



SAROJ LALJI MEHROTRA CENTRE OF LEGAL STUDIES

of

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A. BACKGROUND

1. Technoterra, a democratic country based in South-East Asia, has a population of approximately 140 crores. The Parliament of Technoterra (**Parliament**) is the paramount legislative body responsible for framing and passing laws and consists of representatives elected by its citizens. The Constitution of Technoterra (**Constitution**) lays down the foundation for *inter alia*: (a) the parliamentary system of law making; (b) separation of powers between the legislature, executive and judiciary; and (c) fundamental rights and duties.¹

2. In December 2002, the Parliament passed the Competition Act, 2002 (**Competition Act**), which received presidential assent in January 2003. The purpose of the Competition Act as outlined in its Preamble is to provide for the establishment of an antitrust regulator known as the Competition Commission of Technoterra (**Commission**), whose mandate is to: (a) keep a check on practices having appreciable adverse effect on competition (**AAEC**); (b) foster and maintain fair and healthy competition in markets; (c) protect consumer interest; and (d) ensure free trade in the country.

3. The Competition Act is a sector agnostic law that seeks to regulate various anti-competitive practices, including anti-competitive agreements and abuse of dominance. Under the Competition Act, the Commission may inquire into anti-competitive practices either *suo moto* or based on: (a) any information received from any person or association; or (b) a reference from the Government or statutory authority. The Commission may direct its investigative arm, the Office of the Director General (**DG**), to investigate anti-competitive practices if it arrives at a *prima facie* finding of contravention.

4. The DG is required to prepare a comprehensive and detailed investigation report (**DG Report**) containing the specific facts of the case, the investigation process, the findings, i.e., whether the Competition Act was contravened or not, and the evidence relied on. Based on the DG Report and the arguments of parties during the oral hearing, the Commission passes a final order. If the Commission agrees with the findings of the DG Report, it may pass a final order imposing hefty penalties based on the global turnover of the infringing party for contravention of the Act.

5. Since 2018, the Commission has been actively looking into anti-competitive practices of various digital enterprises, including e-commerce platforms, app stores, messaging applications, social media platforms, online hotel booking platforms and online delivery platforms. It has closely scrutinized their business policies, practices and their relationships with users, competitors and key business partners and has found many of them to be engaging in anti-competitive conduct.

1. Technoterra's laws are in pari materia with that of India, except where stated otherwise.

Various large-scale companies operating digital platforms have faced hefty penalties and have also had to significantly modify their business models and practices based on the Commission's directions.

6. This shift in enforcement priorities follows from a growing consensus among lawmakers, policy experts and legal experts that digital markets operate differently from traditional markets and therefore must be regulated differently. This is inspired by various factors such as the increased scrutiny of digital markets and regulatory developments in other jurisdictions such as the European Union, the Commission's own experience in regulating digital markets under the Competition Act, and the Parliamentary Standing Committee's Report on 'Anti-Competitive practices by Big Tech Companies' published in December 2022.

7. The Ministry of Corporate Affairs of the Government of Technoterra (MCA), in February 2023, constituted the Committee on Digital Competition Law (CDCL), to prepare a report assessing the need for a separate *ex-ante* law to regulate digital markets. On 27 February 2024, the CDCL submitted its report (CDCL Report) along with a draft legislation in the form of a Digital Competition Act (DCA).

8. After an extensive consultation process with all stakeholders and regular meetings between the MCA, Commission and other stakeholders, the draft DCA as prepared by the CDCL was tabled before the Parliament as a Bill on 31 April 2024. It received presidential assent on 8 June 2024, after being passed by both houses of the Parliament. The Central Government notified all provisions of the DCA on 09 June 2024.²

B. THE E-COMMERCE INDUSTRY IN TECHNOTERRA

9. E-commerce has revolutionized not only the way consumers purchase goods, but also the way businesses function in Technoterra. Consumers benefit from easy accessibility, convenience, wide choice and competitive prices. It is also extremely convenient as customers simply need to create an account, login, select the relevant products, select the mode of payment, enter the delivery address and place their order. Further, businesses that are listed on such platforms to sell goods and services get wider reach, a higher customer base, and greater visibility.

