

**COMPETITION LAW AND SIGNIFICANCE OF DATA IN DETERMINATION OF
MARKET POSITION**

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ABSTRACT

Most antitrust agencies around the world are currently focusing on challenges in the enforcement of antitrust laws posed by the data in possession of tech giants. As businesses are edging towards digitalization amid the pandemic, enough emphasis cannot be laid on the importance of data and the reliance placed on it by companies. One of the important issues faced by the antitrust agencies is the infinite quantum of such data which makes measuring such data impractical. Although platform markets are usually zero priced, in the current times, it is not wrong to equate data with the currency of digital markets. Many industry experts and businesses have referred to data as the new oil. However, these digital markets are dominated by a few players that have no significant threat to their market position. This article aims to analyze the impact of the acquisition of data and challenges faced in implementing competition law in data-oriented markets. The article further discusses the possible abuse of dominance caused due to data amassed by tech giants.

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I. INTRODUCTION

One of the main criteria to assess the size of a business is its capital wealth. More often than not, in traditional markets, profits are associated with the success of an entity as well as all the stakeholders involved. However, this is not the case with the digital or data-driven markets. Various agencies have recognized and accepted the fact that profits may not be the true indicator of market power in data markets.¹ In digital markets, market power can be ascertained by the amount as well as the nature of the data collected by the firms, including both personal and non-personal data (either publicly available or acquired through tracking).² Most of the digital platform markets are multi-sided markets, where the success of one side of the market depends on the flourishing of the other side of the market. For instance, advertisers are attracted to Google as compared to other search engines due to its huge consumer base. They are both interdependent and this phenomenon is known as networking effect. Networking effect also plays a strong role in ascertaining market power which, in turn, is intertwined with the data collected, as both grow simultaneously. As first movers in the market, these tech giants are able to tip the market/ network effect in their favour, making it difficult for a new entrant in the market. The enormous amounts of data along with tools of machine learning and artificial intelligence [“AI”], further amplifies market strength of these data driven technology companies.³

The data collected is not limited to the information that the consumers provide as product reviews or under surveys, but also includes the market studies and the consumers' behavioral patterns. Such market studies involve the application of analytics to the simple data collected. However, the big tech firms are uniquely positioned as they can monitor data of each player dependent on the platform. Even minute data for instance, time spent by an individual on viewing each product and deep tracking such as amount of time a consumer focuses on certain post, can be extracted using AI. This endless data allows for tracking of the consumer behavior and provides exclusive access to tech giants to such data without any scope of replication, and thereby creating dominance. This collection and possession of data has not

¹Ramji Tamarappoo and Nandita Jain, ‘Competition Assessment of Mergers in Digital Market’ (National Conference on Economics of Competition Law, New Delhi, March 2020).

²Michael Porter, ‘Strategy and the Internet’ (2001) Harvard Business Review <<https://hbr.org/2001/03/strategy-and-the-internet>> accessed 07 November 2020.

³C. Scott Hemphill, ‘Disruptive Incumbents: Platform Competition In An Age Of Machine Learning’ (2019) 119(7) Columbia Law Review, 1973.

only raised privacy concerns among the consumers, but has also highlighted competition law concerns due to the unfair advantage of the big-tech firms over their competitors. Further, it becomes important to understand that the first mover's advantage and the network effect help the tech-firms to consolidate their market power.

