

THE BIG (DATA) PROBLEM WITH THE COMPETITION ACT, 2002

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ABSTRACT

India has witnessed a rapid growth in the sphere of digital economy in the last decade. While some would debate that demonetization has pushed India towards an era of robust digitalization, it still remains an indisputable fact that India is no longer at its infant stage of e-commercialization. A large number of online businesses now flourish all over the cyber space and thrive by harnessing, assimilating and accumulating user data. For centuries we have witnessed that business rely on the usage of data and marketing relies on market research, yet, with online businesses growing out of proportion, a significant risk remains of tipping off the economies of scale. In the WhatsApp Order, CCI held that “*any breach of the IT Act, 2000 did not fall within the purview of the Competition Act, 2002¹.*” Still, the fact remains that competition law has to dynamically evolve in order to deal with the economic concerns of the new digital age. Just like the MRTP Act of 1969- the predecessor to the Act of 2002, had to be scrapped off to deal with the concerns post liberalization; we must now rethink, reassess and re-examine whether the Competition Act, 2002 -in its current form, is equipped to deal with the issues stemming from the present age digital markets in light of the big data concerns.

¹ Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016.

TABLE OF CONTENTS

ABSTRACT	2
INTRODUCTION	4
1. BIG DATA HARMS IN THE DIGITAL WORLD FROM AN ANTI-TRUST PERSPECTIVE	5
1.1 DATA HARVESTING AND BIG DATA	5
1.1.1 MERGERS AND ACQUISITIONS	6
1.1.3 PRICE DISCRIMINATION	7
2. THE COMPLICATIONS CONCERNING BIG DATA UNDER THE NEW ECONOMY..	7
2.1. HIGH RATES OF INNOVATION AND RAPID TECHNOLOGICAL STRIDES	8
2.2 INCREASING RETURNS OF SCALE	9
2.3 NETWORK EFFECTS	10
2.4 DEEP DISCOUNTING	11
3. BIG DATA IMPLICATIONS AND CONCERNS IN COMPETITION LAW ENFORCEMENT	12
3.1. REDEFINING ‘RELEVANT MARKET’	12
3.2. REDEFINING ‘MARKET POWER’ AND ‘ASSESSING DOMINANCE’	14
3.3 ASSESSING PRIVACY VIOLATIONS	15
BIBLIOGRAPHY	18

INTRODUCTION

The inception for India's inspiration towards adopting and developing its very own Anti-Trust Regime, for all intents and purposes, can in fact be found within the four-corners of the Constitution. It was the Founding Fathers of the Indian Republic, who in the furtherance of socialism, considered it paramount to seal in a mandate, through Article 38 and 39 of the Directive Principles, for future governments to foster and legislate, such statutes, that promote, inter alia, the welfare of the people of India by securing and preserving social, economic, judicial and political order². The objective behind this is for the State to do the utmost to reduce inequalities in income, status, facilities and opportunities, so that, plenitude and amenities for all is distributed in such a manner that minimizes accumulation of such resources in the hands of the few and maximizes equitable distribution for the welfare of all³. Premised on these directives, in 1969, the Government of India enacted the Monopolies and Restrictive Trade Practices Act (MRTP Act) to garner the liberal interplay of competitive forces coupled with maximum material progress through the allocation of economic resources to protect the interests of its nationals.

However, post 1991, as India trudged to embrace a laissez faire economy, and as investment and competition from within the country and outside poured in, the MRTP Act turned out to be ill-equipped to deal with the new Liberalisation Privatisation and Globalisation regimen. A perusal of the Act demonstrates at first glance, the defects inherent within it. Neither definition nor indication was found therein of some of the offending trade practices, which are restrictive in nature, such as- 'Abuse of Dominance', 'Cartels', 'Collusion and Price Fixing', 'Bid Rigging', and 'Predatory Pricing'. And while, it was possible to deal with these issues under the generic umbrella of "restrictive practices," the absence of specification of these offences and conducts led to dissenting viewpoints. This inevitably necessitated the enactment of a newer, more equipped legislation that would bring in a fresh perspective.

The Competition Act was enacted in 2002, so that, the adverse effects on competition are not only prevented but pro-competitive behaviour is sustained and promoted. Additionally, the Act aimed at protecting Freedom of Trade carried on by all market participants in India and for matters connected therewith or incidental thereto.⁴ The rubric of the new law not only remedied the patchy framework of its predecessor but also adapted and equipped itself to the then economic climate. Some of the unique features of the Act of 2002 such as- extraterritorial jurisdiction, harmonisation with IPR and other laws, overlaps between the Competition Act and Sectoral Regulatory Laws and competition advocacy; subsumed in the spirit of the whole globalization phenomenon, were extraordinary for its time.