10. E-commerce has permeated into every sector in the economy, ranging from fast moving consumer goods, apparel, home care and even electronics. It has become a viable shopping channel for consumers with the increasing internet penetration in Technoterra. Various platforms such as Clubkart, Franzon, Nyntra and Labong offer periodic cashbacks and heavy discounts to increase demand. The onset of the Covid-19 pandemic also accelerated the adoption of e-commerce. For these reasons, there has been an undeniable shift in consumer preferences away from traditional channels of shopping and towards e-commerce.

2. The provisions of the DCA are identical to the provisions of the draft Digital Competition Act released on 12 March 2024.

11. In the initial days of increasing adoption of e-commerce, there was a gap in the market for sale of electronic appliances online, as well as for providing after-sales services such as servicing and repairs. ElectraMart, a US-based e-commerce aggregator, stepped in to fill this gap. Its model involved selling electronic goods and appliances through authorized and verified retail electronic goods and appliance stores listed on its platform, known as **Retail Partners**. ElectraMart's platform became available in Technoterra in 2018.

12. Just like any e-commerce platform, customers can create an account on ElectraMart by entering their personal details such as name, mobile number, email address and address for delivery (**User Data**). As a part of the registration process, each customer is required to unconditionally accept all terms of ElectraMart's Privacy Policy, which, *inter alia*, states that-

“Clause 3.5: The Customer gives unconditional consent to ElectraMart to collect User Data, including but not limited to their name, phone number, email address and delivery address. ElectraMart may share such User Data with any third party at its discretion.”

13. ElectraMart also began collaborating with various businesses (known as **Servicing Partners**) to provide servicing and repair services for electronic goods and appliances sold through its platform. This collaboration enabled its customers to avail easy, convenient and reliable servicing and repair services for products purchased through the platform. Additionally, customers who use these Servicing Partners for their servicing and repair needs are regularly offered special discounts and cashbacks.

14. The standard agreements that ElectraMart enters into with Servicing Partners include a clause for ElectraMart to share the User Data collected by ElectraMart on a real-time basis. This sharing is crucial for Servicing Partners to retrieval of information on the products bought by customers, authentication for servicing and repair requests, and for follow up with customers. ElectraMart also shares detailed predictive analytics derived from User Data that enables Servicing Partners to pre-emptively identify and reach out to customers who are likely to require servicing and repair services. The extract of the clause is reproduced below-

“Clause 9.1: ElectraMart shall enable real-time access to all User Data collected by it with the Servicing Partner, in relation to each Customer that avails any Services, through the Nucleus platform.”

“Clause 9.7: ElectraMart shall share analytics derived from User Data with the Servicing Partner, based on parameters to be identified and updated by ElectraMart from time to time. Such analytics shall take into account User Data from all customers of ElectraMart, except for customers that are excluded pursuant to laws applicable in Technoterra.”

“Clause 10.2: The Servicing Partner shall not use the User Data shared with it or any insights derived from it for any other purpose other than this Commercial Arrangement.”

15. Retail Partners are also required to enter into standard form agreements with ElectraMart to get listed on its platform, which *inter alia* contain provisions for: (a) limited exclusivity in listing of Retail Partners on ElectraMart’s platform for a defined period; and (b) a prohibition on the Retail Partners from actively steering users on their own respective websites or applications. These clauses are reproduced below-

“Clause 2.3: The Retail Partner shall not list itself on any Competing Platforms listed in Schedule I to this Agreement or otherwise engage their services to facilitate the sale of any electronic goods and appliances for a period of 1 year from the Effective Date.”

“Clause 2.4: ElectraMart and the Retail Partner may amend Schedule I to this Agreement through mutual agreement.”

“Clause 2.5: Throughout the term of this Agreement, the Retail Partner shall refrain from actively steering any users to its own websites or applications...”

“SCHEDULE I: (a) Franzon; (b) Clubkart; (c) Bata Fliq; and (d) TUV.”

16. ElectraMart also sells a limited range of hair dryers, hair straighteners and hair clippers, on a white label basis, which are exclusively available on its website and application under a separate brand name owned by it.

17. With its effective and user-friendly interface, coupled with availability of verified Retail Partners and responsive customer care services, ElectraMart has become the go-to platform that is considered as a one-stop-shop for all electronic goods and appliances.

18. The market for online sale of electronic goods and appliances is characterized by the presence of e-commerce giants like Franzon and Clubkart, as well as specialized platforms such as ElectraMart and retail store-owned websites and applications, including Electrama and Vijayanta Sales.

