

DIGITAL PAYMENTS AND COMPETITION CONCERNS

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ABSTRACT

In the new era of digitalization, the major players of digital payment dominate the market which might lead to the marginalization of small businesses. In order to prevent this, the Competition Commission of India is empowered to make rules which, however, is showing inconsistencies in its decision. The research discusses the major competitive issues present in the digital market in the countries such as India, The Netherlands, and UK. Specifically with respect to Indian digital payment market, the competition issues in India in the digital payment market have been thoroughly analyzed with the help of cases such as the cases Re WhatsApp Pay Case/ Google Pay Case where the entities were charged for the abuse of dominant position. Thus, to take such actions the regulatory bodies such as CCI, NPCI and RBI exercise effective control in dealing with such issues.

Keywords: WhatsAppPay, CCI, NPCI, GooglePay, Competition, Dominant Position

INTRODUCTION:

The advancement of technology has created several utilities for the individuals in various sectors such as health, education, communication which has lead to enhancement in their productivity levels.¹ One such aspect with respect to it includes the concept of digitalization of payments which is a part of the ‘Digital India’ campaign introduced in 2015. Under this, the transfer of funds takes place through digital device which includes the modes such as UPI, Mobile Wallets, Banking Cards, Adhar Enabled Payment System; etc having several benefits such as it neutralizes the risk of fake currency, offers secure and fast mechanism for payment.

Considering the present circumstances, due to demonetization in the year 2016, the digital payment sector in India has seen a sudden increase and is currently booming as it is expected to grow to 71.7% inclusive of all the payment transactions by the year 2025.² The sector consists of several payment gateway/applications such as Paytm, Paypal, Phonepe, Google Pay, Whatsapp pay, etc. Such market constitutes well – established competitors with equipped resources and strategies which are adaptive to the dynamic business environment. For example, due to the introduction of the concept of UPI by NPCI, mobile wallet apps such as Paytm, Mobikwick were forced to include the UPI system.³ Therefore, these tech companies form lucrative policies/ schemes incessantly in order to sustain competition in the market.

However, the market features various competition issues which include abuse of domination position by the big tech companies, cartelization, customer locking, use of soft encroachment tools, etc. For instance, in 2020, the CCI ordered an investigation against Google Pay for the abuse of dominant position as it made inescapable use of the app in the Google Play Store app purchases. Thus, restricting the available choice of modes of payment to the consumers. Not only G- pay, other competitors such as Whatsapp Pay, PhonePe have also faced the same issues with

¹ Radhika Kapur, Advantages of Technology, (Sept. 21,2021, 3: 30PM), available on https://www.researchgate.net/publication/333395640_Advantages_of_Technology.

² Prashasti Awasthi, Digital Payment to Grow by 71.7% by 2025, (Sept.21, 2021,3:45 P.M.), available on <https://www.thehindubusinessline.com/news/digital-payments-in-india-to-grow-to-717-of-all-payment-transactions-by-2025-report/article34204827.ece>.

³ C. Vijay, Mobile Wallets and its Future in India, 6, JETIR, 574, 576-577 (2019).

legal repercussions.⁴ Also, most of these payment gateways are formed by collaborations in the form of joint ventures which leads to reduced innovation in the services.

Therefore, to tackle such affairs, various laws, policies and regulatory bodies are constituted to resolve these issues. The countries with strong payment mechanisms include The Netherlands, UK, France which have full figured authorities; for instance, one of the key objective of EU Commission is to foster innovation and competition in the financial services and payment sector.⁵ Whereas in India, the Competition Commission of India (CCI), National Payment Corporation of India (NPCI) and RBI are the regulatory bodies which oversee not only the competition concerns but also the operations of the digital economy.⁶ Moreover, its neighboring countries such as Pakistan and Bangladesh comprehended the need of digitalization of payment only during the pandemic which led to formation of plans/ policies by the government (such as EFT Act, 2007 introduced in Pakistan) and are still been revised and implemented presently.⁷

Thus, the strife among the big tech companies associated with digital payment creates serious concerns which may lead to far- reaching legal insinuation on such competitors. Therefore, in the present research, the authors wish to analyze such major competition issues and link it with the remedies provided under law by focusing and juxtaposing it with the ultra- modern plans and policies framed by various nations.

