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Consumer protection under competition law highlighting relevant market issues under digital market

Sadhana S Kunder

Sadhana, Student at Symbiosis Law School (LLM), Pune

Dr Bindu Ronald

Professor Dr. Bindu Ronald, Symbiosis Law School, Pune

Shivani Rajesh

Assistant Professor Shivani Rajesh, Symbiosis Law School, Pune

Abstract---Competition law in India strives to protect and promote competition in the market. Along with this objective, competition law also tries to protect consumer interest in different aspects. Consumers are protected under the Consumer Protection Act, Still, when competition in the market affects consumers adversely, the consumers can claim relief under the Competition Act. In the present scenario, various case laws have been adjourned by CCI on the ground that they fall within the ambit of the Consumer Protection Act and not Competition Law. Thus, it becomes necessary to understand the consumer protection aspect under the Competition law, and this article provides about the same. This paper analyses the dual purpose of competition law in protecting consumer interest and promoting competition in the market. It will help to evaluate the benefits available to the consumers in the traditional market as well as problems faced as a consequence of the development of technology with particular reference to issues about the definition of the relevant market in the digitalized world, which affects the consumers. Competition Commission of India plays a very important role in protecting consumer interest but they do face difficulties while understanding the relevant market in Digitalised Market and the same has been highlighted in this Article.

Keywords---competition law, competition policy, CCI, consumer protection, relevant market, digitalised market.

Introduction

The original concept of competition, like many other concepts, dates to the 18th century when Sir Adam Smith underlined the need for the absence of legal restraints on trade in his book “The Wealth of Nations.” The Modern Competition Law has governing legal norms inherited from two sources of law: common law developed by courts of law, and civil law developed by courts of law and Judges' interpretation of statutory law. Regarding the United States of America's antitrust law, it may be said that the economic conditions of the time encouraged the enactment of all legislation, assisting in the growth of what is now known as modern competition law.¹

The modern competition laws are concerned with promoting free trade and protecting competition in the economy.² In India, the Competition Act 2002 mentions that its objective is to protect competition and promote consumer welfare, along with other objectives. Policies regarding the competition and protection of the consumer have a significant regulatory effect on the working of the market. Fair competition guarantees that all customers who need a specific product or service can get it at a value that mirrors the actual expense of the product and service.³ And thus, fair competition in the market has benefited consumers in general.

There are various views regarding the goals of competition law. The ultimate goal of competition law is to maintain fair competitive behavior in the market. Some point out that, the goal is to prevent the small business holders against the large; others say to avoid the concentration of powers and maintain fair competition.⁴ Bork has pointed out that the goal of the Sherman Act was to promote the welfare of the consumer.⁵ Various goals are associated with the anti-trust laws throughout the globe. However, the ultimate goal of the competition law is to maintain fair competition in the market and to promote and protect consumer welfare.

Competition law plays a very important role in maintaining fair competition in the market. Any gaps in the competition law would affect fair, competitive behavior and may indirectly affect the consumers. The issues relating to the definition of “relevant market” under the Competition Act 2002 regarding digitalized market have been one such instance.⁶ Further in India, Consumers are mainly protected under the Consumer Protection Act 1986, but when the consumers are affected by anti-competitive behavior, the competition law plays a vital role. Thus, it becomes necessary to understand the concept of consumer protection under

¹ Franklin D. Jones, Historical Development of the Law of Business Competition, 35(8), Pg. 905, Yale Law Journal (1926).

² Richard Whish & David Bailey, Competition Law 19-25, oxford University Press (8th 2015).

³ Vinod Dhall, Competition law today 471-483, Oxford Publication (2nd Ed. 2019).

⁴ Ma. Joy V. Abrenica, Balancing Consumer Welfare and Public Interest in Competition Law, 13, Asian Journal of WTO and International Health Law and Policy, 446, 443-462 (2018).

⁵ Robert H Bork, Legislative Intent and the Policy of the Sherman Act, 9, J.L & ECON. (1996).

