

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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# **HUB-AND-SPOKE CARTELS IN INDIA'S DIGITAL MARKETS: ANALYSING PLATFORM FACILITATOR LIABILITY POST-2023 AMENDMENT**

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## **ABSTRACT**

This research paper examines the application of facilitator liability provisions to digital platforms in India, focusing on the ongoing investigation into Amazon and Flipkart. The Competition (Amendment) Act, 2023 introduced Section 3(3-A) to the Competition Act, 2002, which extends liability to any person who "participates or intends to participate" in an anti-competitive agreement, even if they are not engaged in identical or similar trade. This provision was designed to capture third-party facilitators like trade associations and consultants. However, its application to digital platforms that host millions of sellers raises novel legal questions.

This paper argues that the Amazon-Flipkart case presents a classic "hub-and-spoke" cartel structure, where the platforms act as hubs coordinating the conduct of preferred seller spokes. The paper analyses the Director General's investigation report, which found that both platforms systematically privileged select sellers, allocated markets through exclusive launch agreements, and used algorithms to structurally exclude non-preferred sellers. The paper then examines whether the platforms can be held liable under Section 3(3-A) as facilitators, or under Section 4 for abuse of dominance.

The paper concludes that while the 2023 amendment provides a powerful tool for addressing platform-facilitated collusion, significant interpretive questions remain regarding the meaning of "participation," the standard of proof for "intent," and the relationship between facilitator liability and abuse of dominance. The paper recommends that the Competition Commission of India (CCI) issue detailed guidelines on hub-and-spoke arrangements and algorithmic facilitation, and that the government consider ex ante regulation for digital platforms along the lines of the European Union's Digital Markets Act.

**Keywords:** Hub-and-spoke cartel, facilitator liability, digital platforms, Amazon, Flipkart, Section 3(3-A), Competition Act 2002, algorithmic collusion.

## 1. INTRODUCTION

### 1.1 Background

In August 2024, the Director General (DG) of the Competition Commission of India (CCI) submitted a bombshell investigation report. The report alleged that Amazon and Flipkart, India's two largest e-commerce platforms, had engaged in a carefully designed system to privilege a small cohort of preferred sellers. The DG concluded that "no seller other than its preferred seller can survive" on these platforms. This finding, if upheld, would represent one of the most significant competition violations in Indian history.

The case raises a fundamental legal question: When a platform designs its algorithms and contracting terms to favor certain sellers, is this an anti-competitive agreement between the platform and those sellers? Or is it a unilateral abuse of the platform's dominant position? Or could it be both?

The 2023 amendment to the Competition Act added Section 3(3-A), which explicitly extends liability to "any person who participates or intends to participate" in an anti-competitive agreement, even if that person is not a competitor. This provision was primarily intended to capture traditional facilitators like trade associations and consultants. But its language is broad enough to cover digital platforms like Amazon and Flipkart.

This paper examines whether the Amazon-Flipkart case can be understood as a "hub-and-spoke" cartel, with the platforms as the hub and the preferred sellers as the spokes. It analyses the legal basis for holding platforms liable as facilitators under Section 3(3-A) and considers the relationship between this provision and Section 4 (abuse of dominance).

### 1.2 Research Questions

This paper addresses the following questions:

1. What is a hub-and-spoke cartel, and how does it apply to digital platforms?
2. Does the DG's investigation report against Amazon and Flipkart establish the elements of a hub-and-spoke arrangement?
3. Can Amazon and Flipkart be held liable under Section 3(3-A) as facilitators of anti-competitive agreements?
4. How does facilitator liability interact with abuse of dominance provisions under Section 4?

### 1.3 Methodology

This paper adopts a doctrinal legal research methodology. It analyses the provisions of the Competition Act, 2002 (as amended in 2023), the DG's investigation report (as publicly reported), and relevant case law from India and other jurisdictions (particularly the European Union, where hub-and-spoke jurisprudence is more developed).

## 2. THE HUB-AND-SPOKE CARTEL CONCEPT

### 2.1 Definition and Structure

A hub-and-spoke cartel is a form of anti-competitive agreement where a common facilitator (the "hub") coordinates conduct among competitors (the "spokes"). The spokes may not directly communicate with each other. Instead, they each communicate with the hub, and the hub ensures that their conduct is aligned.