⁴ The Hindu, CCI to Probe Google Abuse of Position, (Sept. 22, 2021, 4:15 PM), available on <https://www.thehindu.com/business/Industry/cci-to-probe-googles-abuse-of-position/article33060668.ece> .

⁵ OECD, Digital Disruption in Financial Markets- Note by EU, (Sept. 23,2021, 5:18 AM), available on [https://one.oecd.org/document/DAF/COMP/WD\(2019\)33/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)33/en/pdf) .

⁶ Y. Dubey, Interface Between Intellectual Property in Payment Systems Market in India, (Sept, 22, 2021, 6:35 AM), available on https://link.springer.com/chapter/10.1007/978-981-13-1232-8_13#citeas.

⁷ State Bank of Pakistan, Regulation for EMI, (Sept 23, 2021, 6:15 AM), available on <https://www.sbp.org.pk/psd/2019/C1-Annex-A.pdf> .

RESEARCH OBJECTIVES:

The objectives of the study are:

1. To study the status of digital payment market and its evolution in India and finding the major competitors of digital payments present in the Indian market.
2. Ascertaining the substantial competition issues with respect to digital payment market in the countries and such as India and Europe.
3. To comprehend legal implications and the consequences of such issues with the help of landmark judgments/ case studies and understanding the roles and responsibilities of regulatory bodies this deals with modulating the competition in such market.
4. Identifying the gaps/ similarities and recommending the ingenious modes developed by the countries which can be adopted by the Indian authorities to tackle such issues.

DISCUSSION:

1. EVOLUTION OF DIGITAL PAYMENT MARKET IN INDIA::

Digital payment market in India has witnessed a momentous change during the past ten years where there is a huge shift from paper clearing to digital payment of transactions due to the major factors such as demonetization introduced by government in 2016 and Covid- 19 in 2020. According to RBI, the paper clearing transactions in the year 2010- 11 constituted almost 60% of the retail payments in the country. However, in 2019- 20 the paper clearing system has almost dropped to 20% due to the introduction of various digital payment mechanism such as card based payments, direct transfers such as RTGS, NEFT, UPI, etc consisting of more than Rs, 3,435 lakh crore transactions.⁸ Thus, India is moving towards digital economy and is proliferating at a faster rate as it has witnessed the highest number of online transactions in 2020 leaving behind countries such as USA, China and South Korea.⁹

1.1.1 Major Competitors in Digital Payment Sector:

Due to digitalization of payment and increased preference of consumers, various apps have been developed by the big tech companies to provide digital transfer of value. Though there are several methods under the digital payment, the concept of UPI and mobile wallets apps have clinched to gain attention with 30% of the market share.¹⁰ Therefore, the major competitors include Phone Pay, Google Pay, Paytm, Amazon Pay, Whasapp Pay. On the other hand, we also have BHIM UPI app launched by NPCI in 2016 to empower the society digitally. According to latest data of Feb 2021, Walmart's Phone Pay backs the first position at 42.55% share followed by G pay at 36. 11%. Paytm backs the third position at 14.86%. The other apps consisting of Amazon Pay, Whatsapp Pay, Axis Bank Apps backs 1%-2% of the market share.¹¹ Therefore, to

⁸ RBI, Payment Settlement System in India- Journey in the Second Decade of the Millennium 2010- 20, (Sept. 23,2021,9:30 AM), <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/PSSBOOKLET93D3AEFDEAF14044BC1BB36662C41A8C.PDF>.

⁹ Financia Express, Digital Payments: India Pips China, US, others in 2020,(Sept. 23,2021, 7:15 AM), <https://www.financialexpress.com/industry/banking-finance/digital-payments-india-pips-china-us-others-in-2020-leads-global-tally-with-this-many-transactions/2226074/>.

¹⁰ Ashwin Manikanadan, NPCI caps market share for UPI at 30%, (Sept.23,2021, 7:45 AM), <https://economictimes.indiatimes.com/tech/technology/npci-enforces-new-market-share-rules-on-upi-for-google-pay-phonepe-paytm-others/articleshow/81701508.cms?from=mdr>.

¹¹ Id.

engage in the market, such tech companies introduce schemes/ features to attract the customer base and shift their preferences.