19. A market study by DEF, a leading policy think tank, identifies the market share of all players in the market for online sale of electronic goods and appliances in Technoterra as follows-

Name of Company	Market Share
ElectraMart	41%
Franzon	34%
Clubkart	10%
Bata Fliq	06%
TUV Ltd. (TUV)	05%
Others (including online platforms of retail stores)	04%

20. ElectraMart boasts a user base of over 20 crore end users in Technoterra, with over 40,000 Retail Partners in Technoterra listed on its platform. Based on audited financial statements for the financial year 2023-24, ElectraMart registered a global turnover of USD 25 billion across 20 countries worldwide, with INR 3500 crore in Technoterra alone. However, owing to reducing valuations of digital companies recently, its global market capitalization during the same period ranged from USD 50 billion to 60 billion.

C. PROCEEDINGS BEFORE THE COMMISSION

21. On 18 June 2024, ElectraMart received a notice from the Commission under Section 4(3) of the DCA seeking information on its domestic and global turnover, global market capitalization, number of end users and business users, among others, to ascertain whether it fulfils the criteria laid down under Sections 3(2) or 3(3) of the DCA to be designated as an SSDE (Systemically Significant Digital Enterprise).

22. ElectraMart filed its response on 30 June 2024, providing all the information sought in the notice. The Commission noted ElectraMart's submissions on the relevant thresholds under Section 3(2) of the DCA. It also noted that:(i) ElectraMart has a significant number of end-users and business users; (ii) it enjoys significant economic power; (iii) end-users and business users are heavily dependent on ElectraMart; (iv) there are high barriers to entry due to requirement of significant investment in digital infrastructure and the exclusivity clause in ElectraMart's agreement with Retail Partners; and (v) ElectraMart enjoys an advantageous position due to two-sided network effects. It therefore designated ElectraMart as an SSDE for a period of 3 years under Section 3(3) of the DCA.

23. In July 2024, the Commission received complaints under Section 16(1) of the DCA about ElectraMart's alleged contravention of its obligations from three different informants-

(a) Mr. Z, a user of ElectraMart since 2023, approached the Commission alleging contravention of Section 12(2) of the DCA by virtue of Clause 3.5 of the user agreement, which enabled ElectraMart to excessively collect and share his data at its discretion. He has also claimed that ElectraMart had an unfair and discriminatory discounts and cashbacks policy, in contravention of Section 10 of the DCA, as they were only given to those consumers who availed of servicing and repair services from its Servicing Partners, thereby excluding all other users;

(b) M Enterprises, one of ElectraMart's Retail Partners, filed an information with the Commission alleging various unfair terms in its agreement with ElectraMart, including anti- steering clauses and exclusivity requirements, thereby violating Sections 10 and 14 of the DCA. It also accused ElectraMart of acting in contravention of Section 11 of the DCA by placing its own brand of personal care products on its website and application at an advantageous position on the homepage and at the top of every search result relating to personal care products, thereby severely affecting M's visibility on ElectraMart in this category;

(c) The Commission also received information from TUV. TUV is an online intermediary that connects consumers and retailers for the sale of various products, including electronic goods and appliances. TUV has alleged that ElectraMart has gained an unfair advantage by leveraging its access to large amounts of consumer data. It has also claimed that ElectraMart has violated Section 10 of the DCA by indulging in unfair and exclusionary practices, due to the exclusivity clause in its agreements with Retail Partners, as a result of which, TUV has found it extremely difficult to list retail stores on its platform.

24. Considering the nature of information filed in all three cases and the issues involved, the Commission decided to club all of them. Based on its assessment of the facts and submissions of all parties, the Commission concluded that there is a *prima facie* case of ElectraMart failing to fulfil its obligations as an SSDE under the DCA and passed an order under Section 16(1) of the DCA (***Prima Facie Order***) directing the DG to conduct investigation. The Commission's ***Prima Facie Order*** makes the following observations-

(a) ElectraMart failed to submit a report required under Section 9 of the CDA.

(b) ElectraMart's privacy policy does not fully disclose the scope of data sharing. This is not informed consent. Therefore, ElectraMart is enabling third parties to use data without the end user's consent in contravention of Section 12(2) of the DCA.