⁶ Vibodh Parthasarathi, The Conundrum of ‘Relevant Market’: Market Definition in India’s Complex TV Distribution Business, 15(2), Indian Journal of Law and Technology, 494-520 (2019).

competition law. Cellini,⁷ while speaking about the economic perspective of the competition law regime, provides about the evidentiary study such as “the competitive advantages of nations” including certain case-laws such as “the case of monopolies” -to provide about how the competition law helps in the economic development of the nation as a whole. It’s the consumers who will be benefitted as they will have more comprehensive options at a lower price. Hence, there is always an interconnection between consumer welfare and the competition policy. Further, S M Dugar⁸ also mentions how Consumer protection is an essential objective of the Competition Law and various other objectives while highlighting the concept of Competition Law in India. But both articles have failed to provide a clear idea of the consumer welfare aspect. Hence it becomes necessary to understand the consumer protection aspect regarding competition law and the gaps in the competition law concerning the definition of “relevant market” regarding digitalized market which affects the consumers, along with the relevant case laws.

Competition law and competition policy

The term “Competition” is a broad term, and the definition of the same is not included under the Competition Act 2002. Competition means a battle or a struggle to land a superior position, and in the business world, it means “striving for customers and business in the marketplace.”⁹ In general, the phrase competition refers to a form of rivalry. When we talk about competition, we're referring to a market structure in which no buyer or seller can affect the price of goods or services through their purchases or sales.¹⁰ There have been inevitable confusion regarding the meaning of the term “Competition Law” and “Competition Policy.”

Competition policy has been defined by Massimo Motta as “the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society.”¹¹ But at the same time, competition policy is a very broad term, and it cannot be restricted within a particular boundary. Here the competition law is a narrower term when compared to competition policy. In general, competition law refers to the rules and regulations that strive to maintain fair competition to “maximize consumer welfare”.¹² Hence both Competition policy and Competition Law strive to protect the interest of the consumers from the various anti-competitive activity and increase Consumer welfare by providing better products at lower prices.

⁷ Cellini, Economic Growth and Consumer Welfare- The Role of Competition Law 461-470, Oxford publication (2nd Ed. 2019).

⁸ S M Dugar, Guide to Competition policy, Lexis Nexis (7th ed. 2017).

⁹ Richard Whish, Competition Law, 3, Oxford University Press (2009).

¹⁰ Richard Whish & David Bailey, Competition law 4-5, Oxford University Press (8th Ed. 2015).

¹¹ Massimo Motta, Competition Policy: Theory and Practice (2004).

¹² Terry Winslow, Competition Law and Policy: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity, 42, OECD Journal of Competition Law and Policy (2004).

Concept of consumer protection and welfare

The terms consumer welfare and protection are interlinked with each other. In general, Consumer protection refers to “safeguarding the interest and rights of the consumers.” In India, Consumers are protected mainly under the “Consumer Protection Act 2019,”¹³ and issues regarding consumers are dealt with under a separate tribunal¹⁴. Even Consumers Protection Act was initiated during the period of Late Prime Minister Rajiv Gandhi, who directed his minister KPN Singh Deo to draft a law to protect individual consumers amidst the competition in the market.¹⁵ Consumers as a whole need to be protected from anti-competitive behavior in the market, and in such instances Competition Act 2002 plays a vital role.

Consumer welfare in the context of Competition is explained in various ways. Some¹⁶ mentioned that the Concept of consumer welfare concentrates on the effects on the consumers from anti-competitive activities in the relevant market. Whereas others, along with the Chicago school, consider consumer welfare as a “Broader Concept.”¹⁷ Indeed the consumer welfare aspect regarding the competition law is a broader concept that considers the “welfare of all consumers in the society.”¹⁸

Consumer protection under competition law

“Competition Law” and “Consumer protection” are inextricably linked. In India, consumers are protected under separate laws,¹⁹ and in the case of anti-competitive activities,²⁰ they shall seek help under the Competition Law. It is necessary to analyze the aspect of Consumer protection under competition law, but before that, it becomes essential to understand the difference between the consumer protection aspect in competition law and consumer protection law. There is a certain distinction between “The Consumer Protection Act 2019” (Consumer Protection Act) and the “The Competition Act 2002” (Competition Act) when it comes to consumer welfare and protection concept in India, and they are

¹³ The Consumer Protection Act, 2019, No 35, Act of Parliament, 2019 (India).

