broadcom was ordered to "*cease to apply the exclusivity and leveraging provisions contained in its six agreements with manufacturers of TV set-top boxes and modems*" and also to "*refrain from including the same provisions in any future agreements with these manufacturers, and also refrain from implementing other practices that would have an equivalent effect*."[122] This decision of the EC was based on its finding that Broadcom held a dominant position in the relevant market, and had abused such dominant position. This resulted in the violation of Article 102 of the TFEU, which expressly prohibits the abuse of dominant position by any person or entity, insofar as it impacts the trade between the Member States.

In the aftermath of the Broadcom decision, interim measures have resurfaced to occupy an important position in European competition law. A recent report of the Digital Competition Export Panel of the United Kingdom recommended changes in the antitrust laws to encourage the implementation of interim measures by competition authorities and also serve the dual purpose of timely intervention and the granting of the opportunity to be heard and defend.[123] The report recommended 'greater and quicker use of interim measures' in order to safeguard the market players from significant harm.[124] As per this report, the antitrust enforcement mechanism can at times, be slow and cumbersome, making it more and more difficult to curtail the abuse of dominance by entities in the fast-moving digital sector and bring

---

[120] Case AT. 40608 – Broadcom, 2019, EC, 127, decision on interim measures dated October 16, 2019, <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40608/40608_2791_11.pdf> accessed 7 March 2022.

[121] ibid 128.

[122] ibid.

[123] Jason Furnam, Unlocking Digital Competition (2019) Report of the Digital Competition Export Panel 1, 104.

[124] ibid 14.

them to books.[125] Therefore, interim measures are perceived as an effective instrument to address these concerns relating to the digital market sector.[126]

In addition to the above, the Member States of the European Union have also become cognizant of the need of using interim measures in a proactive manner. Amendments to the antitrust law in Germany provide for more relaxed pre-requisites for passing interim orders. Competition authorities in France have also been using interim measures in appropriate cases.[127] Further, the competition law of the United Kingdom has also undergone modification. The threshold for employing interim measures by the Competition and Markets Authority, was relaxed in the United Kingdom from 'serious irreparable damage' to 'significant damage'. In this manner, the EU, its Member States and the United Kingdom are enhancing their legal framework to encourage active utilization of the power to order the adoption of interim measures.[128]

Part VII

VII. Recommendations Towards More proactive Use of Interim Measures in Indian Competition Law

In light of the foregoing analysis, it is evident that competition law in India needs to be suitably modified in order to facilitate the use of interim reliefs more proactively, especially in light of competition concerns relating to digital markets. It is important not only to decide when to intervene but also how to intervene, so that competition can be enhanced without curbing efficiency, in such markets. Hence, use of interim measures should conform to a set of guidelines, so as to avoid the danger of excessive implementation of such measures, which could again be counter-productive.

In this regard, a few suggestions are put forward by the authors:

Firstly, there is a need to relax the strict prerequisites for invoking the provision for grant of interim relief. The law, as it exists, is sufficiently worded to authorize the CCI to grant interim reliefs to applicants in genuine need of the same. However, the implementation of the provision (Section 33) granting power to the CCI to issue interim orders, is guided by the test provided by

[125] ibid 6.
[126] Concurrences (n 7).
[127] Prateek and Seth (n 8).
[128] ibid.

the Supreme Court of India, in *CCI v. SAIL*.[129] In the opinion of the authors, the three-prong test given in *CCI v. SAIL* needs to be reconsidered, as it imposes a harsh burden on the applicant seeking interim relief. According to the authors, in a situation whether an applicant is able to satisfy the CCI of the first prong (*prima facie* contravention) and of the third prong (the *likelihood* stage), it seems to be, but a direct inference that there arises a '*necessity*' to grant interim relief to the applicant and protect the competition in the relevant market. Therefore, the *second prong* of the test (necessity) given in *CCI v. SAIL* is no longer relevant today. In light of this, the authors suggest that it is time for the CCI to align its approach to that of the European Commission, and consider the grant or rejection of the remedy of interim orders, by considering the two-prong test of the European Commission ("*serious and irreparable damage to competition*" and *"prima facie case of infringement"*) and dispensing with the three-prong test by doing away with the "necessity" stage. It is important to note that the decision of *CCI v. SAIL* was delivered at a point in time much before the growth of digital markets. The rise of the digital sector has brought with itself a real and severe threat of large companies driving smaller competitors out of the market in a much shorter span of time. Thus, an overly stringent test for passing an interim order may hamper competition, instead of safeguarding it.