The Competition Act, 2002 [“**Act**”] provides an inclusive list of factors⁴ that the Competition Commission of India [“**CCI**”] may take into regard while determining the dominant position of an enterprise. The CCI has the power to rely on any other factor that is relevant to the investigation and this provision should be utilized by the CCI to deal with cases concerning the digital markets.⁵ The whole concept of dominance would see a paradigm shift if possession of data, in terms of both quantity and quality, is included within the aforementioned list of relevant factors in determining the dominance of a firm. In case of digital markets, the market power might be shared simultaneously amongst the key players and hence, market share is not sufficient as the sole indicator of dominance in the relevant market. Needless to say, even in case of mergers, the CCI is required to assess the amount of data accumulated by each firm as well as the consolidating networking effects, which has the potential to make their market position formidable. Big-tech firms and many competition law authors claim that in the digital markets, competition is just a click away, as consumers have an option of multi-homing, i.e. to use multiple platforms for a similar purpose. For instance, a consumer may use Whatsapp as well as Hike for messaging services. This claim is far from reality in many cases as, despite having a choice, very few consumers practice multi-homing, especially in the market of search engine.⁶ Adding to these problems is the lack of transparency in data collection, storage, processing, as well as the actual utilization.

II. STRENGTHENING MARKET POWER

The critics of competition law enforcement in the digital markets argue that disruption of the digital market may stifle innovation.⁷ However, they fail to consider the price-oriented framework of competition law enforcement, which does not fit well into the dimensions of

⁴Section 19(4), the Competition Act 2002.

⁵ibid.

⁶*Google Search (Shopping)* (Case COMP/AT.39740) Commission Decision [2017] OJ C9/11<http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf> accessed 07 November 2020; *GVG/FS* (Case COMP/37.685) Commission Decision [2004] OJ L11/17.

⁷Geoffrey A. Manne and Joshua D. Wright, ‘Google and the Limits of Antitrust: The Case Against the Case Against Google’ (2011) 34(1) Harvard Journal of Law and Public Policy 171, 244.

innovation and data-driven markets. Data-driven companies aim to expand and make the most out of networking effects in the supply-side markets, rather than reaping profits due to significant cross-subsidization of advertising and other related markets.

Once the size of a firm grows, thereby increasing the data collected, there is a significant networking effect tipping in their favour, while drastically reducing the marginal costs incurred in operating the business or catering to additional users. The market dynamics of the digital arena are such that the increase in capacity and the retention of users increases the data collected and thereby, enhancing the quality of targeted advertisements.⁸ This, further increases the predictability of an individual's behaviour and the likelihood of clicking on a particular advertisement or a website. While the data collected in itself may not hold value, it is constructed and analyzed in comparison with the data previously stored or collected. AI and machine learning can combine non-personal data and personal data collected through cookies, trackers, and other methods through various sources, to develop into sensitive information which may not be replicated.⁹ For example, Facebook accumulates data not only during usage on its own platform but also from the third-party applications using Application Programming Interface when an individual chooses an option to log-in or avail the service using Facebook login credentials. Simply put, the data collected and the size of a firm are directly proportional, leading to further reinforcement of the market power of the incumbents. This renders them invulnerable to the new market entrants, which are at a greater risk of being acquired by the existing giants.

The case against Facebook, investigated by the German antitrust authority, Federal Cartel Office [“FCA”], brings out the concerns surrounding the amount and methods of collection of information by the tech-giants.¹⁰ The judgment illustrates how Facebook collects not only individual, but also family data, and data from other related hardware using Bluetooth, Wi-Fi etc. The FCA had left the market definition open because not only the social networking market, but also the integrated as well as the related markets were affected. In its analysis, the

⁸Fabiana Di Porto and Gustavo Ghidini, ‘Big Data between privacy and competition: dominance by exploitation? Which remedies?’ (2018) 5 ASCOLA <https://www.law.nyu.edu/sites/default/files/upload_documents/Di%20Porto%20and%20Ghidini.pdf> accessed 07 November 2020.

⁹Italian Communications and Media Authority (ICMA), ‘Big data Interim Report’ (2018) n. 217/17/CONS.

¹⁰Bundeskartellamt, Case B6-22/16 [2016] <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5> accessed 07 November 2020.

