TACKLING BIG TECH'S DATA ADVANTAGE: IS THE INDIAN REGULATORY FRAMEWORK GEARED UP?

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ABSTRACT

The realm of data-driven digital markets has widened its domain to a great extent and takes within its fold every strand of our experience in contemporary society. Globally, the term 'Big Tech' refers to the technology giants operating in the digital space, including mainly the 'Big Four' - Google, Amazon, Facebook and Apple ["**GAFA**"]. *Sometimes the term also includes Microsoft, thereby making it the 'Big Five'. The Big Tech engages in the creation of innovative products and services with phenomenal advantages for their users. However, in relation to competition law, there are concerns all across the globe over rising anti-competitive threats as a consequence of the conduct of the Big Tech in the digital space. The recent scholarly expositions and arguments reflect the distortion of the natural flow of market forces through monopolisation by the Big Tech. In the absence of healthy competition, consumers would be deprived of the bounties of a thriving digital economy. Through this discourse, the author seeks to analyse the anti-competitive repercussions triggered by the GAFA effect and suggests regulatory/policy measures for India after comparatively analysing the legal frameworks across foreign jurisdictions.*

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I. INTRODUCTION

Successful economies of the world are characterized by robust competition. Competition is a key engine of economic activity driving innovation, technological advancement, investment in research and development, and improvement in business processes. Apart from productivity and innovation, competitive buoyancy in the digital markets can further propel competition amongst the firms along the lines of privacy and data protection because digital market entities usually compete on quality.[1] In this context, a digital market devoid of competition would be a 'kill zone'[2], and this lack or absence of competition would erode the privacy and data protection of users.[3]

A digital economy is tainted by sophisticated anti-competitive manoeuvres that involve digital platforms collecting and using the consumers' data to drive out competitors and establishing their dominance in the market. There are increasing competition concerns over the Big Tech's dominance in the digital markets. The competition regulators across different jurisdictions need to address these concerns urgently to safeguard their economies from the looming threat posed by the Big Tech. In light of these concerns, the competition regulators globally have been analysing the digital markets and scrutinizing the factors that enable the tech giants to exclude competition. The Indian antitrust regime is as susceptible to these troubles of the new technological age as any other domestic regime. The Indian competition regulator needs to grasp the business models of digital platforms to extenuate any anti-competitive risks.

The Organisation for Economic Co-operation and Development [**"OECD**"] defined the term 'Digital Economy' (also known as 'Internet Economy' or 'New Economy') as:

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[1] 'Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary' (2020) <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/10/investigation_of_competition_in_digital_markets_majority_staff_report_and_recommendations.pdf> accessed 3 July 2021.

[2] There is a growing worry that digital platforms (multi-sided markets that offer digital services to customers, often for free, in exchange for data) might be gaining market power, distorting competition, and slowing innovation. A specific concern is that such platforms might acquire any potential competitors, dissuading others from entering, and thus preventing innovation from serving as the competitive threat that is traditionally believed to keep monopoly incumbents on their toes. In a sense, such platforms create a "Kill Zone" around their areas of activity Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, 'Kill Zone' (*Harvard Law School Forum on Corporate Governance*, 2020) <https://corpgov.law.harvard.edu/2020/03/26/kill-zone/> accessed 29 October 2021.

[3] ibid.

> "*The Digital Economy incorporates all economic activity reliant on, or significantly enhanced by the use of digital inputs, including digital technologies, digital infrastructure, digital services and data. It refers to all producers and consumers, including government, that are utilising these digital inputs in their economic activities.*"[4]

The online or digital platforms form an integral part of the Digital Economy. These digital platforms and marketplaces have an advantage in the form of a developed customer base and logistics infrastructure. However, the recent anti-competitive attacks by the Big Tech have overshadowed the benefits conferred by these platforms.

The article advances on this discourse through five parts. The first part touches upon the essential characteristics of digital markets. In the second part, the authors analyse the anti-competitive repercussions of data collection by the Big Tech. The third part delves into the India-specific discussion on regulatory mechanisms and decisions by the Indian competition regulator ["**CCI**"]. In the fourth part, the authors comparatively evaluate the legal frameworks across various foreign jurisdictions. Lastly, the article concludes the discussion through the suggestions regarding the prospects for ensuring healthier competition in India.