¹⁴ National Consumer Disputes Redressal Commission.

¹⁵ Ankur Saha & Sri Ram Khanna, Evolution of Consumer Courts in India: The Consumers Protection Act 2019 and Emerging Themes of Consumer Jurisprudence, 9, International Journal on Consumer Law and Practice (2019).

¹⁶ Jacobson & Gary J Dorman, Monopsony Revisited: A Comment on Blair and Harrison, 37, Antitrust Bull (1991), See also Robert H. Lande, wealth Transfer Should Guide Antitrust, 58, Antitrust Law Journal (1988).

¹⁷ J. Thomas Rosch, Monopsony and the Meaning of Consumer Welfare: A Closer Look at Weyerhaeuser 2006 Milton Handler Antitrust Review, 2:353, Columbia Business Law review (2007). See also, Robert H bork, The Antitrust paradox, 66 (1978).

¹⁸ Ibid

¹⁹ The Consumer Protection Act, 2019, No 35, Act of Parliament, 2019 (India).

²⁰ Suhail Nathani & Pinar Akman, The Interplay between Consumer Protection and Competition Law in India, 5(2), Journal of Antitrust Enforcement (2017).

as follows - To begin with, the definition of consumer²¹ varies slightly across both statutes. The Competition Act applies a broader definition of the word consumer, including anybody who buys goods or hires services for business purposes. Under the “Consumer Protection Act,” the consumer must be an end-user who will use the products for his own purposes. Whereas under the Competition Law, the consumer can be a commercial element who will use the products for business purposes. Secondly, the “Consumer Protection Act” gives individual consumers rights and reliefs, such as the right to seek compensation for a specific case of inability to be provided with proper and sufficient goods and services. At the same time, the Competition laws are more public interest and welfare-based, such as the obligation of the competition commission to ensure reasonable competition in the entire market. Third, CCI’s role is that of a regulator and not to provide reparative or adequate remedy to the one who files complaints. In contrast, the Consumer Law Authorities give an adequate remedy to the individual consumer. Finally, the Consumer Protection Act solely addresses consumption and the interests of consumers, not markets as a whole, whereas “Competition Law” regulates markets in general.²²

It was observed that the parliamentarian’s intention when drafting the Competition Act of 2002 was to protect consumer interests, as evidenced by the preamble and “Section 18 of the Act”²³, which states that it is CCI’s duty to eliminate practices that possess an unfavorable effect on competition, promote and sustain competition in markets, safeguard consumer interests, and guarantee market freedom of trade. In the case of “Competition Commission of India v. Steel Authority of India,”²⁴ the Supreme Court of India stated: “The principal objects of the Act, in terms of its preamble and Statement of Objects and Reasons, are to eliminate practices and sustain competition in the market, to protect the interests of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country.” To put it another way, the Act intends to defend not only trade but also consumer interests, and under the competition law in India, consumerism is promoted primarily through four key aspects that are, Protecting consumers from market controller’s “anti-competitive agreements,” Protecting consumers from market participant’s “abuse of dominance,” Protecting consumers from a mix, such as “mergers, acquisitions, and amalgamations,” By informing consumers about the importance of “competition advocacy.”

Along with protecting the consumer’s interest, the competition in the market also benefits the consumer in different ways, such as efficiency and productivity are boosted through competition. In a highly competitive business, the industry generally has a propensity to improve and become more efficient. This occurs because competition drives out low-quality items or services, leaving behind only better and exceptional things for the public to use. This competitive advantage shall benefit the general public, as they will access higher-quality goods and

²¹ The Consumer Protection Act, 2019, Section 2(7), No 35, Act of Parliament, 2019 (India). See also The Competition Act, 2002, Section 2(f), No 12, Act of the Parliament, 2002 (India).

²² Supra Note at 21.

²³ The Competition Act, 2002, Section 18, No 12, Act of the Parliament, 2002 (India).