Secondly, the *CCI v. SAIL* case has also raised the threshold of prima facie infringement to a degree higher than what is provided under Section 26(1) of the Competition Act.[130] The authors suggest reducing the burden of proving "*prima facie case of infringement*", to the extent of its requirement as per the statute, under Section 26(1). The Competition Law Review Committee ("CLRC") in its July 2019 report ("CLRC Report"), had also considered this matter. In its recommendation, it supported the existing language of Section 33, without modification.[131] After reiterating the 3-prong test as propounded by the Supreme Court in *CCI v. SAIL*,[132] the CLRC considered whether there was a requirement to amend Section 33 to alter the threshold of '*satisfaction*' for granting interim relief, as opposed to keeping the existing '*prima facie*' standard.[133] The CLRC noted that there exist various other factors, such as weighing the balance of convenience and preventing irreparable injury which the CCI is required to consider before passing any order of temporary restraint. Accordingly, the CLRC recommended that

---

[129] *CCI v. SAIL* (n 15).
[130] ibid 31(4)(a).
[131] Report of the Competition Law Review Committee, July 26, 2019, para 5.3-5.4, pp 88 ("CLRC Report").
[132] *CCI v. SAIL* (n 15).
[133] CLRC Report (n 131).

the language of Section 33 should be retained as it is, and not be amended.[134] It is the opinion of the authors that in the wake of rapidly evolving newer markets, it is preferable to apply the *prima facie* test to its limited extent, as required under Section 26(1), instead of imposing a higher degree of 'satisfaction' of *prima facie* contravention of the provisions of the Competition Act, as prescribed in *CCI v. SAIL*.[135]

Thirdly, it is not only just the grant of an interim order, but also the time frame during which the order should stay in place and continue to operate, that needs to be specified. This is extremely important, as interim orders that do not come with specific timelines could lead to the very same danger of causing irreparable injury to the market. The CLRC Report had recommended that at the time of granting an interim order, the time period for which it shall remain in operation, also be mentioned by the CCI. However, this recommendation has not been followed. For instance, in the *FabHotels and Treebo Case*, the CCI has not specified the duration up to which the applicants shall remain re-listed on the platforms of MMT-Go.[136] Hence, it is the opinion of the authors that a set of guidelines be put in place, governing the grant of interim orders. These guidelines should specify the procedure to be followed while granting interim orders, including the thresholds mentioned above, so that there is more clarity in this aspect.

Fourthly, even with a set of guidelines in place, it cannot be ignored that digital markets are far more complex in nature than traditional markets. Hence, it may not be possible to treat such markets on the same plane as the latter. A telling order in this regard is the *Uber* matter where the CCI expressed its hesitation in interfering with evolving markets. To quote:

> *"At this stage, it is difficult to determine with certainty the long-term impact of this pricing strategy as the market is yet to mature...the Commission is hesitant to interfere in a market, which is yet to fully evolve. Any interference at this stage will not only disturb the market*

---

[134] CLRC Report (n 131) para 5.5, pp 88.

[135] *CCI v. Steel Authority of India Ltd* (2010) 10 SCC 744.

[136] S 33 uses the phrase 'temporarily retrain', hinting that an interim order can only be in the nature of a prohibitory injunction, as opposed to a mandatory injunction which directs the parties to perform an overt act to comply with the order. Therefore, it can be argued that the time period to be specified in the order is for setting out the duration of the restraint. In the *FabHotels and Treebo Case*, the CCI has stated that its direction to re-list the Applicants is not in the nature of a mandatory injunction as it is to 'prohibit' conduct that may have an adverse effect on the market. In any case, the decision of the CCI does not contain a time-period up to which the order shall remain in operation. See, Mohini Parghi, 'CCI on Interim Measures in Digital Markets' (IndiaCorpLaw, 3 April 2021) <https://indiacorplaw.in/2021/04/cci-on-interim-measures-in-digital-markets.html> accessed 7 March 2022.