II. CHARACTERISTICS OF DIGITAL MARKETS

A. 'Data': An Economic Asset

A new realization has dawned upon today's economies, comprising the Big Tech telecom companies and even other industries that collection and monetization of personal data of the consumers serves as an important economic asset that has the potential of producing cash flows over a period of time.[5] The advent of Artificial Intelligence ["**AI**"] marked the achievement of a significant milestone in the contemporary technology-driven world. Data serves as a critical resource in AI and other data-driven technologies and the tech giants continue their relentless quest for data collection. They collect every component of a user's personal data that includes identity, behavioural, and network data. For instance, in precision

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[4] 'A Roadmap Toward a Common Framework for Measuring the Digital Economy, Report for the G20 Digital Economy Task Force, Saudi Arabia' (*OECD*, 2020) <https://www.oecd.org/sti/roadmap-toward-a-common-framework-for-measuring-the-digital-economy.pdf> accessed 3 July 2021.

[5] 'Hearing on Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition, Written Testimony of FTC Commissioner Rohit Chopra Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law' (*USA Federal Trade Commission,* 18 October 2019) <https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-Wstate-ChopraR-20191018.pdf> accessed 5 July 2021 [hereinafter *Rohit Chopra*].

marketing, the companies analyse the user data to send targeted advertisements to potential customers based on certain characteristic labels given to them such as 'makeup lover', 'travel lovers', 'sports enthusiast' etc.[6]

However, data is distinct from other kinds of assets. Rohit Chopra, a former commissioner of the Federal Trade Commission ["**FTC**"] distinguished data from other economic assets on the following pointers:

i. Infinite Resource:

Data could not be regarded as a finite resource. Personal data increases with every passing second.

ii. Non-consumable:

Data could not be consumed in the traditional sense. If raw materials are employed in the manufacturing process, they could not be used for any other purpose. Data, on the other hand, can be copied and shared. In case, an entity collects and monetizes personal data, the value from such data could be extracted by other entities as well.

iii. Increasing Marginal Returns of Data:

As the collection of data increases, it leads to an equivalent increase in its value. The collection of data from more people facilitates gaining new perspectives of individuals or businesses and other entities interacting with them. For instance, Amazon Fresh and Whole Foods relies on big data analytics to comprehend the consumer's purchasing behaviour and their interactions with the suppliers and the grocers.[7] This data proves to be instrumental when a need arises to implement changes in the business operations. Netflix, an over-the-top content platform, employs big data analytics for advertising movie suggestions based on the users' search history.[8] In this manner, the marginal returns of data increase in the context of Big Data.

B. Extraction of Data: Price for the Online Services

Online services are usually misconceived as being 'free'. However, the companies providing these digital services like Facebook, Google, etc., have well-established, highly lucrative behavioural marketing and advertising businesses that collect massive volumes of data from their users. Therefore, the users pay for these services by providing their data, unlike a dollar.

[6] Winston Ma, 'Breaking the Big Tech Monopoly, Horizons' (2020) 18 J. of Int'l Rel. & Sustainable Dev. 166.
[7] Rohit Chopra (n 5).
[8] ibid.

C. Multi-sided Platforms

Digital platforms are multi-sided platforms that bring a multiplicity of users under one place to interact with each other. In such a scenario, one set of users increases the platform's value for the other set of users.[9] For instance, customers, as one set of users representing one side of the platform, may use the search engine to find products or content, while businesses, as another set of users representing the other platform side, may seek to advertise to attract the audience.[10]

D. Network Effects

The uniqueness of data, as an economic asset, significantly impacts the nature of competition in the digital markets. The digital market players comprise data-intensive platforms connecting different kinds of transaction partners such as riders and drivers, buyers and sellers etc. In such cases, an unregulated market would possibly tip in favour of a few platforms or even a single platform.[11] With more users joining the platform, the value of the platform also increases. For instance, the ability of the Uber platform to attract more riders attracted more drivers to the platform, resulting in increased availability. Riders tend to choose the platform that everyone in their network is using and this phenomenon showcases the network effects.

E. Other Characteristics

i. Varying Prices

Online platforms charge different prices for different sets of customers. The rationale is that it would be pro-competitive to "subsidize one side of the market when its presence is very valuable to the other side".[12]

ii. Economies of Scale

In the absence of territorial barriers, it is easier for online platforms to build a huge customer base and thereby, achieve economies of scale globally.