² Constitution of India, Article 38

³ Constitution of India, Article 39

⁴ Competition Act, 2002, Preamble.

Now, at the turn of the 21st Century, India has again reached another crucial juncture, a crossroad in its Anti-Trust regime, where it has become paramount to explore, inquire and investigate the efficacy of the Competition Act of 2002- in the epoch of technology, in the face of digitalization, commercialization and Internet of Things.

As the last vestiges of the brick-and-mortar stores steadfastly reach extinction and behemoths of the internet graze the opulent savannah of the largely unregulated and vastly diverse economy of the country, it becomes increasingly necessary to contemplate if India is in dire need of a long-haul amendment of the Competition Act, 2002.

1. BIG DATA HARMS IN THE DIGITAL WORLD FROM AN ANTI-TRUST PERSPECTIVE

Ranked as the second largest online market worldwide in 2019, after China, India is home to almost 700 million internet users. Propelled by extensive smartphone penetration, decreased Internet Tariffs and widespread drive of the 'Digital India' campaign, the Indian E-commerce market has grown tremendously and with great vivacity over the last few years.

This sudden sprout of growth and the success of online platforms have probed academicians, scholars and policy makers to debate whether these online platforms strengthen competition or rather promote market monopolization and concentration.⁵

1.1 DATA HARVESTING AND BIG DATA

In 2014, the Economist, Leslie Johnston, discerned that in the US, an average company in any sector has at least 100 terabytes of data, some even more than 1 petabytes⁶. For comparison, the library of United States Congress had 235 TB of data in 2011⁷. Over these years, it is only safe to presume that these numbers have manifoldly increased as more and more companies have captured and conquered the digital terrain to be crowned as the titans of the technological era. And the currency that these titans have accumulated ubiquitously and what has enabled these giants to rise to their gargantuan stature, is the data ecosystems created from data mining and data harvesting.

Data harvesting and data mining are intended to serve a single resolute purpose- increase the amount of available data resource. Yet, sheer volume of data does not provide a competitive edge to the businesses. No commercial decisions can be taken based on raw data. What the

⁵ Ritam Arora, 'E-Commerce, (Big) Data And Competition Law Need For New Framework For The Application Of Competition Law To Online Platforms'

⁶ 1 TB = 1012 bytes; 1 PB = 1015 byte.

⁷ Leslie Johnston, 'How Many Libraries Of Congress Does It Take? | The Signal' (Blogs.loc.gov, 2021) <<https://blogs.loc.gov/thesignal/2012/03/how-many-libraries-of-congress-does-it-take/>> accessed 14 April 2021. [digitalpreservation/2012/03/how-many-libraries-of-congress-does-it-take/](https://blogs.loc.gov/thesignal/2012/03/how-many-libraries-of-congress-does-it-take/).

online platforms seek to extract from this boundless mineshaft of data is the personal data of its users. This data, collected from the users, that enable companies and online platforms to stay ahead in the game is commonly termed as 'Big Data.'

To distinguish Big Data from data in general, the added niche of Stucke and Grunes turns out to be of great import. To the original '3 Vs' definition by Laney, i.e., "volume of data, the velocity at which it is collected and disseminated, the variety of information aggregated," Stucke and Grunes appended a fourth V: the value of the data⁸. Using Big Data aids the businesses to improve efficiency of production, forecast market trends, improve decision making and enhance user interaction and consumer segmentation through target advertising and personalised recommendations⁹ and as a result warrants stricter, more aggressive Anti-Trust intervention.

Evidence of the following issues are prominently observed as the impact of data in competition analysis¹⁰: -

1.1.1 MERGERS AND ACQUISITIONS

The easiest and the fastest way for companies to obtain large datasets is to acquire or merge with other companies owning a huge data trove. The OECD in 2015 reported that in sectors related to data the number of mergers and acquisitions has steadfastly increased from 55 deals in 2008 to 164 deals in 2012.

When a merger takes place, the probability of a reduction in the intensity of competition can be rightfully predicted if their combined operation has the capacity of reducing consumer choice or coyly influence it. Within the maze of data ecosystems, it is quite common to notice a company leveraging their market power in one market to enter into similar or complementary markets. This phenomenon is repeatedly put into practice by enterprises having a stronghold in one relevant market by utilising the data so accumulated to infiltrate another market or start a joint venture with another enterprise. Again, a potential risk of foreclosing the market for new entrants exists if a merger materializes between two companies having a stronghold in separate upstream and downstream markets. Such issues are often investigated by competition authorities as seen in the context of the Facebook-WhatsApp merger, where the European Commission assessed whether the union between these two gargantuan infrastructures, having a host of their specific users who use these platforms for accessing social media and for communicating, will result in Facebook having the ability to gain access to the data from WhatsApp's interface resulting in diluting competition.¹¹

1.1.2 EXCLUSIONARY CONDUCTS

⁸ OECD, 'Big Data: Bringing Competition Policy to the Digital Era', November 2016.