FCA had also acknowledged and accepted the European Commission's ["EC"] view in the *Google* judgment.¹¹

*“Even though users do not pay a monetary consideration for the use of general search services, they contribute to the monetization of the service by providing data with each query. In most cases, a user entering a query enters into a contractual relationship with the operator of the general search service. For instance, Google’s Terms of Service provide: ‘By using our Services, you agree that Google can use such data in accordance with our privacy policies.’”*¹²

This further ascertains that merely because the services are being offered free of charge, does not necessarily conclude a lack of a commercial angle. The consumers have to pay in terms of their data collected by the firms, which is monetized. This confirms the assertions regarding reinforcement of market power in terms of growth of size and wealth when monetary value is attached to the data collected. Data history acts as another factor in establishing market power. While a new player with huge capital investments may establish data centers with machine learning/AI expertise to process data, it would still lack the raw material or past data which is essential for making meaningful predictions. For instance, Amazon suggests a follow-up purchase related to the product already bought through the behavioral pattern collected by the platform.¹³ Data history acts as an essential feature to train new AI to predict basic consumer behavioral pattern. The presence of data can be directly linked to the market power in case of the big players. Further, it has the potential to act as an entry barrier and expansion to the new players.

III. BARRIERS TO ENTRY AND EXPANSION

There is a significant first-mover advantage that plays a prominent role in establishing a market leader. Thus, the existence of the Google, Apple, Facebook, Amazon, Microsoft ["GAFAM"] are, in practice, uncontested due to the vast amount of practically non-replicable data amassed by them over the years.

¹¹*Google Search (Shopping)* (n 6).

¹²*ibid* [158].

¹³C. Scott Hemphill (n 3)..

Google and other tech firms view data collected and the AI as one of the significant features for their success.¹⁴ The reaction time and relevance are also directly proportional to the number of search queries.¹⁵ The Tail queries or the uncommon queries' results increase with increase data hours i.e. time spent by each individual creating data using the tech services, which is imperative for a successful tech-company. This, indeed, acts as a significant entry barrier and negates the argument of "*competition is just a click away*". A new entrant would never be practically able to compete with the already dominant players that have developed advanced AI, trained using consumer data. Hence, new players never have the opportunity to amass such huge volumes of data without the market power. This can be substantiated by the fact that since the launch of Microsoft's search engine, Bing, in 2009, it has never seen an increase in its market share beyond 10%.¹⁶ It is evident that capital is not the only requirement to enter the digital market and data plays a crucial role in acquisition of market share.

Data history is the source for the AI and machine learning software to increase user-satisfaction. The past behavioral patterns stored in terms of data are required to train and improve the efficiency and accuracy in the predictions of algorithms.¹⁷ The lack of access to historical data renders tough competition to new players in offering quality products to consumers, efficiently reprogramming their AI technology, and sustaining the competition in the digital market without incurring huge losses initially. The new entrants are forced to compete with players who have already gained the advantage of networking effects, changing the dynamics of the market as "winner take all", thus, creating artificial barriers and making co-existing in the same market improbable.¹⁸

Moreover, the undeterred access data enables the tech giants to constantly improve the AI and assessing data to determine the success of the innovation, a luxury which the new

¹⁴Bernard Marr, 'The 10 Best Examples Of How Companies Use Artificial Intelligence In Practice' *Forbes* (09 December 2019) <<https://www.forbes.com/sites/bernardmarr/2019/12/09/the-10-best-examples-of-how-companies-use-artificial-intelligence-in-practice/?sh=6340e1ca7978>> accessed 07 November 2020.

¹⁵*Google Search (Shopping)* (n 6).

¹⁶'Search Engine Market Share Worldwide-October 2020' (*Statcounter*, December 2020) <<https://gs.statcounter.com/search-engine-market-share>> accessed 07 November 2020.

¹⁷Xinran He and others, 'Practical Lessons from Predicting Clicks on Ads at Facebook' (8th International Workshop on Data Mining for Online Advertising, New York, 24 August 2014).