(c) End-users are required to unconditionally agree to ElectraMart's privacy practices (including the data sharing clause) in order to avail its services. This 'take-it-or-leave-it' nature of a privacy policy is unfair and therefore violates Section 10 of the DCA. Furthermore, low standards for end-users data protection not only leads to customer exploitation but also enables an SSDE to have unrestricted access to user data, a non-price competition factor, which can be leveraged, to the detriment of its competitors.

(d) ElectraMart places its own products at an advantageous position at the top of the search results on its platform, giving it an unfair competitive advantage, to the detriment of other products listed, thereby violating Section 11 of the DCA.

(e) By prohibiting its Retail Partners from directing them to their own platforms for sale of electronics/appliances, ElectraMart is acting in contravention of Section 14 of the DCA.

(f) ElectraMart imposes exclusivity conditions on its Retail Partners, thereby prohibiting them from being listed on any other platform that competes with ElectraMart. This is an unfair exclusivity clause and is therefore violative of Section 10 of the DCA.

(g) ElectraMart engages in discriminatory conduct with its differential promotional strategy of only offering benefits to those end-users who avail services from its servicing and repair partners, thereby violating Sections 10 and 15 of the DCA.

25. Aggrieved by its designation and the Commission's Prima Facie Order, ElectraMart challenged the provisions of the DCA and the proceedings before the Commission before the Hon'ble High Court of Terra (HC) under Article 226 of the Constitution.

D. GROUNDS BEFORE THE HC

26. ElectraMart raised the following grounds before the HC -

(a) Under the framework of the DCA, various provisions such as Section 7(3), Explanation to Section 14, Section 49(2)(g) and Section 49(3) lead to excessive delegation of legislative powers in favour of the Commission, especially with regards to framing of obligations of an SSDE. This is in contravention of the basic structure doctrine of separation of powers between the legislature, executive and judiciary, as laid down by the Supreme Court.

(b) The Competition Act is also a special law that deals with anti-competitive practices, including anti-competitive agreements and abuse of dominance, and its applicability is not restricted to any particular sector. All the issues raised by the

Commission regarding the alleged contraventions fall squarely within the scope of anti-competitive practices under Sections 3 and 4 of the Competition Act, which should prevail over the provisions of the DCA. Otherwise, there is a risk of double penalty.

Further, the data-related contraventions alleged against ElectraMart are in direct conflict with the Digital Personal Data Protection Act, 2023 (**DPDPA**), which is a special law that already provides for a comprehensive framework for regulating the processing of personal data. In relation to these specific contraventions, the Data Protection Authority of Technoterra (**DPA**) has jurisdiction, and the Commission's jurisdiction is ousted.³

(c) ElectraMart does not meet any of the quantitative thresholds under Section 3(2) of the DCA. The Commission's assessment under Section 3(3) of the DCA is erroneous as it is not based on an objective understanding of ElectraMart's position in the market and the market realities. ElectraMart operates in the highly competitive e-commerce market. Even in the narrower segment of sale of electronic goods and appliances via e-commerce, ElectraMart faces competitive constraints from other players such as Franzon, Clubkart, and platforms operated by large-scale electronics retail stores such as Electrama, Vijayanta Sales and Feliance Digital. Other factors such as multi-homing contribute to its precarious position in the market.

(d) In any case, ElectraMart's conduct, and practices are justified, and align with standard business practices. They are objectively necessary in response to competitive conditions in the market, and do not unfairly impact its customers or businesses listed on its platform. They align with the letter and spirit of the legislation, and do not violate any relevant provisions of the DCA.

E. LEGAL ISSUES

27. The HC identified the following issues to be decided by it-

- (a) Is the DCA violative of the Constitution due to excessive delegation?
- (b) Is the jurisdiction of the Commission under the DCA ousted due to overlaps with the Competition Act and the DPDPA?
- (c) Is the Commission's designation of ElectraMart as an SSDE legally sustainable under the DCA?
- (d) Subject to the issue above, did ElectraMart breach any of its obligations as an SSDE in contravention of the provisions of the DCA?

3. Unlike in India, all provisions of the DPDPA were notified in Technoterra in May 2023 and the DPA was fully functional within the same month.

The Moot proposition is drafted by Chandhiok & Mahajan. Any connection to the organisation with reference to the moot proposition or the competition shall be considered a valid ground for disqualification