⁹ Ibid

¹⁰ Big Data Papier, Autorité de la concurrence and Bundeskartellamt, 2016.

¹¹ Ibid

Conducts depriving competitors from accessing unique datasets would weaken competition and lead to exclusionary conducts. Especially when the data is inherently “essential facility,” the refusal to access such data would be detrimental for consumers. Although, the ECJ has ruled in a number of cases that a market player can seek access to a facility or network, if the functionary’s refusal to grant such access is associated with a product or a service that is indispensable for conducting the business in question and as such, a dominant player cannot be principally obligated to promote a rival concern when the access to an intellectual property is not at stake.

Again, exclusive agreements and tied sales and cross-usage of data results foreclosing opportunities for rivals and reduced competition when carried out between two dominant undertakings.

1.1.3 PRICE DISCRIMINATION

Collecting and storing data of its users, allows a platform to map purchase habits and predict the willingness of a particular buyer to yield to a particular price. While sellers can change their prices whenever they want, courts have held that they must charge all competing customers the same price at the same time. Yet, various online service providers escape the rigours of Consumer Protection Laws and Anti-Trust Laws on sheer technicalities and legal loopholes.¹²

The aforesaid instances display the various manner data plays an anti-competitive role in the digital market. And while, these enumerations are, in no way exhaustive, they seek to emphasize loopholes that reposes in the Anti-trust regimen and highlight the lacuna that must be sealed and fortified to thwart the evils of Big Data operability.

2. THE COMPLICATIONS CONCERNING BIG DATA UNDER THE NEW ECONOMY

The era of ‘New Economy’ has witnessed the decay of the traditional or age-old economic practices and has made way for:

- i. High rates of innovation and rapid technological strides,
- ii. Increasing returns of scale,
- iii. Network effects,
- iv. Deep Discounting.

¹² US: Judge Dismisses Sidecar's 2018 Suit Against Uber - Competition Policy International' (Competition Policy International, 2021) <<https://www.competitionpolicyinternational.com/us-judge-dismisses-sidecars-2018-suit-against-uber/>> accessed 18 April 2021.

The term 'New Economy' describe sectors that produce or fiercely use technologies with an increasing dependence and reliance on computers, telecommunications and the internet. In the 'New Economy', constant and rapid rates of innovation ceaselessly churn out products into the market with reduced cost of production and demand side economies of scale. In such a situation, the cutthroat struggle to adorn the bejewelled crown of being a colossal corporation, inevitably risk tipping off the economies of scale.

Having laid down the architecture of the modern economy, it is now the need of the hour to analyse the aforementioned issues while simultaneously gauging their effects on competition.

2.1. HIGH RATES OF INNOVATION AND RAPID TECHNOLOGICAL STRIDES

It is apparent that the whirlwind of globalization has ushered in rapid changes across all sectors, especially in the field of technology. The companies are therefore left with no feasible choice and must evolve hastily, to keep up. Under this new climate, in order to fit in and clench onto market position, companies constantly strive to carry out research and development in all fields so as to come up with new innovative ideas. However, this often causes the companies in question, and the market in which they operate, to remain in a constant state of turmoil.

In contrast to the business practices of yesteryears, digital businesses will frequently lack competition *in* the market. And this absence will be cured and rectified by intensive competition *for* the market, as corporates compete to be *the winner takes all*. However, if dominant enterprises latch on to their dominance, even as the external surroundings and tastes change over time, consumers may be denied the benefits of competition to a great extent¹³.

For instance, if we observe some of the key insights and trends in India's Media and Entertainment sector, the effect of innovation and transformation on competition becomes vividly clear as traditional businesses make way for digital disruptors.

The sudden rise of OTT Platforms can be attributable to a variety of factors such as growth in smartphone users, growth in rural internet penetration, growth in average data usage per subscriber per month and growth in average mobile data download speed. In fact, the Eleventh Annual Edition of KPMG in India's Media & Entertainment (M&E) Report suggests that nearly 87 per cent of daily online video content is viewed through mobile phones and quite naturally the number of OTT players have boosted pell-mell from 9 players in 2012 to more than 30 in 2018. As a result, Original Equipment Manufacturers (OEMs), Telecom Operators and Direct-To-Home Broadcasting Services (DTH) have rushed to launch their own OTT platforms and have forged alliances with key distributors to preserve their target audiences across various device ecosystems.