2. SIGNIFICANT COMPETITION CONCERNS IN THE DIGITAL PAYMENT MARKET:

Due to the increase in digital payment transactions, it has created great opportunities for the Peer- to Peer wallet providers to foray in such sector. However, competing in such market is not an easy job; it requires follow up plans and tactics/ strategies which may also result in serious legal repercussions worldwide. The relevant product market based on the factors such as interchangeability, features of product, price as mentioned under Section 2(t) of the Competition Act, 2002 for such type of service providers focuses to enter into digital payment mechanisms and consume the present user base so as to make is digital presence in the market.¹²

One of the main concerns that arise globally is the abuse of the dominant position. Considering the Indian aspect, the dominant position is not prohibited under the law but the abuse of such position is outlawed. For instance, Whatsapp has a dominant position in instant messaging service market but it utilized it to enter into the payment market. Moreover, it attracts section 4(2) of the Act as it comprises of denial to market access as it stimulates the users to use UPI without downloading other applications. Since Whatsapp is a leading messaging app, it will spontaneously result into losses to the other digital market players.¹³ Thus, these apps either stress the customers to use their own services or prohibit the integration of their products.

The digital payment providers often engage in cartelization for regular profits, efficiency and establishing the monopoly power. However, in some of the cases it is laborious for the authorities to perform cartel investigations as due to digital economy, the communication between the big companies are now end- to – end encrypted. Thus, these big companies have an

¹² Supra at Note 9.

¹³ Aniket Ghosh, India: Atitrust Reulation in the UPI Payment Sector, Kulwer Competition Law Blogs, (Sept. 24, 2021, 4:29 PM), available on <http://competitionlawblog.kluwercompetitionlaw.com/2021/07/07/india-antitrust-regulation-in-the-upi-payments-sector/>.

edge to the information asymmetry in the market which is serious threat to the competition regulatory authorities.¹⁴

The other concern associated with this market are the use of soft encroachment tools to ascertain the market condition and the competition issues in the digital payment sector such as in UK (Financial Conduct Authority), The Netherlands (Authority of Consumers and Market), the authorities have used such tools to look for the potential activities of the digital payment players in other countries like USA and China or to review the supply of the card acquiring services. These tools though being effective have witnessed a great criticism of it being ineffective tools which require huge amount of time, cost and resources.¹⁵

Also, there has been a significant debate on whether there should be a merger control in the digital payment sector. According to statistics, big companies such as Google, Walmart, Facebook have undergone more than 400 acquisitions but only handful of them have been reviewed by the competition authorities and none of them have been occluded.¹⁶ These mergers have resulted in doubts with respect to conglomerate effects of whether such merging party in payment sector would hold a strong leverage position and pose fair competition in the market due to the already existing players.

Most of the payment apps offer same kind of services with minute differences which can be interchangeably used by the consumers for the transfer of funds. If one of the players in the market introduces a new feature or new mode of payment, it is found that the same strategies/features are also incorporated by the other players later. This not only reduces quality but also hinders the innovation in the service due to the rapidity in the application of the newly introduced features, so, as to restrict the shift in the customer base. For instance, as mentioned, app such as Paytm was forced to incorporate UPI because it was already introduced by apps such G pay, PhonePay which aimed a lot of popularity and market share.¹⁷

¹⁴ R.B. Barman, Potholes on the Ditigtal Payment Highways, (Sept. 24, 2021, 10:15 AM), available on <https://www.thehindu.com/opinion/lead/potholes-on-the-digital-payment-superhighway/article32911746.ece> .

¹⁵Supra at Note 10.

¹⁶ Id.

¹⁷ OECD, Digital Disruption in Banking and its Impact on Competition, (Sept.24, 2021, 9: 15 PM), available on <https://www.oecd.org/daf/competition/digital-disruption-in-banking-and-its-impact-on-competition-2020.pdf> .

Thus, the digital payment sector encompasses several competition concerns which may be challenging. Therefore, several authorities have been established to regulate such issues.