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[9] 'Digital Platforms Inquiry: Final Report', (Australian Competition and Consumer Commission (ACCC), June 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> accessed 4 July 2021.

[10] ibid.

[11] Rohit Chopra (n 5).

[12] Nimisha Tailor, 'Competition in the New ASEAN Economy' (2020) 37(3) J. of Southeast Asian Econ. 313.

III. DISRUPTING COMPETITION IN THE DIGITAL ECONOMY - THE GAFA EFFECT

Earlier, it was quite easy for an entity to enter the digital market due to low entry barriers. However, this scenario has changed in today's times. The Big Four (or the Big Five) have laid their roots all across the digital space. The main Big Tech players in India also involve companies like Flipkart and Reliance Jio. These entities have formed a huge web by integrating across different dimensions - vertically, horizontally, and diagonally - in an elusive and pernicious manner resulting in the dilution of competition. These entities utilize their position both as the providers as well as the participants of digital platforms to further their commercial interests and enter new product markets. It has also been found that their interests are often over-represented in policy discourses.[13] Evils of price discrimination, self-preferencing, and predatory pricing thrive where there is a proliferation of data collection practice by the Big Tech entities. The time is ripe for India to identify the anti-competitive impact of the Big Tech and accordingly safeguard its economy.

A. Price Discrimination

Price discrimination by the Big Tech is facilitated owing to the tracking of user data. Digital platforms allow their users access to maps, search engines, musical/video-streaming services, columns, blogs, etc. These platforms could now monitor the digital footprint of a user by tracking their location, shopping basket, browsing history, etc.[14] Further, these online platforms enable companies to carry out 'demand experiments'. For instance, eBay was found to be indulging in 'seller experiments' by listing an identical item several times at varying prices.[15] Such practices may give rise to controversies. This is evident from the complaint that about 2000 users filed against Amazon for carrying out price tests and charging different prices for the same DVD and the resultant apology by Jeff Bezos indicating that the tests were random and promising that such tests would never be resorted to by the company.[16]

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[13] 'The Promise and Peril of Big Tech in India' (*Big Tech India*, 2020) <https://bigtechinindia.com> accessed 8 July 2021.

[14] 'Big Data and Differential Pricing' (*Executive Office of the President of the USA*, 2015) <https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf> accessed 8 July 2021 [hereinafter *Big Data and Efficient Pricing*].

[15] Liran Einav, et al. 'Learning from Seller Experiments in Online Markets' (*National Bureau of Economic Research Working Paper No. 17385*, 2011) <http://www.nber.org/papers/w17385> accessed 9 July 2021.

[16] 'Bezos calls Amazon experiment 'a mistake'' *(Puget Sound Bus. J., 28 September 2000),* <https://www.bizjournals.com/seattle/stories/2000/09/25/daily21.html> accessed 9 July 2021.

Tech companies also undertake the practice of 'steering' wherein they identify various demographic groups and offer the same product to different groups at varying prices. Behavioural targeting and personalized pricing are other practices wherein user-specific data is used to target advertising or tailor prices for a set of products.[17] Such differential pricing makes competition law frameworks susceptible to frauds or scams that take undue advantage of unwary customers. Benjamin Reed Shiller's 2014 study on Netflix reveals interesting data about differential pricing. It revealed that Netflix's annual variable profits would have increased by about $8 million, or 12.18% of total profits, if Netflix had tailored price based on web browsing data and variables; if personalized prices were based only on demographics, the increase in total profits would be merely by 0.79%.[18]

However, another spectrum of scholarly opinion posits that price discrimination instils discipline and efficiency in the market and it benefits the consumers – it is suggested that under competitive conditions, price discrimination can further intensify competition and reduce individual firms' market power, thereby disciplining the market.[19]

B. Self-Preferencing

Tech giants often indulge in the practice of showing their products at more prominent places in the online search engines. Such preferential search results, by way of visual prominence, increase the chances of customers opting for their products. Self-preferencing is also done by restricting rival companies' promotional and marketing activities thereby restricting access to essential functionalities, '*sherlocking*' (monitoring success and strategies of rival entities), using default settings to steer consumers towards their products, etc.[20] The overall impact of self-preferencing tactics is to raise rivals' costs because they would be forced to resort to other forms of advertising.[21] Due to this practice of Apple, Spotify initiated a complaint

[17] Big Data and Efficient Pricing (n 14).