¹³ 'Committee For the Study of Digital Platforms Market Structure and Antitrust Subcommittee' (2019) Chicago Booth.

And while the Competition Commission of India in its 2021 Report¹⁴ on the Telecom Sector blatantly admits, at first, that '*OTT services in 2009 upended the secure industry equilibrium,*' later on, retracts this initial finding and pronounces in the very same report that '*experts have in fact found traces of pro-competitive behaviour of the OTTs' functioning which trigger a virtuous cycle within the digital economy (sic).*'

Clearly, the want of a uniform stance veils the present media-scape and the lackadaisical functioning of TRAI have failed to yield a common consensus, leaving netizens in the dark. As, Telecom Service Providers rushed to demand a 'regulatory level playing field' as an immediate response to the opulent surplus of OTT communication services, TRAI subsided their disconcert and began public consultations on the pressing issue of 'Regulation of OTT Players,' first in 2015 and subsequently in 2018. However, the consultations have not concluded its recommendations.

And thus, questions have remained unanswered. Do these services or technologies constitute a distinct and separate market or should the cardinal market that lays underneath be expanded to include them within its scope?

2.2 INCREASING RETURNS OF SCALE

'Information goods'- a term coined to denote "*commodities that provide value to consumers as a result of the information it contains and refers to any good or service that can be digitalized*"¹⁵, " are an indispensable driving force in the new economy. Examples of information goods includes books, journals, computer software, motion pictures, applications, music and, stop motion videos and as such, are amenable to be copied, shared, resold, rented and even auctioned.

Generally, information goods entails increasing returns to scale as their production involves a fixed cost and an absolutely negligible variable cost. Thus, when an additional consumer avails these services or purchases these commodities, cost of production does not proportionally go up. For instance, an e-book or audio book once produced, can be distributed at almost no cost to proportionately to all users with access to internet. This holds true for information services that are subject to fixed design and development costs and fixed maintenance and updating cost; Google can update Google Maps for 100 million users with fixed expenses that would serve a fraction of such users.¹⁶

It is abundantly clear that digital markets dealing in information have an unfair advantage over the traditional markets dealing in tangible goods. Digital markets not only avoid distribution

¹⁴ Competition Commission of India, 'Market Study on The Telecom Sector in India Key Findings and Observations' (2021).

¹⁵ 'What Are the Qualities of Good Information? - Access Data' (access data) <<https://accessdatas.com/qa/what-are-the-qualities-of-good-information.html>> accessed 9 July 2021.

¹⁶ 'Committee For the Study Of Digital Platforms Market Structure And Antitrust Subcommittee' (2019) Chicago Booth.

costs, these markets are widely popular as information goods and services can be delivered to any geographical location. This facilitates the largescale growth of the business at a small cost. However, this short-term tremendous growth is detrimental for competition, as market winners assume market power, often, too quickly. As Chloe Albanesius points out, it only took five years for Facebook, the ‘move fast and break things’ company, to go from a million users in 2004 (the year of its founding) to 350 million users in 2009, when it overtook MySpace.¹⁷

Summarily, a market entity with a large customer base enjoys lower average cost per customer allowing it to offer to its consumers a finished product that is pristine as well as affordable. Increasing returns to scale creates barrier entries as newer firms not dealing with niche products, having no brand name or means to large scale production cannot offer the same or higher quality at lower rates. Furthermore, since firms in the digital space apply machine learning to data sets to extract patterns that improve their products and expand their domain, companies that have a large resource of data sets profit immensely against those smaller firms that have limited data sets. This creates volatile economies of scale, allowing larger firms with large amount of data to raise product quality at reduced cost than smaller firms. Hence, a potential entrant, anticipating the lack of profit from a small-scale production, will not enter the market to challenge the holder.¹⁸

2.3 NETWORK EFFECTS

There exists an intrinsic correlation between internet services and positive network effects, wherein user utility grows as the number of users in a digital platform increases.¹⁹ Markets with network effects are susceptible to concentration since consumers largely benefit from being on the same network as other consumers. As it happens, no one would opt to be on their own on their social media site. However, when one of the dominant player’s popularity subsides or is exhausted or when heterogeneity is favoured, the market structure inevitably takes an oligopolistic turn.²⁰