¹⁸Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (OUP 2016); Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 199(4) *Columbia Law Review* 973.

entrants cannot avail. This allows data dominant enterprises to improve targeted advertisements which increase the revenue stream of the enterprises, enabling them to leverage it for cross-subsidization.¹⁹ The phenomenon of snowball effect, where the data collected by tech companies grows exponentially with increase in size, in a loop, is observed in digital markets in relation to the data collected, access to data, and eventually, the quality of service provided. The gap between the market leader and the new player is ever widening because the data access enables big companies to provide better service, in turn, enticing more customers, and thereby gaining access to more data.²⁰ This leads to a huge gap between the successful player and the new entrants, especially when the access to data is cut-off by the former.

Even though some might argue that third-party data can be and is, in fact, purchased even by the large incumbent players, the new entrants do not have the access to firsthand data. Such firsthand data collected by the platform players captures the time spent by consumers viewing a product their comparisons of various products, including when the consumers click on the product, but not through with the purchase. This primary data is collaborated with third-party data and the collective is imperative to improve existing AI. The latter only acts as a supplement and a catalyst, but not a substitute, to the former in creating accurate behavioural data.²¹ This adds to the significant existing barriers as well as limits the amount of data that can be accessed due to the privacy concerns of the consumer and hence, restricts the data access of new entrants to a bare minimum public data.

Data may ideally be considered ‘non-rivalrous’, as, theoretically, any player can collect the data and the same is not restricted by other competitors. However, in practice, we need to take into account that the ability to collect data, in itself, requires a large database. The lack of interoperability concerning social media platforms further stifles the entry of new players. Interoperability would allow new entrants to flourish with the help of existing big players in the markets as the switching costs would be reduced to a great extent. For instance, consumers who would want to shift to alternate messaging services like Hike, Telegram, etc.

¹⁹Tom Symons and Theo Bass, ‘Me, My Data and I: The Future of the Personal Data Economy’ [2017] European Commission Decode Project COM (34)..

²⁰Autorité de la Concurrence and Bundeskartellamt, ‘Competition Law and Data’ (2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> accessed 07 November 2020.

²¹ibid.

could not shift easily without waiting for other consumers to shift on to such platforms for viability. This phenomenon is more significant in the social networking markets where the networking effects are strong and the switching costs are high in contrast to search-engine markets.²² A lack of data retention when switching to new platforms coupled with lack of interoperability, erects huge barrier in entry with huge switching costs. Simply put, any person who would want to shift to alternate social media platform than Facebook would have to create a new profile from scratch and would also require the friends to shift to this alternate platform for the switching to be viable. Any new entrant is, therefore, required to develop disrupting technology in order to compensate the high switching costs involved to attract users from an established market.²³ This is challenging, especially in such digital markets where the existing competitors, with their immense resources, either buy out a potential competitor or easily mimic the disrupting feature of new entrants, catering the same to their large existing user base. This was witnessed in the futile takeover attempt of Snapchat by Facebook, where the latter, later, incorporated the distinguishing features of Snapchat into its own platform, Instagram. This eventually reduced Snapchat's market power. Although, such acquisitions are harmful, the antitrust agencies are yet to detect the monopolistic tendencies of data companies in foresight. In addition to the entry barriers created by platform markets, a dangerous threat is posed to subsequent markets, which rely on these platforms for conducting businesses. Such unbridled data is used by platforms to enter and consolidate their market power in vertically integrated markets.

IV. TECH GIANTS AS DATA VULTURES

A. Data scrapping

In addition to overcoming the entry barriers, the new players in digital space are often tasked with steering clear and sustaining the challenges posed by the tech giants acting as data vultures. These dominant enterprises leverage their dominance and engage in data scrapping, where they access and collect data of the competitors in the downstream markets who rely on these dominant platforms for their existence. This problem is not just confined to digital

²²Dan Prud'homme, 'How digital businesses can leverage the high cost for consumers to switch platforms' (*LSE Business Review*, 24 September 2019) <<https://blogs.lse.ac.uk/businessreview/2019/09/24/how-digital-businesses-can-leverage-the-high-cost-for-consumers-to-switch-platforms/>> accessed 07 November 2020.