²⁴ Competition Commission of India v. Steel Authority of India, Case No 12 Of 2021.

services at possibly lower pricing. Because of competition existing in the market, market participants do their best to supply customers with what is required to them, and in most of the instance, consumers want high-quality goods at reasonable prices.²⁵

Competition law indirectly increases consumer welfare by ensuring the competitive procedure. The competitiveness movement encourages retailers to provide consumers with the “highest-quality goods and services at the lowest possible prices.” It is observed that when there is fair competition, consumers gain from lower pricing, and more options are available. There may also be additional advantages in matter of bettering not only costs but also the services provided. As a result, competition is viewed as a motivating factor, and fair competition tends to cut prices, give customers more options, provide increased information regarding the decisions of the consumer, and disclose new markets for competing businesses.²⁶

The increase in competition has benefited consumers, but at the same time, various issues aroused regarding certain anti-competitive activities, and it is very evident in the present digitalized world. The concept of consumer welfare under the competition law is facing real issues in the digitalized market. With the development of technology, it has been found that there are few gaps in the competition law itself while dealing with the digitalized market and the prominent one is the definition of “relevant market” regarding digitalized and traditional markets, which have indirectly affected the consumers.

Competition law in a digitalised world

The economic policy in the year 1991 increased the scope of the market forces. The government’s role in various business activities was also limited, and there was a need for the new competition law in India to shift the focus from “curbing monopolists to promoting competition” in the market. It was then the Competition Act of 2002 came into existence. In October 2003, the Competition Commission of India (CCI) was also established with the enactment of the act.²⁷ The Competition law in India, enacted just two decades ago, has been in the position to manage various issues regarding competition with the development of technology to a certain extent, subject to certain criticisms.

India has been one of the fastest developing economies in the world, and globalization played a vital role in it.²⁸ It is the process of globalization that connected the markets throughout the world, and the technology present in various developed countries has been adopted by developing countries. The

²⁵G. R Bhatia, Abdullah Hussain & Ravisekhar Nair, Law in Focus: Competition Law in India, 1, The Indian Journal of International Economic Law, 182 (2008). See also Richard Whish, Competition Law 2 (2001).

²⁶ Cellini, Economic Growth and Consumer Welfare- The Role of Competition Law 461-470, Oxford publication (2nd Ed. 2019).

²⁷ Vinod Dhall, Competition Law in India, 73-78, International Developments (2007).

²⁸ Shobhit Srivastava & Altamash Khan, Globalization and Development in Contemporary India: Cultural Perspective, 4(3), International Journal of Social Science Studies (2016).

development in technology would help all consumers to avail of the services in a much easier manner, for instance- the process of digitalization of goods and services.

The "Digital economy" is an overall word that explains the market that attention on "digital technology." It includes dealing with goods, services, and data across the medium of "electronic trade."²⁹ Various business activities have tremendously expanded with the digitalization of goods and services. As per OCED reports,³⁰ 7/10 of the World's top companies (regarding "market capitalization") were digital market companies during June 2020, where five of them were USA-based companies, and two were China-based companies. There are also various international organizations, such as WTO, OCED, ICN, etc..... which are striving to balance the competition policy in digitalized markets.

The whole process of digitalization increased competition, and it is the consumers who are benefited from these services. Digitalization regarding goods and services is popularised with certain important sectors while taking competition into consideration, such as "Search engines, social media, E-Commerce, E-retail," etc. There has been an increase in competition in various platforms of this sector, necessitating more robust regulatory policies regarding the competition. For e.g., Google, Bing (Search engines), WhatsApp, Facebook (Social networks), Amazon Flipkart (E-Commerce Sectors). With the increase in the competition in all these sectors, there are various problems that have been faced by Competition Authorities as there is a similar regulatory framework for both traditional market and digitalized market.³¹ One of the main issues under the Competition Act 2002 regarding the digitalized market is with regard to the definition of "relevant market."³² The concept of the relevant market has been highlighted in this article as it plays a vital role while deciding any case laws under the Competition Law and any problems dealing with the concept of "relevant market" would affect the decision of the Competition Authorities which shall have Adverse Effect on the Consumers in the market.