[18] Benjamin Reed Shiller 'First-Degree Price Discrimination Using Big Data' (25 April 2014) < https://www8.gsb.columbia.edu/faculty-research/sites/faculty-research/files/finance/Industrial/Ben%20Shiller%20--%20Nov%202014_0.pdf> accessed 31 October 2021.

[19] Rajat Kathuria, Vatsala Shreeti, Parnil Urdhwareshe 'Too much fexi-pricing these days?' (*The Hindu Business Line,* 14 March 2016) <https://www.thehindubusinessline.com/opinion/too-much-flexipricing-these-days/article8352867.ece> accessed 9 July 2021.

[20] Bapu Kotapati et al. 'The Antitrust Case Against Apple' *(Yale Uni. Thurman Arnold Project, Digital Platform Theories of Harm, Paper Series: Paper 2,* May 2020*)* <https://som.yale.edu/sites/default/files/DTH-Apple-new.pd> accessed 10 July 2021 [hereinafter *Bapu Kotapati*].

[21] ibid.

against it, and legal proceedings are underway before the European Commission ["**EC**"].[22] Similar investigations have been undertaken by the Dutch, the Russian and the Chinese regulators against Apple.[23] The Competition Commission of India ["**CCI**"] was confronted with this issue of self-preferencing in *XYZ v. Alphabet Inc. and Ors.,*[24] where the CCI ordered a detailed investigation into the abuse of dominant position by Google. One of the issues raised pertains to the preferential positioning and treatment of Google Pay on the Google Play Store.

C. Predatory Pricing

The evil of predatory pricing has long haunted the competition law regimes globally. This already looming threat becomes even more complex in light of the advanced information and communications technologies ["**ICT**"] that fall within the domain of two-sided platforms. Amazon was found to be involved in outrageous data exploitation in the aftermath of the launch of its home brands such as Amazon Basics and Solimo selling generic products for lower prices thereby eliminating their competitors (third-party sellers).[25] Big Four's Google and Facebook are also facing the heat in multiple jurisdictions, with strict investigations being carried out into their predatory behaviour and 'killer acquisitions' (acquisition of entities in the same industry to wipe out competition).[26] There are also ongoing deliberations about breaking off WhatsApp and Instagram from Facebook and imposing restrictions on their future deals.[27]

The US Justice Department has also accused a few Big Tech like Google of illegally protecting their monopoly over search and search advertising. Google's dominant market share is the result of the agreements that it enters into with Apple, mobile carriers, and other

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[22] 'Antitrust: Commission opens investigations into Apple's App Store rules' (*European Commission*, 16 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 10 July 2021.
[23] Bapu Kotapati (n 20).
[24] XYZ v. Alphabet Inc. and Ors, Competition Commission of India, Case No. 07 of 2020.
[25] Lavanya Gupta, Aaditya Mishra 'Data Accumulation by Big Tech: Is the Indian Competition Regime Ready?' (*The Indian Rev. of Corp. & Comm. L. (IRCCL)*, 29 October 2020) <https://www.irccl.in/post/data-accumulation-by-big-tech-is-the-indian-competition-regime-ready> accessed 11 July 2021 [hereinafter *Lavanya Gupta*].
[26] Anisha Chand, Soham Banerjee 'Breaking Trust: Is Big Tech in Big Trouble' (*Mondaq,* 11 January 2021) <https://www.mondaq.com/india/antitrust-eu-competition-/1023920/breaking-trusts-is-big-tech-in-big-trouble> accessed 11 July 2021.
[27] ibid.

handset makers to make its search engine the default option for users.[28] Hence, the digital landscape has been monopolized as a result of the GAFA effect by the Big Tech. Their anti-competitive attacks have limited consumer choices, jeopardized innovation, and eroded user privacy. However, they have been escaping antitrust scrutiny under the garb of consumer welfare.