For example, suppose a hotel booking platform (the hub) tells each hotel (a spoke) that if it offers the lowest price on the platform, the platform will give it preferential ranking. Each hotel agrees. Without directly talking to each other, the hotels end up charging the same price. The platform has facilitated a cartel.

The key feature of a hub-and-spoke cartel is that there is no direct horizontal agreement between the spokes. The agreement is vertical (hub-spoke) and horizontal (spoke-spoke through the hub). Competition law has struggled with how to characterize such arrangements.

### 2.2 Legal Characterization

There are three possible ways to characterize a hub-and-spoke cartel:

**Option 1: Vertical agreements only.** Under this view, each hub-spoke agreement is a separate vertical agreement. These vertical agreements may be anti-competitive if they cause an appreciable adverse effect on competition (AAEC). However, vertical agreements are subject to rule of reason analysis, meaning the hub can argue pro-competitive justifications.

**Option 2: Horizontal agreement through concerted practice.** Under this view, the spokes are engaged in a concerted practice to coordinate their conduct, even without direct communication. The hub acts as a mechanism for this coordination. The legal test is whether the spokes knew or ought to have known that their conduct was being coordinated through the hub.

**Option 3: Hybrid approach.** Under this view, the hub itself can be held liable as a facilitator of an anti-competitive agreement, even if the spokes are not directly liable. This is the approach taken by Section 3(3-A) of the Indian Competition Act.

### 2.3 International Precedents

The European Court of Justice has decided several important hub-and-spoke cases. In *AC-Treuhand AG v. European Commission* (2015), the Court held that a consultancy that provided meeting rooms, facilitated communication, and stored confidential information for a cartel could be held liable, even though it was not itself a competitor. The Court stated that "any undertaking which knowingly makes a contribution to the implementation of a cartel may be held liable."

In the *E-books case* (Apple, 2016), the US Court of Appeals for the Second Circuit held that Apple had facilitated a price-fixing conspiracy among five major publishers. Apple acted as the hub, and the publishers were the spokes. Apple was held liable under Section 1 of the Sherman Act.

These precedents establish that facilitators can be held liable for cartels, even if they are not competitors in the relevant market.

## 3. THE AMAZON-FLIPKART INVESTIGATION: FACTS AND FINDINGS

### 3.1 Background of the Investigation

The CCI initiated an investigation into Amazon and Flipkart following complaints from the Delhi Vyapar Mahasangh (a traders' association) and other seller groups. The complainants alleged that both platforms had engaged in a range of anti-competitive practices, including preferential treatment of select sellers, exclusive product launches, and deep discounting.

The DG conducted a detailed investigation, which reportedly involved reviewing millions of documents, analyzing algorithms, and examining internal communications. The DG submitted its report to the CCI in August 2024.

### 3.2 Key Findings of the DG Report

According to publicly available summaries, the DG's report made the following key findings: **Preferential Treatment of Select Sellers:** The DG found that both platforms consistently privileged a small cohort of sellers—six on Amazon and thirty-three on Flipkart. These preferred sellers received:

- Early access to inventory storage and warehousing
- Algorithmic prioritization in search rankings
- Subsidized or free logistics services

- Access to customer data not available to other sellers

**Exclusive Launch Agreements:** The platforms entered into agreements with manufacturers for exclusive product launches. These exclusive products were only available through the preferred sellers. For example, a new smartphone model would be launched exclusively on Amazon, and only through one of Amazon's six preferred sellers. Other sellers could not list the product.

**Algorithmic Bias:** The DG found that the platforms' algorithms were designed to favor sellers who used the platform's logistics and fulfillment services. Sellers who used independent logistics were demoted in search rankings. The DG concluded that this was not a neutral efficiency measure but a deliberate strategy to force sellers onto the platform's services.

**Structural Exclusion:** The DG's most striking finding was that "no seller other than its preferred seller can survive" on these platforms. The exclusion was not incidental or temporary; it was embedded in the platform design. New sellers could not realistically compete because the algorithms were rigged against them.

### 3.3 Characterizing the Conduct

How should this conduct be characterized under competition law?

One view is that this is primarily a vertical issue. The platforms are imposing conditions on their sellers. These conditions may be anti-competitive under Section 3(4) (vertical agreements) or Section 4 (abuse of dominance).

