

REGULATION

Amazon and Flipkart have avoided antitrust rap in India so far. Will their private-label push attract regulatory cudgels?

Even as Amazon's market dominance raises the hackles of Europe's competition watchdog, Indian authorities have taken a lenient view of e-commerce giants' market power. For that to change, the definition of "dominance" itself might have to be overhauled.

By Nirmal John, Kanika Saxena 7 Dec 2018



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Margrethe Vestager, Europe's competition commissioner, speaks during Web Summit 2018 in Lisbon, Portugal.

In September, Margrethe Vestager, Europe's competition commissioner, announced that the European Union will investigate Amazon's dual role as a retailer and a platform for third-party sellers, and the potential for abuse stemming from this duality.

Late November, Germany's antitrust authority, the Bundeskartellamt, said it would initiate "an abuse proceeding" against Amazon "to examine its terms of business and practices towards sellers on its German marketplace amazon.de".

Earlier that same month, though, the Competition Commission of India (CCI) seemed to be singing a different tune in a similar case.

In a case of alleged abuse of its dominance by Flipkart, brought by the All India Online Vendors Association (AIOVA), the CCI ruled that "Looking at the present market construct and structure of online marketplace platforms market in India, it does not appear that any one player in the market is commanding any dominant position at this stage of evolution of the market."

AIOVA had made a similar appeal against Amazon, claiming the Seattle-based company favoured sellers like Cloudtail, which it has a stake in.

On the face of it, CCI's ruling is sound. E-commerce is a piddling 3% of India's retail industry, and the competition watchdog has taken this context into account. India's e-commerce market is clearly at a different stage of evolution compared with developed countries, where any one company's monopolistic powers can cause potentially greater damage.

But there are those who challenge this notion in India. They point at one threat in particular: the mushrooming of private labels under Amazon and the Flipkart-Myntra-Jabong conglomerate.

Kush Agarwal, an AIOVA member, tells ET Prime that India, too, could see courtroom battles of the kind playing out in Europe. He says marketplaces must be “neutral”, which is difficult when they have their own brands to peddle.

Amazon India, for example, has private labels in a range of mobile and electronic accessories, luggage and backpacks, chairs, home storage, batteries — all under the Amazon Basics brand, and comforters, kitchen accessories, toilet paper, and even almonds under the Solimo brand.

It has Symbol sneakers, House and Shields T-shirts, and Myx Kurtas. It also has a mobile-phone brand called 10.Or, pronounced as Tenor.

With Walmart-Flipkart combine’s plans still in the early stage, this narrative will look more closely at Amazon.

In the US, according to *The New York Times*, Amazon’s private label business could more than double in revenue to USD25 billion in the next four years. Indian players are also gung-ho about private labels. Myntra, for instance, is making investments in its own fashion labels, including two [artificial intelligence-powered brands ET Prime had earlier reported on](#) which are already worth USD20 million in revenue, according to the company. Before its Big Billion Day sale this year, Myntra parent [Flipkart announced big plan](#)sto scale up its own private labels in an array of categories.

To be sure, private labels, which are attractive because they afford fatter margins, aren’t by themselves objectionable. As Arvind Singhal, chairman and managing director of retail consultancy Technopak Advisors, point out, merely owning private labels is not anticompetitive. It is the e-commerce marketplaces’ alleged use of their technological muscle to give preferential treatment to these labels that is causing the heartache among competitors.

The curious case of “Amazon’s Choice”

While researching for this story, ET Prime reached out to James Thomson, former head of Amazon Services and currently partner at Buy Box Experts, an Amazon account-management and branding-strategy consultancy. While at Amazon, Thomson was responsible for recruiting sellers to the marketplace. He has also written a book called the *Amazon Marketplace Dilemma*.

“With the extraordinary product search data BY CUSTOMER that Amazon has (emphasis Thomson’s), it knows exactly who to target when it launches new private-label products,” Thomson says over e-mail. “It is able to target customers who looked for products similar to Amazon private-label items, and can customise its message depending on whether the customer did or didn’t buy [the brand they] initially searched,” he adds.