IV. THE INDIAN COMPETITION POLICY FRAMEWORK

A. Regulations

There persist sluggish regulations in the area of digital space currently, and the tech companies are thriving by exploiting this vulnerability. The competition regulators worldwide are trying to ensure that anti-competitive behaviour is not left unpunished. They have even imposed huge penalties and asked for changes in business structures and models. It is yet to be seen whether such attempts suffice.[29] The lag in these inquiries is due to the absence of the simple aspect that businesses build market power at the expense of people either by eroding their basic labour rights or by unscrupulously collecting and processing user data and imposition of certain products on consumers. This happens due to the impact of these companies and their size on the market. With such competition concerns arising for adjudication before the CCI, the same regulatory concerns before the EU and the US take on a new colour because of the sheer volume of users and the untapped potential that big tech companies see in the Indian market.[30]

The merger control framework[31] requires the parties to obtain the CCI's approval if they cross a certain limit of thresholds of assets and turnover. However, what needs to be noted is that technology firms are asset-light,[32] and may also not earn revenue for many years if they aim to increase their user base. Thus, the high-value transactions may escape scrutiny. Usually, in digital markets, large tech firms acquire smaller tech firms, engaging in similar

[28] Cecilia Kang, David McCabe, Daisuke Wakabayashi, 'U.S. Accuses Google of Illegally Protecting Monopoly' (*The New York Times,* 20 Oct. 2020) <https://www.nytimes.com/2020/10/20/technology/google-antitrust.html> accessed 12 January 2021.
[29] Shrinidhi Rao, 'The growing clout of Big Tech companies and the regulatory need to prevent their abuse of power' (*Hindu Frontline*, 4 December 2020), <https://frontline.thehindu.com/the-nation/reining-in-the-big-tech-companies-through-regulators-to-protect-users-and-prevent-corporate-abuse-of-power/article33085144.ece> accessed 13 January 2021.
[30] Ibid.
[31] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.
[32] Nicholas Kachaner & Adam Whybrew 'When "Asset-Light" is Right' (*Boston Consultancy Group*, 30 September 2014) <https://www.bcg.com/publications/2014/business-model-innovation-growth-asset-light-is-right> accessed 14 January 2021.

work, to reduce competition, which may plausibly lead to an appreciable adverse effect on competition. Such issues exist in other countries as well. Other nations have approached this issue by allowing the regulators to open non-notifiable transactions or by having merger thresholds based on the deal's value or the transaction's size. Calculating the deal value requires in-depth analysis. Striking a balance between capturing transactions and managing the regulatory burden would be a significant challenge.

Since the *Consim Info* decision in 2018, the CCI has been actively investigating transactions in the digital space. Other regulators are also investigating the business of Big Tech in India, owing to which major changes have taken place in consumer protection law, taxation law and foreign direct investment ["**FDI**"] law. Additionally, the Personal Data Protection ["**PDP**"] Bill is under the final stages of review by the legislature. Furthermore, entities operating in the tech space are held liable under the provisions of the Information Technology Act and the rules and regulations thereunder for any violations of user privacy and data security.

The philosophy underlying the Indian competition law and policy in a way supports the dominance of firms. Our competition legal framework problematizes only 'abuse of dominance' i.e., imposition of unfair/discriminatory conditions or prices in the purchase or sale of goods. However, adopting this strategy may not be the correct way to investigate digital platforms for their anti-competitive behaviours. The following are some lacunae that the authors would like to highlight:

i. <u>Unique features of digital space are not captured</u>

The relevant provisions under the Competition Act, 2002 ["**Act**"] lays out various factors that must be considered while conducting an inquiry into the dominant nature or position of an entity.[33] However, these factors fail to take into account the unique features of entities operating in the digital space, such as network effects, data aggregation effects and multi-sidedness. Such factors could not have been envisaged at the time of the formulation of the statute. WhatsApp imposing the 'take it or leave it'[34] policy to its users, in relation to the

[33] Competition Act, 2002, § 4.