Another view is that this is a horizontal market allocation. The platforms and their preferred sellers have effectively divided the market. Preferred sellers get the customers; other sellers get nothing. The platforms act as the hub, and the preferred sellers are the spokes.

The DG's report appears to adopt the hub-and-spoke framework. The report emphasizes that the platforms "orchestrated" the conduct of preferred sellers. The sellers did not act independently; they responded to the incentives created by the platforms.

## 4. FACILITATOR LIABILITY UNDER SECTION 3(3-A)

### 4.1 The Legal Provision

Section 3(3-A) of the Competition Act, inserted by the 2023 amendment, states:

"Any person who participates or intends to participate in any agreement of the nature referred to in sub-section (3), even if such person is not engaged in identical or similar trade of goods or provision of services, shall be liable for contravention of the provisions of this section."

This provision has several notable features:

**Broad Scope:** It applies to "any person," not just enterprises. This could include individuals, trade associations, consultants, and platforms.

**No Requirement of Similar Trade:** Unlike Section 3(3), which applies to enterprises "engaged in identical or similar trade," Section 3(3-A) applies even if the person is not a competitor. This is specifically designed to capture facilitators.

**Intent to Participate:** The provision covers both actual participation and "intent to participate." This lowers the evidentiary threshold. The CCI does not need to prove that the facilitation was successful; it is enough to show that the person intended to participate.

#### 4.2 Application to Amazon and Flipkart

Can Amazon and Flipkart be held liable under Section 3(3-A)? The answer depends on several factors:

**Did the platforms "participate" in an agreement of the nature referred to in Section 3(3)?** Section 3(3) covers agreements that determine prices, limit production, share markets, or result in bid rigging. The DG's findings suggest that the platforms and preferred sellers engaged in market allocation (Section 3(3)(c)). Preferred sellers were given exclusive access to certain products and customers. Non-preferred sellers were excluded. This is a form of market sharing.

**Did the platforms "intend to participate"?** The DG's report found that the platforms' algorithms were deliberately designed to favor preferred sellers. This suggests intent. The platforms cannot claim that the exclusion was accidental.

**Is there an "agreement"?** The platforms had formal contracts with sellers. These contracts may not explicitly say "we will exclude other sellers," but the combination of contractual terms and algorithmic design creates an arrangement or understanding. Section 2(b) defines "agreement" broadly to include "any arrangement or understanding or action in concert," whether formal or informal.

Based on these factors, there is a strong case that Amazon and Flipkart can be held liable under Section 3(3-A).

#### 4.3 Potential Defenses

The platforms may raise several defenses:

**Efficiency Justifications:** The platforms may argue that their policies are efficiency-enhancing. For example, favoring sellers who use the platform's logistics may improve delivery speed and reliability. Under Section 19(3), the CCI must consider whether the agreement accrues benefits to consumers or promotes technical development.

**No Horizontal Agreement:** The platforms may argue that the preferred sellers did not directly communicate or coordinate with each other. Without a horizontal agreement, there is no cartel. However, this defense misunderstands the hub-and-spoke concept. The law does not require direct communication between spokes. It is enough that the hub coordinated their conduct.

**No Appreciable Adverse Effect:** The platforms may argue that despite the policies, competition still exists. Other e-commerce platforms (e.g., Meesho, Snapdeal) are present. However, the DG's finding that "no seller other than its preferred seller can survive" suggests that the effect is appreciable.

## 5. RELATIONSHIP WITH ABUSE OF DOMINANCE (SECTION 4)

### 5.1 Overlap Between Section 3 and Section 4

The Amazon-Flipkart case also raises issues under Section 4 (abuse of dominance). Both platforms are alleged to be dominant in the relevant market (e-commerce platforms in India). The DG's findings suggest that the platforms have abused their dominance by denying market access (Section 4(2)(c)) and imposing unfair conditions (Section 4(2)(a)).

The relationship between Section 3 and Section 4 is not exclusive. The same conduct can violate both provisions. For example, a dominant platform that enters into exclusive agreements with sellers may be violating Section 3(4) (vertical agreements) and Section 4(2)(c) (denial of market access).

The CCI can proceed under either provision. The choice has practical implications:

- Under Section 3, for horizontal agreements, there is a presumption of AAEC. The burden shifts to the parties.
- Under Section 4, the CCI must prove dominance and abuse. The Schott Glass case requires an effects-based analysis.