Again, indirect network effects may also be multisided; one category of users benefit from the presence of another category of user. For instance, in a standard e-commerce platform, while buyers will not particularly benefit from the presence of more buyers, the presence of buyers will consequentially attract more sellers and this will in turn benefit both parties. Similarly, it has been observed that Amazon’s user reviews create a form of network effect: the more users that have purchased and reviewed items on the platform, the more useful information other users can gather from the site²¹. The Fourth Circuit iterates this issue, applying ‘the ripples of

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ See Guy Rolnik & Asher Schechter, *Is the Digital Economy Much Less Competitive than We Think It Is?*, PROMARKET (2016), <http://promarket.org/digital-economy-much-less-competitive-think> [<http://perma.cc/K2R6-TB7Q>].

harm analysis’- *“Once dominance is achieved, threats come largely from outside the dominated market, because the degree of dominance of such a market tends to become so extreme.”*^{22, 23}

A platform’s control and supremacy over data, meanwhile, can also anchor and enrich its bearings. Access to user data enables platforms to improve customised services and gauge demand. Omnipresence across markets, meanwhile, may enable a company to use data extracted from one market to benefit another business line²⁴. On multisided platforms, one or more sides are often subsidised to attract customers on the other side who are willing to pay. Users of Gmail pay no nominal price to set up their accounts but permit Google to read their mails and access their contact list. This in turn facilitates Google to place curated targeted ads based on their personal information, for which Google charges a lumpsum amount from the advertisers.

Thus, in this manner, network effects act as a form of entry barrier. And while, there is veracity in the fact that network effects bring an atmosphere of consumer-friendly competition to the market at early stages; economic theory and market observation indicate that if network effects are excessively strong at the outset of intense competition, the market will tip in favour of one competitor, who shall then emerge out as the monopolist.

2.4 DEEP DISCOUNTING

E-commerce enterprises indulge in predatory pricing by providing deep discounting as sellers so as to obtain an unfair advantage in the market they are already dominant in. The practice of deep discounting can lead to permanent value erosion of products and undermine their market position. Furthermore, deep discounts in the goods category raises concerns centring on issues of below-cost pricing, mainly in the categories pertaining to smartphones and electrical appliances on the online platforms, impairing the ability of brick-and-mortar stores to compete on a level playing field.²⁵

Although, the carrying out of ‘deep discounting’ does not strictly fall under the purview of anti-competitive practices of the Competition Act of 2002, the concern of preferential treatment and predatory pricing has seldom been defined as abuse of dominance, if a dominant position of the player in the market is proved.

E-commerce platforms carry out discount festivals around the year, providing gobsmacking deals to the public. The slashed prices offered by these platforms have raised a lot of controversy over the years and various trade organisations have expressed their objection regarding this issue. As a result, the Competition Commission of India conducted a thorough

²² Novell Inc. v. Microsoft Corp., 505 F.3d 302, 308 (4th Cir. 2007)

²³ Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J (2016)

²⁴ Ibid.

²⁵ Competition Commission of India, ‘Market Study on E-commerce in India: Key Findings and Observations’ (2020).

Market Study on e-commerce in India and simultaneously ordered a probe into the unfair trading practices effectuated by Amazon and Flipkart in January 2020. The unfair trading practices that the Competition Commission's order alleged fall under Section 3(1) read with Section 3(4) of the Competition Act, 2002 and stated therein three main issues, deep discounting, preferential listing of sellers and exclusive tie-ups.²⁶

Curiously, on two earlier occasions, the Competition Commission had adopted an antithetical stance and dismissed the allegations that were brought against the e-commerce entities- first, in Mohit Manglani and M/s Flipkart India Private Limited & Ors and then, again, in All India Online Vendors Association versus Flipkart India Private Limited where the Competition Commission observed that *'the exclusive arrangement between sellers and the companies does not appear to have an appreciable adverse effect on competition.'*

It would, therefore, be interesting to note down, whether, in the wake of the overarching growth these platforms are reaching, Competition Commission of India records a uniform, versatile viewpoint that will function as a binding precedent.

While it was the great economist Adam Smith who propounded that, markets will, in fact, eventually self-correct and external interferences will only disrupt market equilibrium from forming, expeditious self-correction in digital markets is unlikely. High rates of innovation, rapid technological strides, economies of scale, network effects, deep discounting and more, cumulatively make it impossible for newer entrants to make a successful ingress in existing markets. And while acolytes of the Chicago School make pressing arguments that are adhered to by the courts worldwide, it is impracticable to turn away from evidentiary debate that highlight the stagnancy and harm digital markets may not only create but potentially amplify.