[34] WhatsApp Privacy Policy 2021 <https://faq.whatsapp.com/general/security-and-privacy/were-updating-our-terms-and-privacy-policy?campaign_id=12619934302&extra_1=s%7Cc%7C509623924212%7Cb%7C%2Bwhatsapp%20%2Bpolicy%7C&placement=&creative=509623924212&keyword=%2Bwhatsapp%20%2Bpolicy&partner_id=googlesem&extra_2=campaignid%3D12619934302%26adgroupid%3D128540813748%26matchtype%3Db%26network%3Dg%26source%3Dnotmobile%26search_or_content%3Ds%26device%3Dc%26devicemodel%3D%26adposition%3D%26target%3D%26targetid%3Dkwd-

recent privacy policy update, stems from its dominant position amongst the other messaging apps. The company is well aware that almost all the users would mostly accept the updated privacy policies because their communication networks also comprise of WhatsApp users. This is a glaring example of network effects. Therefore, a prime focus on the abuse of dominance may cater to achieving short-term ends by curbing monopoly power 'then and there', but such a strategy will remain a mere reactionary quick-fix in the absence of a lack of clear understanding when the object of regulation as well as the big tech platforms themselves are not well understood.

ii. No regulation of boundary-less markets

The existing Act understands the term 'market' traditionally: that is, the understanding of a "relevant" market.[35] However, the digital medium, which is boundary-less, is a kind of space that has recently emerged. Businesses of technology platforms focus on dynamic innovation, and accordingly, their market boundaries continuously change.[36] For example, defining WhatsApp's relevant market is impossible. Initially, WhatsApp was merely a messaging platform, but now it has many other products, including the recent WhatsApp Pay service for money transfer. All these varied products and services are merged into one big platform i.e., WhatsApp.

iii. Monitoring the apparatus

The CCI needs to monitor big tech's technical apparatus. The shrewdness of the digital space has been accentuated by the development of algorithmic systems that envisage new kinds of anticompetitive harms with each passing day. The CCI needs to be in sync with such developments and must conduct comprehensive studies into them.

1116964500370%26loc_physical_ms%3D9061884%26loc_interest_ms%3D%26feeditemid%3D%26param1%3D%26param2%3D> accessed 15 January 2021.

[35] Competition Act, 2002, § 2(r).

[36] Archana Sivasubramanian, 'To regulate WhatsApp and Big Tech, India's competition panel needs more teeth – and fresh thinking' (*Scroll*, 11 April 2021) <https://scroll.in/article/990939/to-regulate-whatsapp-and-big-tech-indias-competition-panel-needs-more-teeth-and-fresh-thinking> accessed 16 January 2021 [hereinafter, *Archana Sivasubramanian*].

B. Recent investigations

i. XYZ v. Alphabet Inc. & Ors.[37]

The informant alleged that Google was leveraging its dominant position in the market for licensable mobile operating system ["**OS**"] for smartphones and the market for Android OS Play Store to protect its position in the market for Apps facilitating payments through UPI. Further, multiple instances of abuse of dominant position were alleged against Google in the relevant markets under Section 4:

1. Mandatory use of Google Play's payment system for paid apps & in-app purchases.
2. Pre-installation and prominence of Google Pay on android smartphones.
3. Prominent placement of Google Pay on the Play Store
4. Privilege to Google Pay by displaying it as the first ad when a user searches for another app facilitating payment through UPI.
5. Exclusivity requirement imposed by Google resulting in unfair terms being imposed on Users

After a detailed analysis, the CCI was of the *prima facie* view that the Opposite Parties had contravened various provisions of Section 4 of the Act. The DG was directed to cause an investigation into the matter under the provisions of Section 26(1) of the Act.

ii. Satyen Narendra Bajaj v. PayU Payments Private Limited & Anr.[38]

The Informant alleged that PayU is dominant in the market for 'e-payments gateway in India' and Wibmo is dominant in the downstream market of 'risk-based authentication and payment security services in the e-payments gateway in India'. It is further alleged that after the acquisition of Wibmo by PayU, PayU's market power would enhance in the market of e-payment processing gateway services in India. There were also allegations related to the foreclosure of competition and the creation of entry barriers for new players. CCI observed that the Informant's allegations were premised only upon the fact that the combined entity has become dominant in the market. CCI held that the mere existence of a dominant position, without prima facie evidence of its abuse, is not recognized as anti-competitive conduct under the Act, and the complaint was dismissed.