3. LEGAL IMPLICATIONS OF DIGITAL PAYMENT AND PERSPECTIVES OF COMPETITION COMMISSION OF INDIA

Over the past five years, India has witnessed an exponential growth in digital payment sector due to Smartphone penetration and deeper data.¹⁸ The main driver of this surprising growth is Unified Payment Interface (UPI). However, due to competition concerns, various market players have faced legal reverberations ordered by authorities due to violation of competition laws and policies pertaining to UPI sector in India that has been discussed below:

a. WhatsApp Pay Case (Harshita Chawla v. WhatsApp Inc. & Anr.)¹⁹

In this case, anti-competitive effect was examined by CCI of tying the UPI App with the most popular messaging service app i.e. WhatsApp by forming WhatsApp Pay. In the beginning, the relevant market was delineated by CCI as, “*the market for the over-the-top messaging services for smartphones in India*” and it was *prima facie* found by the Commission that in the said market, WhatsApp is dominant. It was observed by the Commission that, UPI payments are qualified as a separate product market which is independent of any other method of payments on the basis of differing “*technology and user*” convenience and held that, “*market for UPI Payment applications in India*” as a “separate product market”. It was noted by the Commission that if users chose not to use WhatsApp Pay then also, they are not constrained from using the messaging platform WhatsApp. It was further observed that there are various steps involved for the process of operationalising the account on WhatsApp Pay such as KYC (Know-Your-Customer) requirements that would make the user to shift automatically to a different digital payment platform i.e., UPI service provider that are available and can be downloaded at free of cost by the users. Therefore, pertaining to the allegation of WhatsApp using its dominant position in the “OTT Messaging Market” in order to influence the market of UPI Payment, it was observed that there are no competition concern raised due to “*the absence of coercion and*

¹⁸ Supra at Note 16.

¹⁹ *Harshita Chawla v. WhatsApp Inc & Anr.*, Case No. 15 of 2020 vide order dated 18.08.2020.

presence of well-established players in the market". The complaint against the WhatsApp was dismissed due to adequate competitive constraint and availability of choice for users.

b. Google Pay Case (*XYZ v. Alphabet Inc*)²⁰

In this case, it was alleged that in the market for licensable OS for smartphones, Google has used its dominance by making the manufacturers to pre-install Google Pay that leads to Google Pay having an advantage over other UPI Payment Service Apps. Through MADA (Mobile Application Distribution Agreement), Android OS is licensed by the Google that makes it mandatory for the manufacturers to pre-install few Google Apps that falls under "must-have". This lead to CCI investigation against Google for the license terms in the Agreement. But Google argued that MADA does not cover Google Pay and therefore its pre-installation is not mandatory. Further, Google entered into RSA (Revenue Sharing Agreement) with few manufacturers of smartphone which also was not mandatory for all the manufacturers as they retained choice. The purpose of the Agreement was a monetary incentive to promote the products related to Google. However, it was observed by the CCI that the "must-have" nature of the Google's products shows an unequal relationship between smartphone manufacturers and Google and held that the issue of choice/coercion needs to be examined from this angle. It was noted by the Commission that there is a significant presence of Google in the market related to App that facilitates UPI payment and held that the financial incentive under RSA might lead to creation of sense of exclusivity and that might have effect on the opting of competing payment application by the users due to the default application having an existing *status-quo* bias. Therefore, an investigation was merited by CCI as contractual arrangements might lead to dominant position of the Google and disturbing the level playing field in "*market for apps facilitating payments through UPI*".

It can be seen that a contrasting approach has been adopted by CCI in both the cases. In the Google Pay Case, the fact of Google's dominance in the market was taken into consideration that lead to order of investigation by CCI but the absolute dominance of WhatsApp in the OTT messaging market was ignored and the Commission observed that the users have choice for opting for such payment services. Also, the concern regarding *status-quo* bias was taken into

²⁰ *XYZ v. Alphabet Inc.*, Case No. 07 of 2020 vide order dated 09.11.2020.

account for Google Pay case but that is also applicable in the WhatsApp Pay case because of the nature of WhatsApp messenger which was not enough for the CCI to order an investigation in the WhatsApp Pay case. It can be inferred from these reasons that no uniformity in assessing the factors was followed by the Commission.