²³German Monopolies Commission (Monopolkommission), 'Competition policy: The challenge of digital markets' (2015) Special Report No. 68 <https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf> accessed 07 November 2020.

business but also make the traditional business relying on these platforms, vulnerable. By the very nature of these platform markets, tech companies, as well as other companies relying on them for conducting their daily business, risk sharing the data collected by them to be simultaneously recorded with these platforms. Mere collection of this data does not pose any threat to the downstream markets even if it is used to enhance their services. However, the problem arises when they start to use this data to eliminate competition in such downstream markets. Vertical integration by the tech giants causes serious disruptions in the related markets. This is mainly due to the asymmetrical data among the competitors, and the large user database of the platforms, with practically, unlimited access and the ability to refine and analyze the data. This, to a great extent, exposes the players in the downstream market to data scraping.

One of the classic examples of data scraping is the case of Google and Yelp. Google tried to acquire Yelp, a local reviews site. However, when rejected, the former started to mimic Yelp's content on its platform. At that time, Google's local reviews were comparatively inferior to Yelp and lesser relied upon.²⁴ The United States antitrust authority, the Federal Trade Commission ["FTC"], in their investigation, had found Google to have engaged in preferential treatment to its own vertical searches. Google was also found to be engaging in data scraping or stealing content from its downstream competitors such as Yelp and other stand-alone search providers who relied on Google for their viewership.²⁵ Google, in the pretext of resolving the issue, had offered a 'False Choice' to the helpless players like Yelp, relying on Google, to either accept content scraping or to quit using Google's services and shift to its competitors, and eventually, risking reduction in visibility.²⁶

Google was even warned by the EC that the use of third-party data, without their consent, could amount to an abuse of dominance.²⁷ The EC had acknowledged that Google's initial shopping comparison service operating without any preferential treatment from Google, had performed poorly as compared to its subsequent versions. It was observed that the latter were

²⁴Howard A. Shelanski, 'Information, Innovation, And Competition Policy For The Internet' (2013) 161(6) University of Pennsylvania Law Review, 1663.

²⁵Lina (n 18).

²⁶Jeremy Stoppelman, 'The Power of Google: Serving Consumers or Threatening Competition?' (*U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 21 September 2011) <<https://www.judiciary.senate.gov/imo/media/doc/11-9-21StoppelmanTestimony.pdf>> accessed 07 November 2020.

²⁷Ibáñez Colomo, 'Restrictions on innovation in EU competition law', (2016) 41(2) European Law Review 201.

a success due to the preferential treatment meted, at the cost of other players providing shopping comparison services. To safeguard the interest of the consumers and many downstream developers, it is imperative for the antitrust agencies to take cognizance of data scraping as potential anti-competitive conduct that could hamper the innovation and growth of a nascent player in the field.

B. Self-preferencing

Self-preferencing, in simplest terms, means prioritizing products of your enterprise in comparison with that of your competitors. Self-preferencing, in itself, is not *per se* an anti-competitive practice. Most of the businesses grow with the help of vertical integration and it is often economical as well as logical to depend on one's own products in the downstream markets. The way of conducting business has transformed with time. Recent market studies have shown that 55 % to 70 % of the population prefers to shop online.²⁸ In India, the value of e-commerce sales has risen by 31.9 % from 2018-19.²⁹ With the COVID-19 pandemic, this number has further risen rapidly. Therefore, it can be said that digitalization has forced companies to have an online presence, in turn, increasing their reliance on digital marketing. Digital marketing has greater reach with a fraction of offline advertisement costs, making it the most plausible method for startups.