[37] XYZ v. Alphabet Inc. and Ors, Competition Commission of India, Case No. 07 of 2020.
[38] Satyen Narendra Bajaj v. PayU Payments Private Limited & Anr., Competition Commission of India, Case No. 23 of 2019.

iii. Harshita Chawla v. WhatsApp Inc.[39]

The Informant alleged abuse of dominance against WhatsApp and Facebook in light of the introduction of the online payments service, WhatsApp Pay, in the Indian market, thereby acting in contravention with Section 4 of the Act. Additionally, it alleged that by enabling automatic installation of payments service in the main messaging app, WhatsApp could take advantage of its vast user base to popularize its newly launched WhatsApp Pay. Concerns related to data security of personal information was also raised before the CCI. However, the CCI dismissed the allegations of abuse of dominance, which were levelled against the opposite parties holding that there's no threat to competition with the launch of the said app. Moreover, it was stated that the mere existence of an App on the smartphone does not necessarily convert into transaction/usage. The matter was closed under Section 26(2) of the Act.

iv. Other Investigations

With the launch of Reliance Jio in India, several strategies had made their way into the Indian digital spectrum that came to be associated with 'Big Tech'. During the initial three months, free services were offered to its users and this strategy was opposed by other competitors like Bharti Airtel arguing that Jio engaged in predatory pricing, i.e., lowering prices to a point where other firms are unable to compete and are forced to leave the market. [40] However, the CCI negated this claim by holding that by virtue of the fact that the new firm is not dominant, provision of free services could not be held to be anti-competitive.[41] Ever since that episode, Jio has moved up the ladder to become India's second-largest telecom provider. It is increasingly seen to be abusing its position by violating not just net neutrality but also consumer choice by the way of blocking chat services such as Telegram, and several proxy websites.

A prohibition was imposed by the Ministry of Trade and Commerce on FDI in business to consumer (B2C) enterprises (except on the fulfilment of specific conditions) by Flipkart and Amazon. It was alleged that Flipkart and Amazon had violated the said prohibition. In 2019, the Enforcement Directorate [**"ED"**] began investigating the said violations. On submission

[39] Harshita Chawla v. Whatsapp Inc., Competition Commission of India, Case No. 15 of 2020.
[40] Sarayu Natarajan & Astha Kapoor 'Is India Adequately Prepared to Regulate Big Tech' (*The Wire*, 17 July 2019) <https://thewire.in/tech/india-regulation-big-tech-data-protection> [hereinafter *Sarayu Natarajan*] accessed 17 July 2021.
[41] In Re. C Shanmugam et al., Competition Commission of India, Case No. 98 of 2016.

of a complaint filed by Delhi Vyapar Mahasangh, in 2020, the exclusive online sale of certain smartphones came under the scrutiny of the competition regulator. Merit was found in the allegations related to abused of dominance in the e-commerce sector and acts of deep discounting, preferential listing and exclusivity. Sometime later, the Karnataka High Court stayed the CCI investigation into Amazon and Flipkart and ordered the ED to investigate the FDI violations. Recently, the CCI's application to vacate the said stay and to proceed with the investigation into DVM allegations was rejected by the Supreme Court.

V. LESSONS FROM COMPARATIVE MAPPING OF FOREIGN JURISPRUDENCE

Section 19 of the Act empowers the CCI to inquire into anti-competitive agreements and abuse of dominant position that contravenes Sections 3 or 4 of the Act by listing certain that the CCI shall consider while conducting the inquiry. However, these factors are not in consonance with the complexities of the so-called 'data-opolies' or data-monopolies. Section 20(4) also does not differentiate between traditional and tech companies while setting down its parameters. Therefore, the Act is not well equipped to carry out different scrutiny for data-driven entities.

German regulatory authorities have amended their competition law to lend consideration to the goods or services provided free of charge.[42] Following course, the recent Report of the Competition Law Review Committee ["**CLRC**"] has recommended widening of the ambit of the 'price' definition under Section 2(o) of the Act to include even non-monetary considerations such as personal data in case of digital markets.[43] The new kinds of agreements emerging from the digital markets have led the CLRC to recommended enlarging the scope of Section 3(4) to include 'other agreements that do not strictly fall under the heads of vertical and horizontal agreements'.[44]

German law has further added 'access to competition-relevant data' as one of the relevant factors for assessing market power.[45] On these lines, Section 19(4)(b) of the Act expressly refers to 'resources of the enterprise' as a relevant factor. The CLRC noted that Section 19(4)

[42] Acts against Restraints of Competition, § 18(2)(a).
[43] 'Report of Competition Law Review Committee' Chapter 8: Technology and New Age Markets (*Ministry of Corporate Affairs Government of India*, July 2019) <https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf> last accessed 18 July 2021 [hereinafter *CLRC Report*].
[44] ibid para 2.12.
[45] 10th amendment to the German Act against Restraints of Competition [hereinafter *ARC Digitalization Act*].