> *dynamics, but also pose a risk of prescribing sub-optimal solution to a nascent market situation.*"[137]

In view of the difficulty and complexity of analyzing digital markets, it is the suggestion of the authors, that the CCI equips itself with a panel of experts to deal with cases pertaining to digital markets. This specialized panel can take into account all relevant factors and guidelines, and assist the CCI in deciding whether interim relief should be granted in particular cases. Competition agencies across the world have been appointing such specialized panels to deal with digital markets. For instance, in the United Kingdom, an expert Digital Markets Unit has been constituted to work toward a pro-competitive regime for digital markets.[138] In the United States, the Federal Trade Commission has formed a Technology Enforcement Division to monitor competition in technology markets.[139] In Australia, the Australia Consumer and Competition Commission has set up a Digital Platforms Branch to examine cases pertaining to digital platform markets.[140]

Fifthly, the legal framework should be modified to facilitate the CCI in making appropriate decisions regarding the use of interim measures. Competition law in India, in its current form, is not equipped to tackle the challenges that ensue with the emergence of digital markets. However, to facilitate any change in the law on this matter, a detailed discussion amongst competition law authorities, academicians and legal practitioners is the need of the hour. Jurisdictions across the world have been appointing working groups to study digital markets.[141] As a step in this direction, the authors suggest the constitution of a specialized Working Group on Digital Markets, in line with other Working Groups constituted by the CCI. In 2020, the CCI conducted a Market Study on E-Commerce. However, the report analyzed

---

[137] *Fast Track Call Cab (P) Ltd & Meru Travel Solutions Pvt. Ltd. v. ANI Technologies (P) Ltd* 2017 SCC OnLine CCI 36, paras 122-123.

[138] See, 'Digital Markets Unit' (UK Government) <https://www.gov.uk/government/collections/digital-markets-unit> accessed 7 March 2022.

[139] See, Patricia Galvan and Krisha Cerilli, What's in a Name? Ask the Technology Enforcement Division (Federal Trade Commission, 16 October 2019) <https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division> accessed 7 March 2022.

[140] See, Digital Platforms (Australian Competition and Consumer Commission) <https://www.accc.gov.au/focus-areas/digital-platforms#:~:text=The%20ACCC%20has%20set%20up,and%20competition%20law%20enforcement%20cases> accessed 7 March 2022.

[141] See, World Reports on Digital Markets <https://www.chicagobooth.edu/research/stigler/events/antitrust-competition-conference/world-reports-on-digital-markets> accessed 7 March 2022.

broad trends and views that had emerged in stakeholder consultations.[142] The CLRC Report also discussed the 'new age developments in digital markets' and stated that there was a need for the creation of a conducive environment for businesses to thrive in such newer markets. However, this Report also did not focus in detail on digital markets or discuss the matter relating to the grant of interim reliefs in such markets.[143] Therefore, a more detailed discussion on this subject needs to be undertaken by the members of a Working Group specifically established for and dedicated to this purpose.

In conclusion, it may be said that the *Fab Hotels & Treebo Case*[144] has ushered in an increased awareness of the significance of CCI's power to grant interim reliefs, especially for the purpose of maintaining competition in digital markets. Damage to competition in such markets, sans quick intervention, may be irrevocable. Hence there is an urgent need for reforms with respect to the grant of interim injunctions in such newer markets. Such reforms could be in the form of changing the approach towards implementation of the law as discussed, and eventually, in the long term, by changes to the legal framework itself. This shall go a long way in ensuring that interim measures serve as a powerful safeguard against irreparable injury to competition.

---

[142] See, Market Study on e-Commerce in India (Competition Commission of India) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 7 March 2022.

[143] *See*, CLRC Report (n 131) pp 63, 68, 70-72, 101, 128, 140-159.

[144] The *Fab Hotels and Treebo case* (n 1).