In the Amazon-Flipkart case, the DG appears to have proceeded under both provisions. The report found violations of Section 3(4)(c) (exclusive supply agreements) and Section 4 (abuse of dominance). The hub-and-spoke framework under Section 3(3) is an additional theory.

### 5.2 Advantages of the Facilitator Liability Framework

Using Section 3(3-A) to hold platforms liable as facilitators has several advantages:

**Lower Burden of Proof:** Under Section 3(3), horizontal agreements are presumed to have an AAEC. The platforms would bear the burden of rebutting this presumption. Under Section 4, the CCI bears the burden of proving abuse.

**Focus on Coordination:** Section 3(3-A) focuses on the platform's role in coordinating conduct.

This captures the essence of the hub-and-spoke arrangement. Section 4 focuses on unilateral conduct, which may not fully capture the collaborative aspect.

**Deterrence:** Holding platforms liable as facilitators sends a strong deterrent message. Platforms cannot hide behind the claim that they are merely passive intermediaries.

## 6. CHALLENGES AND RECOMMENDATIONS

### 6.1 Interpretive Challenges

Despite the potential of Section 3(3-A), significant interpretive challenges remain:

**What constitutes "participation"?** Does merely providing a platform (like Amazon's marketplace) constitute participation? Or is something more required, like actively designing algorithms to favor certain sellers? The CCI will need to develop a standard.

**What is the standard of proof for "intent"?** Section 3(3-A) covers "intends to participate." This is a low threshold. But how does the CCI prove intent? Can intent be inferred from conduct? What if the platform had mixed motives (e.g., efficiency and exclusion)?

**Can a platform be liable for facilitating collusion among sellers that it does not control?** In the Amazon-Flipkart case, the platforms had significant control over preferred sellers. But what if a platform simply provides a marketplace and sellers independently decide to collude? Should the platform be liable?

### 6.2 Recommendations

Based on this analysis, the following recommendations are offered:

**For the CCI:**

- 1. Issue Guidelines on Hub-and-Spoke Arrangements:** The CCI should issue detailed guidance on how it will analyze hub-and-spoke cases, including the factors that indicate facilitation, the standard of proof for intent, and the relationship between Section 3 and Section 4.
- 2. Publish the DG Report (with Redactions):** The CCI should publish the DG's report on the Amazon-Flipkart investigation (with appropriate redactions for confidentiality). This would provide valuable guidance to the bar and the business community.
- 3. Consider Algorithmic Audits:** The CCI should develop the capability to audit platforms' algorithms. In many cases, the only evidence of facilitation will be the algorithm itself.

**For the Government:**

- 4. Consider Ex Ante Regulation:** The Amazon-Flipkart case demonstrates the limitations of ex post enforcement. By the time the CCI completes its investigation, the market may have already tipped. The government should consider ex ante regulation for digital platforms, along the lines of the EU's Digital Markets Act. Such regulation could prohibit self-preferencing and require data portability, preventing platforms from engaging in hub-and-spoke conduct in the first place.

**For the Judiciary:**

- 5. Develop Doctrine on Algorithmic Facilitation:** Courts should recognize that algorithmic design choices can constitute facilitation, even in the absence of explicit agreements. The principles developed for traditional hub-and-spoke cases should be applied to algorithmic coordination.

## 7. CONCLUSION

The Amazon-Flipkart investigation is a landmark case for Indian competition law. It raises fundamental questions about the role of digital platforms, the nature of facilitation, and the adequacy of existing legal frameworks.

This paper has argued that the case can be understood as a hub-and-spoke cartel, with the platforms acting as hubs and the preferred sellers as spokes. The 2023 amendment, through Section 3(3-A), provides a powerful tool for holding platforms liable as facilitators. The provision's broad language—covering "any person" who "participates or intends to participate"—is well-suited to capture platform conduct.

However, significant interpretive questions remain. The CCI, the courts, and ultimately the legislature will need to provide clarity on what constitutes "participation," how "intent" is proved, and how facilitator liability interacts with abuse of dominance.

Regardless of how the Amazon-Flipkart case is resolved, one thing is clear: digital platforms cannot be treated as passive intermediaries. Their algorithms, contracting terms, and data practices actively shape market outcomes. Competition law must evolve to address this reality. The hub-and-spoke framework, supported by facilitator liability provisions, is an important step in that evolution.

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