Going by the kerfuffle in Europe, that argument certainly seems to have found resonance there. Now, Indian

sellers' unions such as AIOVA want the CCI to examine whether the marketplaces here are also unduly favouring their own brands by directing customers to them through preferential positioning or preferential access.

A search on Amazon reveals that at least in some of the categories where it has private labels, these products often do get pride of place. In many instances, Amazon Basics brands are marked as "Amazon's Choice", but there is very little information shared by the company on how that badge is earned, except one line: "Amazon's Choice recommends highly rated, well-priced products available to ship immediately."

The screenshot shows the Amazon.in search results for "IPHONE CABLE". The top navigation bar includes the Amazon.in logo, a search bar with "IPHONE CABLE" entered, and a search icon. Below the navigation bar, there are links for "Deliver to Nirmal Bengaluru 560008", "Shop by Category", "Buy Again", "Nirmal's Amazon.in", "Today's Deals", "Amazon Pay", "Sell", and "Customer Service". The search results show 1-16 of over 10,000 results. On the left, there are filters for "Electronics" (Mobile Phone Data Cables, Mobile Accessories, Mobile Phone Mounts & Stands) and "Computers & Accessories" (USB Cables). The main results area features three sponsored products: 1) "Apple Certified Lightning Cable At Great Prices" with a price of ₹799.00 (38% off from ₹1,295.00). 2) "Regor Nylon Braided Apple MFi Certified Lightning Cable - 5 Feet (1.5 Metres) - (Black)" with a price of ₹699 (53% off from ₹1,500) and a "Lightning Deal" badge. 3) Two other "Limited time Deal" products with prices of ₹899.00 (36% off) and ₹1,395.00 (36% off). The bottom left shows "Refine by" options for Amazon Prime, Delivery Day, Pay On Delivery, and Brand.

AmazonBasics Velvet Suit Hangers - Black (Set of 30)

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1-24 of over 50,000 results for Home & Kitchen : Home Furnishing : Bedding & Linen : Bedsheets : "cotton bedsheet" Sort by

Show results for

- Any Category
- Home & Kitchen
- Home Furnishing
- Bedding & Linen
- Bedsheets**
 - Flat Bed Sheets
 - Fitted Bedsheets

Refine by

Amazon Prime



Pay On Delivery (What's this?)



Material

- Cotton
- Sateen
- Polyester
- Polycotton
- Satin



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 Set - (Includes 1 bedsheet, 1 Fitt...
 ★★★★★ 115

Showing results in Home & Kitchen. Show instead results in All Categories.



The screenshot shows the Amazon.in homepage with a search for 'BATTERIES'. The header includes the Amazon Prime logo, delivery location (Bengaluru 560008), and navigation links like 'Shop by Category', 'Buy Again', and 'Nirmal's Amazon.in'. The search results show 1-16 of over 1,00,000 results. On the left, there are filters for 'Electronics', 'Health & Personal Care', 'Matches', 'Car & Motorbike', and 'Industrial & Scientific'. The main content area features a sponsored banner for AmazonBasics batteries with the text 'High quality products at great prices' and 'Shop now'. Below this, there are product listings for 'AmazonBasics AAA Performance Alkaline Non-Rechargeable Batt...' and 'AmazonBasics AAA Performance Alkaline Batteries (20-Pack) - Pac...'. A 'Top Rated from Our Brands' section is also visible.

The screenshot shows the Amazon.in homepage with a search for 'usb cables'. The header is similar to the previous screenshot. The search results show 1-16 of over 80,000 results. On the left, there are filters for 'Computers & Accessories', 'Electronics', and 'Refine by'. The main content area features a sponsored banner for AmazonBasics USB cables with the text 'High quality products at great prices' and 'Shop now'. Below this, there are product listings for 'AmazonBasics Micro USB Charging Cable for Android Phones (3 Feet...)' and 'Wayona Nylon Braided WN3LB1 USB Syncing and Charging Cable sync and Charging Pack of 1, Black'. The Wayona product listing shows a price of ₹399 (69% off from ₹1,299) and 'FREE Delivery by Saturday'.