Issues regarding relevant markets in digitalized world

The term relevant market under competition law can be defined as what is determined by the CCI or competition authorities regarding the "Relevant product market" and "Relevant geographical market."³³ The main goal of identifying the relevant market is to observe whether certain products and services have a competitive effect on other companies dealing with similar goods and services.³⁴

²⁹ Aryan Mohindroo and Rajat Mohindroo, DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM, 3, Indian Competition Law Review, 83, 83-84 (2018).

³⁰ United Nations Conference on Trade and Development, https://unctad.org/system/files/official-document/ciclpd57_en.pdf (last visited May. 26, 2022).

³¹ Aryan Mohindroo and Rajat Mohindroo, DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM, 3, Indian Competition Law Review, 83, 84-88 (2018).

³² David S. Evans, Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy, 2 Concurrences 57-62 (2008).

³³ The Competition Act, 2002, Section 2(r), No 12, Act of the Parliament, 2002 (India).

³⁴ Richard Whish & David Bailey, Competition Law, oxford University Press (7th 2015).

This shall be applicable in various scenarios, whether it's regarding combinations, firms indulging in anti-competitive activities, or regulatory intervention.³⁵

A relevant market must be properly defined in an antitrust complaint. Failure to define the relevant market where competition is allegedly harmed may result in the lawsuit being dismissed.³⁶ For example- In *Tanaka v. University of Southern California*, it was held that "failure to establish a relevant market is a valid ground for dismissing a claim."³⁷ In some cases, claims involving internet advertisements have been dismissed due to a failure to assert the relevant market³⁸. One example is the case of *America Online, Inc. v. GreatDeals.Net*.³⁹ However, in other circumstances, courts recognized the claims and the appropriate "product-market." In the *eBay Seller Antitrust Litigation*, for example, the court recognized the online auction market as a relevant product market. Thus, the development in technology has created few confusions and problems for the competition authorities while dealing with various case laws.

There are mainly three kinds of platforms in the digital market, namely One-sided market where only one type of service is provided to the customers, two-sided markets where it deals with two different services offered to customers, for instance, Newspapers Advertisements, and "Multi-sided Market" which sells with various customers in the single platforms such as Google, Amazon, Facebook, etc.⁴⁰ The Multi-sided Market mainly increased as a result of development in digitalized economy. Competitive activities among these kinds of platforms, such as mergers and acquisitions and interaction among consumers in these sectors, do create certain issues, and any act contrary to the interest of fair competition and consumers shall be subject to the scrutiny of CCI.⁴¹ But this scrutiny by CCI doesn't serve much purpose when the problem arises while defining the concept of "relevant market" regarding the digital market, especially in Multi-sided Market platforms⁴².

With the development of Various multi-sided markets such as Amazon, Facebook, and Google, identifying whether there is the existence of one or many other relevant markets has ended up being a challenge to the competition authority. In

³⁵ Competition Commission of India v. Co-ordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors., 5 S.C.C. 17 (2017).

³⁶ D.J. Baker and Christopher Harris, Antitrust law issues—Relevant market, 14 Bus. & Com. Litig. Fed. Cts.at 152.10 (4th ed.), December 2016

³⁷ 252 F.3d 1059, 1063 (9th Cir. 2001)

³⁸ *Tanaka v. University of Southern California*, No. 00-55046, 2001.

³⁹ *America Online, Inc. v. GreatDeals.Net*, 49 F.Supp.2d 851.

⁴⁰ David S. Evans, Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy, 2 Concurrences 57-62 (2008). See also INFORMATION SYSTEMS: A MANAGER'S GUIDE TO HARNESSING TECHNOLOGY.

⁴¹ Philip Lowe, The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition, No.3, Competition Policy Newsletter, European Commission (2008).

⁴² Aryan Mohindroo and Rajat Mohindroo, DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM, 3, Indian Competition Law Review, 83, 84-88 (2018).

a particular case regarding WhatsApp and Facebook,⁴³ the CCI considered various services provided under WhatsApp, such as online messaging, voice calling, and video calling, were considered within one relevant market, that is, “the market for instant messaging services using consumer communication apps through smartphones.” There are various applications that might be affected by one particular service provided by WhatsApp, which is included with other services under the “relevant market” aspect, such as skype, which solely deals with video calling. In such instances, it becomes difficult for the authority to clearly define the “relevant market” concept.