3. BIG DATA IMPLICATIONS AND CONCERNS IN COMPETITION LAW ENFORCEMENT

One other issue that continues to perplex and confuse the Anti-trust Regulators worldwide, is the economic verbiage and the traditional competition tools that have become obsolete and redundant to function as a befitting yardstick for assessing competition concerns in the new economy. For instance, in the new zero-price markets, the customary SSNIP test and other conventional devices aimed at appraising market concentration, prove to be inadequate for capturing the specific features of these markets. Therefore, in this cybernetic climate it becomes crucial that the limitations of the current competition tools be identified and solutions be hypothesised.

3.1. REDEFINING 'RELEVANT MARKET'

²⁶ Ibid

The definition of ‘Relevant Market’ is a task that anti-trust regulatory authorities undertake on a case-by-case basis to comprehend the general features of a given market, the products traded therein, the placement of players and the ingrained features necessary to gather a macro understanding of the lay of the land. Hence, determining the relevant market in the nascent stages of investigating competition concerns is of vital importance as it allows the authorities to gather a clear understanding of the terrain; the participants, that is, the manufacturers, distributors and even consumers, their interests and biases, the market size, the presence of barriers to entry and the likelihood of market power and dominance²⁷.

On the flip side, the task of determining relevant market, in the labyrinth that encompasses the world of Big Data, can be rather perturbing, especially in multisided markets displaying network effects. For instance, the tech giant Apple plays multifarious and multifaceted roles of being a platform through iOs, Apple Store, iTunes and Apple TV, a seller of technological gadgets and an IT infrastructure linchpin through iCloud services; all at the same time. Additionally, Apple also transacts and negotiates with other players, through allocating users, showcasing products and services, auctioning advertising space, soliciting with app developers and even collaborating with other platforms such as Facebook or YouTube.

This polygonic structure of the market ought to compel Competition Authorities to tweak their antique competition tools to something more age-appropriate which will help gauge competition concerns especially within zero-price digital markets. This is more so because, while the conventional ‘Small but Significant and Non-transitory Increase in Price (SSNIP) Test’ or the ‘Hypothetical Monopolist Test’ might indicate a relevant product market in an orthodox setting, in the digital space where services and products are free of charge, these tools would prove to be entirely useless. On the other hand, an SSNDQ test to compute a ‘Small but Significant and Non-transitory Decrease in Quality’ might, in fact, be an appropriate apparatus to estimate and define the relevant market in the cyberspace²⁸. Nevertheless, when we take a look into the existing case laws in India and the EU, one thing is made abundantly apparent—there exists a clear dearth of a conceptual framework to evaluate anti-competitive concerns arising out of online multi-sided platforms. As such, glancing at the judgments of the European Commission, a few inconsistencies starkly appear. For instance, while in the Google/Double Click merger only one market was predominantly taken into account by the European Commission to assess possible market concentration and monopolization, contrastingly, in the MasterCard case, the Commission undertook a different approach and inquired into two overlapping markets. A similar inconsistent pattern can be traced in the plethora of Indian case laws as well. In *Ashish Ahuja v Snapdeal and Others*, the Competition Commission of India observed that as buyers tend to find a good deal through discounts—both online and offline,

²⁷ Bagnoli, Vicente, *The Definition of the Relevant Market, Verticalization and Abuse of Dominant Position in the Era of Big Data*. (November 6, 2017). *Competition and Innovation: Annals of the international congress to promote debates on Competition Law and Technological Innovation facing the reality and challenges of the Digital Economy*. Bagnoli, V. (coord.), Sao Paulo: Scortecci, 2018, Available at SSRN: <https://ssrn.com/abstract=3216679>

²⁸ OECD, ‘The Role and Measurement of Quality in Competition Analysis’, 2013.

before making a final decision about buying a product an increase in price in one segment will shift the buyer to the other segment hence and as such, “these two markets are different channels of distribution of the same product and are not two different relevant market.” Contrarily, in *Albion InfoTel Limited v Google Inc and others*, the Competition Commission held that the online search market and search advertising market was distinguished from offline forms of advertisement and consequently, the Commission went onto define the relevant market as, “the market for online search business in India as the relevant market.”

Observing these contradictions amongst jurists, it becomes manifestly obvious that the lack of an unmistakable understanding of the workings of virtual marketplaces and their correlation with the physical marketplaces has increasingly effectuated an overall stunted understanding of competition concerns that corresponds with the new age economy. A uniform reform of the Competition Law and an establishment of a regulator of digital spaces and augmented reality will recalibrate and compliment competition regulation in a manner that will be effective as well as fruitful and a reconstituted foundation of the Law will provide a momentum towards such a direction.