ET Prime’s e-mail to Amazon requesting its perspective on antitrust concerns went unanswered.

Stifling search?

Thomson says over the past two years, Amazon has regularly reduced the amount of paid search opportunities available for other companies competing with Amazon's own private-label products, as Amazon takes those paid search spaces for itself.

“It is important to understand that most sales on Amazon happen from products that show up on the first page of organic search results — and Amazon is taking over more and more of that first page of space for its own products, essentially squeezing out incumbent or national brands that historically have had that space,” he says.

But proving that this seemingly preferential treatment constitutes anti-competitive behaviour is not going to be easy.

An earlier judgment by the CCI may be worth examining in this context. In February, the CCI had enforced an INR135.86 crore [fine on Google](#) for "search bias" and abusing its "dominant position". Google was alleged to have favoured its own services and partners and manipulated search results to play up its own products like Google Flights.

The judgment noted, “Google is leveraging its strong position in various online search markets to enter into and enhance its position in ancillary markets. Not only does that cause direct harm to competitors in vertical markets, it also causes direct harm to other website owners, since their websites are moved down on SERP (search engine results page) and hence, they receive less clicks as a result of lessened traffic. Further, this also harms consumers as they no longer receive the most relevant results at the top of SERP.”

In that case, the decision was made easier for the CCI considering Google Search’s status as the sole gatekeeper to the Internet. However, the competitive nature of the e-commerce market in India means Amazon or Flipkart-Myntra-Jabong might escape similar censure, even though there may be similar use of technology to give prominence to their own brands or sellers.

This is where Walmart’s acquisition of Flipkart takes on a critical complexion. Two deep-pocketed rivals (Walmart via Flipkart and Amazon) slugging it out will mean neither will have the sort of dominance in the near to medium term that Amazon enjoys in the online market in Europe and the US.

According to investment bank Barclays, both Amazon and Flipkart are on a similar run rate of USD11.2 billion in GMV (gross merchandise value) for FY19. Vaibhav Choukse, partner at law firm J Sagar Associates, says the CCI will intervene only when the market share of one of these players becomes high enough, something that is still far from happening.

A case of interpretations

Antitrust in the technology era has been a subject of intense debate. An article in *Yale Law Review* by Lina Khan, an American lawyer, had ignited heated chatter in competition-law circles on the need to rethink interpretations

of antitrust in a tech-driven world.

Central to this is the argument that traditional interpretations of anti-competitive practices centered on price manipulation need to be rethought, since the power of technology and deep pockets allow Amazon to have a far greater impact across the ecosystem, not limited to the end consumer.

“The thousands of retailers and independent businesses that must ride Amazon’s rails to reach market are increasingly dependent on their biggest competitor,” Khan noted in her paper.

But this line of thinking has its critics, such as John E Lopatka, distinguished professor of law at the University of Pennsylvania. “Antitrust law loses its coherence when it loses its focus on promoting consumer welfare, and it invites judges to make trade-offs between consumer welfare and other values that courts are ill-equipped to make,” Lopatka says.

According to a former member of the CCI who wanted to stay anonymous, India has thus far broadly taken the middle road in interpreting competition law by taking into account the impact on the consumer as well as on other pillars of the ecosystem. He agrees that the traditional concepts that underpin competition law may indeed need a refresh soon.

With companies like Amazon and Flipkart anchored in the marketplace model with technology as its centrepiece, the definition of “dominance” itself needs to be far more nuanced. It has to take into account practices *within* the evolving marketplace ecosystem and not necessarily in the context of the entire retail market.

The debate over private labels and how they are sold on these marketplaces is likely to intensify in the days ahead, with Walmart likely to bring in its own massive catalogue soon. As the former CCI member quoted above says, “The relationship between these marketplaces and their own brands and third-party sellers needs further examination by the CCI in the future.”