The dynamic nature of the digitalized market also paves the way for the difficulties while defining the relevant market concept. In the process of digitalization, various companies establish new markets, and, in such a scenario, it becomes difficult to clearly point out the relevant market. For instance- Uber provides online taxi services, but today they have also entered the e-retail platforms by introducing food services.⁴⁴ Further, CCI also faces difficulties regarding the tests adopted to define the relevant market.⁴⁵ The “Small but Significant and Non-transitory Increase in Price” (SSNIP) test is used in India to define the relevant market, and this test is designed according to the traditional market concept. In the case of two-sided and Multisided markets in the Digitalised economy, this test somewhere fails to take “interdependencies and network effects that are the result of an interaction between two sides of a two-sided or a multi-sided platform.”⁴⁶

Digitalization no doubt benefitted the consumers in the society, but certain steps taken by the CCI regarding various issues, such as in combination, may affect the consumers in the long run. Permitting a few combinations may provide benefits to the consumers in the short run but may have an adverse effect in the long run. So, the CCI has to take a prudent move while dealing with issues pertaining to the digital market.

Conclusion and Suggestions

Consumers clearly benefitted from the fair competition persisting in the markets. The goal of the competition law is to protect the consumer interest in terms of “public welfare.”⁴⁷ Hence the focus here is not on the individual consumers interests but all the consumers in society. The welfare of the consumers has been one of the main objectives of Competition law in India, but few problems have

⁴³ Shri Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016.

⁴⁴ Supra note 34.

⁴⁵ Lapo Filistrucchi et al., Market Definition in Two-Sided Markets: Theory and Practice, Tilburg Law School Legal Studies (2013).

⁴⁶ Study of the Policy Department A: Economic and Scientific Policy on Challenges for Competition Policy in a Digitalised Economy (2015). See also Aryan Mohindroo and Rajat Mohindroo, DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM, 3, Indian Competition Law Review, 83, 84-88 (2018).

⁴⁷ Ma. Joy V. Abrenica, Balancing Consumer Welfare and Public Interest in Competition Law, 13, Asian Journal of WTO and International Health Law and Policy, 443-462 (2018).

been raised with the digitalization of goods and services. Hence the same has to be looked into while dealing with various case laws.

Further, with regard to the difficulties persisting regarding the relevant market, certain steps can be suggested to reduce the difficulties faced by the Competition Authority. Firstly, while defining the markets, all the other aspects relating to the relevant market shall be taken into consideration, and an understanding of their relationship shall be included to have better results. Secondly, Tests shall be adopted, or changes shall be made according to the dynamic nature of the digitalized market and not limiting it to the framework of the traditional market. For instance, the SSNIP test is more price-oriented while analyzing situations, but in most digitalized platforms, various services shall be provided at zero-priced. In such a scenario, it may be difficult to analyze the situation with these tests used for traditional markets. Thirdly, adopting the same competition law for both traditional and digital markets shall provide adverse results, and hence certain amendments shall be made in the competition policy to deal with various cases in the Digitalised economy. Germany is the first country in Europe that initiated the amendment (10th Amendment in 2021) in competition law to address multiple issues regarding the digital market. Further, China is also focusing on updating the competition law to expand “scrutiny of Online platforms.”⁴⁸ Fourthly, the authorities can issue guidelines about the digital market under competition law which shall help to solve various issues in a precise manner. For instance, the “State Administration for Market Regulation” in China has provided certain guidelines for anti-trust activities in the digitalized market in order to curb the monopolistic behaviors of various online sectors.⁴⁹ Finally, and the most important one in the present scenario, is to undertake the market studies in multiple cases relating to digitalized markets so that the current market scenario can be understood while dealing with the various issues. Adopting these measures will help in maintaining consumer welfare under competition law in a better manner.

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⁴⁸ United Nations Conference on Trade and Development, https://unctad.org/system/files/official-document/ciclpd57_en.pdf (last visited May. 26, 2022).

⁴⁹ Id at 7

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