4. BODIES REGULATING AND DEALING WITH COMPETITION CONCERN IN DIGITAL PAYMENT SECTOR

To safeguard the interest of different players in the digital payment sector and prevent the abuse of dominant position, there are many bodies established that regulates and deals with the competition concerns in digital payment sector such as.

CCI: On 14th October, 2003, Central Government of India established Competition Commission of India in order to achieve the objective of Competition Act, 2002. It was established under Section 7(1) of the Act²¹. It regulates and governs with any enterprise's anti-competitive behaviour. The rationale behind its establishment is to curb the competition's negative aspects.

RBI: RBI is the apex body in the banking sector of India. Digital payments in India are controlled by RBI and it is responsible for issuing guidelines and regulation for the same. In order to capture the extent of payment digitisation in the country, RBI has taken a step where they'll announce the Reserve Bank of India- Digital Payments Index (RBI-DPI). The first time it was released in March 2018. The recent Index was released in March 2021 which was 270.59.²²

NPCI: It stands for National Payment Corporation Sector that operates India's retail payment and settlement system and is an initiative of RBI and IBA (India Banks' Organisation) and is established under Payment and Settlement Systems Act, 2007. Its aim is to widen the scope and reach of payment modes by bringing innovation in the payment system in the retail.

²¹ Section 7 of Competition Act, 2002.

²² Nikita Prasad, RBI Digital Payments Index at 270.59 for March 2021, NDTV Profit (Sept. 21, 2021, 11:30 AM), available on <https://www.ndtv.com/business/rbi-dpi-digital-payments-index-reserve-bank-of-india-rbi-digital-payments-index-at-270-59-for-march-2021-2497049>.

CONCLUSION AND WAY FORWARD:

From the present research, it can be reckoned that digital payment market in India is persistently evolving with new technologies and marketing strategies. However, even it has lately captivated the attention of the competition and antitrust regulators overseas. Considering the Indian aspect, the Indian market will definitely have more opportunities in the coming future due to shift in consumer preferences towards a digital economy. However, if we look into the competition concerns and its regulation in the digital market with respect to other countries, it can be established that India needs more impregnable strategies and regulatory bodies as it can be seen that the orders of CCI in some of the cases such as in Whatsapp Pay case were problematic and received criticism whereas if we look into the developed nations such as UK, The Netherlands, etc, have more authoritarian and stern policies and pronouncement with respect to competition in the digital payment sector. Not, only this, these countries have formed several other rules and policies to regulate the financial market with broad objectives with a view to make online payment system stronger. Thus, India shall carefully analyze and adapt such objectives of other regulatory bodies. This will not only result in healthy competition among the market players but will also lead to increased customer faith in online mode of payments with a much wider use.

Moreover, India can opt the platform competition strategy that is followed by United Kingdom in order to deal with the competition related issues faced by the country in terms of digital payment. The three strategies as discussed above are germination strategy, orchestration strategy and transformation strategy. In germination strategy, the firm is able to grow and cultivate private business networks through capturing the value without the third party intervention at the platform level. Through this process, value streams are directed inward for reinforcing an insular platform and are tightly controlled. Platform that adhere to inclusive profiles and are co-opetitive are called orchestration strategy. This strategy is dependent on the already established value delivery that is architecture in a way to attain joint market reach at a high level. For example, the case of Paytm and Zapp. These platforms are designed in such a way that with the existing mobile banking applications, it is highly integratable. Under transformation strategy, platforms reverberated with open and hybrid profiles. Process innovations and products in technology industries are two factors that control the transformation. For examples, the attempt of Circle and Blockchain.info to introduce structural innovations in the market of mobile payment. The

dominance of pre-existing value delivery structure can be circumvented by both the companies through a “novel value delivery architecture” can handle the risk in value movement of not becoming the dominant standard such as Blockchain.

Though the digital payment market in India is getting attention but it has resulted in serious competition issues. Therefore, from the present research, it can be recommended that keeping a wider view authorities such as CCI shall exercise with due vigilance with respect to the market players confronted with anti- competitive allegations in digital area. Moreover, these market players shall success on the basis of the market forces actors rather than utilizing their dominant position. Also, when such players enter into arrangements, they should consider factors such as the freedom of the members of joint venture to join in multiple payment systems, the extent of members individually or collectively have market power associated with denied elements and the substitutes available for such element.