However, helping the small enterprises may not be the agenda for the big techs that look to expand in every possible way, having the requisite ability and the required data to execute it. This behavior of digital platforms becomes risky when coupled with self-preferencing. The tech giants not only collect a massive user data compared to a traditional counterpart, the GAFAM also act as intermediaries while competing with the businesses who are dependent on these platforms. These platforms can monitor the consumer behavior pattern, continuously, not only concerning their products, but any downstream company who uses their services to forward their business. This, in turn, creates unfair playing field and huge data asymmetry in the downstream markets. In the United States congressional hearing [“**Hearing**”],³⁰ it was highlighted that Amazon merely has a policy which recommends non-

²⁸Maddy Osman, ‘Ecommerce Statistics for 2020-Chatbots, Voice, Omni-Channel Marketing’ (*Kinsta Blog*, 17 December 2020) <<https://kinsta.com/blog/ecommerce-statistics/>> accessed 07 November 2020.

²⁹‘Ecommerce Statistics’ (*Ecommerce guide*) <<https://ecommerceguide.com/ecommerce-statistics/>> accessed 07 November 2020.

³⁰Tony Romm, ‘Amazon, Apple, Facebook and Google grilled on Capitol Hill over their market power’ *The Washington Post* (Washington DC, 29 July

usage of competitors' data collected on their platform, to improve its own line of products or even develop a new product similar to its competitor. Mr. Jeff Bezos, the Chief Executive Officer of Amazon, had testified that there is no enforcement mechanism for the policy, and neither can he guarantee that the policy has not been violated by their product developers. In such a scenario, the small competitors who use Amazon's services stand no chance to compete with the tech giant.

Further, Amazon funded the research project of the Nucleus, researching in the voice recognition area. Nucleus was assured that Amazon won't replicate its data, despite contrary reservations from the promoters. Once the information was shared by the Nucleus with Amazon for funding, Amazon Echo was launched within a year with features similar to that of the Nucleus.³¹ The promoters had no choice but to give in to Amazon because of Nucleus' inability to compete with a firm of its size. Another example can be the Quidisi's hostile takeover, where Amazon had monitored the baby products sold on its platform and has forcefully acquired diapers.com after an ugly price war. This involved undercutting the prices and forcing Quidisi to sell its business to Amazon.³² During the hearing, Mr. Bezos accepted that promoting one's products is a general business order and also that Alexa might be promoting their products over others.³³ Further, he admitted there are incidents where Amazon has sold products below the cost price on promotions. This will potentially drive out small competitors being forced to either sell their business to Amazon or face the risk of being driven out of the market. Amazon can track consumer preferences and replicate the most profitable or successful products by preying on competitors' non-public data. Further, the risk factor gets reduced with the bare minimum research and development ["R&D"] costs because the data collected enables the company to identify the products which can be

2020) <<https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/>> accessed 07 November 2020.

³¹Dana Mattioli and Cara Lombardo, 'Amazon Met With Startups About Investing, Then Launched Competing Products' *The Wall Street Journal* (New York, 23 July 2020) <<https://www.wsj.com/articles/amazon-tech-startup-echo-bezos-alexa-investment-fund-11595520249>> accessed 07 November 2020.

³²Lina M Khan, 'Amazon's Antitrust Paradox' (2016) 126 Yale Law Journal 710 <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=ylj>> accessed 07 November 2020.

³³Adi Robertson, 'Everything you need to know from the tech antitrust hearing' *The Verge* (Washington DC, 29 July 2020) <<https://www.theverge.com/2020/7/29/21335706/antitrust-hearing-highlights-facebook-google-amazon-apple-congress-testimony>> accessed 07 November 2020.

replicated profitably and have scope for development. The competitors would never be able to match the prices of the competing product launched by the tech giants as a result of the use of this data. This stifles innovation and destroys any incentive to further invest in R&D knowing that they face the risk of hostile takeovers by these tech giants.