3.2. REDEFINING ‘MARKET POWER’ AND ‘ASSESSING DOMINANCE’

Analogous to the struggle of defining ‘Relevant Market’ for multisided platforms in the digital world, the difficulty of defining ‘Market Power’ of companies providing zero-price services to consumers is a similar plight that shrouds scholars and practitioners of Competition Law. Yet, the truth is, that the obvious correlation between market power and dominant position and monopoly is more often than not, a play of semantics.

What constitutes dominant position has traditionally been investigated by evaluating the market shares of a company within a relevant market. Naturally, both the Court of Justice of the European Union²⁹ and the Competition Commission of India³⁰, leaned in the past towards the presumption that a firm’s dominant position is constituent of 50% or above in market shares within the confines of a relevant market.

However, as pointed out by the French *Autorité de la Concurrence* and the German *Bundeskartellamt* in their collaborative report, as it happens with internet-based platforms that offer services for free, the ownership of Big Data becomes the currency to weigh market power, especially because data is often used as a barrier to entry.³¹ As such, both the European Commission and the Indian Commission have recognised that market shares may not adequately reflect the existence of market power in the digital market environment.

²⁹ Case C-62/86 *AKZO Chemie v Commission* EU:C:1991:286, para 60

³⁰ *Schott Glass India Pvt Ltd v Competition Commission of India* (2012)

³¹ *Big Data Papier*, *Autorité de la concurrence and Bundeskartellamt*, 2016.

This stance was further solidified by the European Commission as well as the Competition Commission of India during the WhatsApp and Facebook merger. For the purposes of this decision, the Commissions had to rigorously analyse potential data concentration which would give rise to the strengthening of Facebook's market position in the domain of online advertisements or in any similar sub-segments. Both Commissions however, refused to assess privacy-related concerns stemming from data accumulation and the consequential control of this data by Facebook as this issue did not fall within the scope of Competition Law but was rather under the umbrella of Data Protection Rules³².

It is safe to conclude, that it has almost been set in stone that, in markets which predominantly display multisided effects as well as simultaneously offer zero-price services to its users, control and accumulation of data must be the assigned yardstick to measure 'Market Power' over market share, price-cost margin³³ or similar traditional measures.

3.3 ASSESSING PRIVACY VIOLATIONS

In the assessment of abuse of dominance and other competition concerns, the aspect of the data-centric nature of digital markets often give rise to the debate of whether privacy violations are sanctionable under the current commandment of competition law. Ostensibly, however, the general outlook on the subject, lean towards the conclusion that Big Data concerns should typically be dealt as standard data protection or privacy concerns rather than anti-trust concerns as it is often believed that competition policy should have as its sole objective the promotion of competition and not meddle outside its prescribed scope.

Over the recent years, the proposition that under certain circumstances privacy apprehensions may become the key criterion of assessing competition concerns especially during merger reviews, have been vigorously deliberated by competition authorities. When privacy considerations and non-price competition are factored in to determine whether post-merger, a combination shall have an adverse effect on competition in the relevant market, the boundary between competition and privacy laws automatically dissolve. The earliest case that can be traced back to have highlighted 'privacy' as a component for calculating the effect of a combination on competition is the Google/DoubleClick merger, where the US Federal Trade Commission inquired into the issue of whether the merger had the potential of stripping consumers of significant privacy choices³⁴.

Interestingly enough, the reason why competition in the market has been encouraged sanctimoniously, can be boiled down to an element of allowing consumers the liberty to exercise their individual 'choices.' Allowing consumers to avail meaningful choices have

³² Case No COMP/M.7217 - FACEBOOK/ WHATSAPP

³³ Lerner's Index (LI), in economics, is a measure of the market power of a firm calculated through a formula: $LI = P - MC/P$ where P represents the price of the good set by the firm and MC represents the firm's marginal cost.

³⁴ OECD, 'Big Data: Bringing Competition Policy to the Digital Era', November 2016.

always been the foundational strata upon which the edifice of competition policy is built and here, it is important, to iterate that ‘price’ is only one type of choice³⁵. And even though, the postulates of anti-trust jurisprudence began with careful reflection and rumination over microeconomics vis-à-vis ‘price theory,’ overtime, the focus has been broadened to embrace within the scope of competition law, factors that have a direct bearing with consumer choices such as quality, innovation, brand value and variety. Therefore, privacy protection being a candid representation of individual liberty, inevitably becomes one of the ascertainable units influencing non-price competition.