The congressional hearing has surfaced reports of various market studies where the small businesses which depend on these tech giants, describe these tech companies as bullies. Due to lack of competitors in the digital market space, these companies find themselves competing with the tech giant in the product market that have vertically integrated. This is not restricted to one tech platform but other platforms as well, as seen in the *Google Shopping* case³⁴, wherein a study conducted by the Wall Street Journal unearthed many discrepancies regarding how Google handled its search algorithms.³⁵

The Competition Agencies must strictly analyze such issues where the data dominant firms have an undue advantage over the rest of the competitors, not only in their market, but in the related markets as well. This behaviour can be considered as an issue of leveraging which has been long established in competition law enforcement. Many authorities have acknowledged the ‘Gatekeepers’ or the ‘bottleneck problem’ caused by the tech-giants engaging in self-preferencing. Further, the authorities must take into account the effect of such data possession on the competition including both ex-post and ex-ante consequences.³⁶ Tackling the problem of data scraping and self-preferencing must be made the priority to safeguard the interest of the smaller players dependent on the big techs and prevent the big tech firms from taking undue advantage of the hard work of the dependent firms to prevent stifling of innovation in the relevant markets.

³⁴*Google Search (Shopping)* (n 6).

³⁵Kirsten Grind and others, ‘How Google Interferes With Its Search Algorithms and Changes Your Results’ *The Wall Street Journal* (United States, 15 November 2019) <<https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753>> accessed 07 November 2020.

³⁶Rod Carlton and Rikki Haria, ‘Self-Preferencing – Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)’ (*Competition Policy International*, 24 June 2020) <<https://www.competitionpolicyinternational.com/self-preferencing-legal-and-regulatory-uncertainty-for-the-digital-economy-and-beyond/>> accessed 07 November 2020.

V. CONCLUSION

Data has been one of the major driving factors in the digital age and has become an indispensable part of our economy. It is safe to conclude any enterprise having access and control over such data has the ability to succeed and control the relevant markets. When platform markets have access to such data, smaller competitors or new entrants often lack any scope to compete with the dominant players. It is time to acknowledge and deal with the new challenges introduced by data-driven markets.

The volume of data and access to it cannot be overlooked while assessing a digital antitrust case, as it forms the main foundation for the tech-markets. Access to data determines the power of these enterprises to control not only in its market but also in the related markets where such dominance and access to data is leveraged. Dealing with such cases may not be possible through establishing harm in terms of innovation, because the existing jurisprudence makes it highly improbable for it to succeed. Antitrust agencies need to acknowledge that in addition to harm to innovation, undeterred size of big tech firms significantly reduces consumer choice and alternate options or business avenues for the small businesses which are dependent on these platforms. It is time to consider access to data itself as an integral factor which could impede competition when leveraged to enter vertical markets. The time has come to try and experiment with the structural remedies to deal with the data problems, as the behavioral changes have not been quite successful. Division of enterprise and isolating the platform services provided by the tech giants with that of other subsidiaries would solve the issue of self-preferencing and ensuring healthy competition in other downstream markets. However, the feasibility of this solution is yet to be analyzed by the antitrust agencies around the world. Many jurisdictions, including the EU, are contemplating on developing new tools to analyze and tackle issues in the digital market space. It remains to see how the competition regulation framework will be developed to tackle the problems associated with the data markets. One key point to be kept in mind while making a new legislation or expanding the scope of existing laws, is not to overreach. This is detrimental to innovation and quality of the products or services provided by the tech companies.

Lastly, the possession of data should be a key consideration while analyzing mergers or acquisitions in digital markets that help the tech-giants to reinforce their market power by creating barriers to entry and expansion or other anti-competitive effects. With the introduction of the new Draft Competition Amendment Bill, 2020 in line with the recommendations of the Competition Law Review Committee, 2019, it would be interesting

to see if and how deal value thresholds introduced to regulate mergers, would affect the mergers in the digital market space. The key challenges which the CCI might face would be with respect to quantifying data and tackling dynamic deal values. The CCI should keep the above discussed ambiguities in mind while introducing any new threshold, to ensure clarity and maintain ease of doing business.