Why privacy constitutes an integral factor to account adverse effects on competition in a relevant market not governed by the constraints of price analysis, is a question that must be carefully examined. Although, privacy is indubitably a significant and separate concern having far-reaching impact upon the general population that consumers are not willing to trade-off capriciously, an especially acute problem is that, more often than not, consumers relinquish their privacy in-lieu of and in order to obtain better quality of service. This paradoxical situation compels the intervention of competition law to regulate the market. More so because, a player having to their advantage a huge repository of data should be subjected to ramifications if that data is unethically harvested and irresponsibly used to yield pecuniary gains. This was, in fact, the grounds that motivated the German Bundeskartellamt to investigate Facebook in March 2016 on the suspicion of having misused its market position by breaching data protection rules. Bundeskartellamt, in this case, was of the opinion that when a dominant establishment abuses privacy regulations and mishandles the personal data of its users to conquer market power, competition law is an apt tool to wield.

Interestingly enough, the German Competition Act was subsequently modified in the following year to properly preserve the sentiments of the Bundeskartellamt in the proceeding carried out against Facebook. As such, the German Act against Restraints of Competition was dynamically augmented so as to face head-on the challenges stemming from Big Data in the digital market. The amended Act was empowered with distinct specifications to review market dominance and to scrutinize specifically, issues such as- direct and indirect network effects, parallel use of multiple services and switching costs for the users, economies of scale arising in connection with network effects and innovation-driven competitive pressure. Finally, what can be perhaps be deemed as a historical step towards bringing ‘data’ under the auspices of competition policy, is the amendment to Article 18 of the Act which in clear words categorized an ‘undertaking’s access to data’ as a criterion for assessing market power within the digital economy.

³⁵ Lande, Robert H., The Microsoft-Yahoo Merger: Yes, Privacy is an Antitrust Concern. FTC: Watch, No. 714, 2008, University of Baltimore School of Law Legal Studies Research Paper No. 2008-06, Available at SSRN: <https://ssrn.com/abstract=1121934>

CONCLUSION

Competition Law jurisprudence has evolved since 1890, when the Sherman Act was first proposed by Senator John Sherman in the United States Congress, in a common law like manner, as newer learnings, judicial standpoints and market experiences were inculcated to shape its design. This process, still continues as competition law and regulators have acknowledged, for instance, previously unidentified concerns regarding 'exclusive rights to exploit intellectual property' and as such, the 'Essential Facilities Doctrine' has been developed to incorporate new learnings about competition complications. However, evolution in a common law like manner is an excruciatingly slow process and thus, is practically incompatible in the matter of Big Data concerns as the growth of digital platforms is extremely high-speed. Therefore, instead of anticipating the gradual changes that will perhaps coalesce over time into the Competition Act, 2002 the more rational solution is to address the competition problems and propel an urgent amendment.

There are numerous possible areas within the Competition Act, 2002 which needs to be revised to make the Statue more aggressive in regulating deplorable conducts that have a direct bearing on economic welfare, while maintaining market autonomy. Firstly, the modern literature and research by economists on multi-sided markets operating free of charge must be referred to for deriving at potential focus areas that need to be defined to calculate harm within the new economy. Secondly, economic welfare of the general public must be emphasised and problems emanating from digital platforms, taking advantage of consumer biases, must be addressed. Thirdly, potential competition must be assessed and in doing so a provision dealing with 'Attempt to Monopolise' should be appended, drafted in the lines of Section 2 of the Sherman Act. The role of the Commission, in attempting to assess exploitative conduct of a market player, should not be restricted to prevent the abuse of dominance once dominance has been attained but must also focus on market entities approaching dominance. A radius mechanism would, in fact, allow authorities to buy some time before the market tips. Fourthly, although 'Predatory Pricing' is recognised as an abuse of dominant position, prohibited under Section 4 of the Act of 2002, it is crucial that the same be modified and made more rigid so as to be better equipped to combat the problems of below cost pricing and deep discounting. Finally, mergers between dominant market players and substantial competitors should be presumed to be prohibited, subject to rebuttal and thereby, shifting the onus to rebut upon the firm with the most access to user data or related information on issues of competition and that would derive the maximum long-term benefit from the merger. Thus, giving an opportunity to the Competition Commission to nip a monopolising situation at the bud.

It is seemingly clear that, ultimately, whether the utility of Big Data will overcome the costs for society, lies in the hands of regulators, authorities and administrators and how they will be able to perceive and realise the challenges of the digital economy. This paper has identified and analysed few of these challenges that have materialized alongside Big Data gains and carried forward the discussion that is, in fact, going on since the brink of the Digital Age. This paper does not claim to be exhaustive, but is rather trying to shine a light on some of the areas

which policy makers must focus on to effectuate a much-needed reform in Competition Policy in India to better equip regulators to keep up with the swift development of the new economy.

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