read with Section 19(4)(b) is broad enough to include control over data as a determining factor.[46] Section 19(4) is also broad enough to include network effect as a relevant factor. In light of the new merger control thresholds for digital markets in Germany, the USA ('size of transaction test') and the UK ('transaction value threshold'), the CLRC recommended the Indian merger control regime to go beyond the existing asset and turnover thresholds.[47] However, it is yet to be seen to what extent the CCI would approve these recommendations. Limiting scrutiny of tech companies owing to consumer welfare (price and output benefits) can prove to be fatal. The consideration of 'consumer welfare' under the current framework needs to undergo a paradigm shift. The CCI must employ a 'presumption-based approach' to presume predation when there is prima facie evidence of platforms in below-average cost pricing.[48]

Recently, the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary released a report titled "*Investigation of Competition in Digital Markets*" that dissects the entire gamut of anti-competitive repercussions of data collection by the Big Four.[49] India can learn important lessons from the detailed recommendations made by the Committee, which can be broadly and succinctly summarized in the following points:

1. Restoring Competition in the Digital Economy by:
   - Reducing Conflicts of Interest, Thorough Structural Separations and Line of Business Restrictions
   - Implementing rules to prevent Discrimination, Favouritism, and Self-Preferencing
   - Promoting Innovation Through Interoperability and Open Access
   - Reducing Market Power Through Merger Presumptions
   - Creating an Even Playing Field for the Free and Diverse Press
   - Prohibiting Abuse of Superior Bargaining Power and Require Due Process
2. Strengthening the Antitrust Laws by:
   - Invigorating Merger Enforcement
   - Rehabilitating Monopolization Law

[46] CLRC Report (n 43) para 2.15.
[47] ibid at para 2.20.
[48] 'Investigation of Competition in Digital Markets' Majority Staff Report and Recommendations <https://www.documentcloud.org/documents/7222836-Investigation-of-Competition-in-Digital-Markets.html> last accessed 31 October 2021.
[49] ibid.

3. Strengthening Antitrust Enforcement

A. U.S. Strategy to Tackle Price discrimination

A report of the Executive Office of the President of the United States suggests that, taking into account the rapid evolution of technology along with that of business practices, commercial applications of big data must be under consistent scrutiny – this becomes even more crucial in cases where companies may be utilising sensitive information in a way that is non-transparent for users, and that encroaches upon the boundaries of existing regulatory frameworks.[50]

B. Need to adopt definite tests for Self-preferencing

In the Indian context, questions over self-preferencing have been argued before the CCI previously. The allegations associated with self-preferencing arose against Google in *Umar Javeed and Ors. v. Google LLC and Ors.*[51] and *Matrimony.com Ltd. v. Google LLC and Ors.*[52] Despite several opportunities, the CCI has failed to provide any definitive test related to self-preferencing and has also been unable to clarify the legal standards associated with it.[53] This issue has given rise to a two-sided debate where one side argues self-preferencing to be anti-competitive *per se* while the other one argues self-preferencing to be anti-competitive only when it has exclusionary effects.

The EC has tackled this debate in the *Google Shopping* case,[54] where it held that it is not necessary to prove the occurrence of anticompetitive effects. Mere suspicion of foreclosure effects as a result of self-preferencing would give rise to a *per se* presumption. However, the decision of the EC in the case of *Tabacalera v. Filtrona*[55] acknowledged preferential treatment to own products as a valid commercial strategy. A requirement on part of dominant entities to share competitive advantages with rivals can negatively impact firms' incentives to invest and innovate. This would be at odds with the very objective of competition law and policy. Considering that self-preferencing can create synergies and enhance consumer

[50] Big Data and Efficient Pricing (n 14).
[51] Umar Javeed and Ors. v. Google LLC and Ors, Competition Commission of India, Case No. 39 of 2018.
[52] Matrimony.com Ltd v. Google LLC and Ors, Competition Commission of India, Case no. 07 of 2012.
[53] Manjushree RM 'The New Antitrust Probe into Google' (*Vidhi Centre for Legal Policy*, 12 November 2020) <https://vidhilegalpolicy.in/blog/the-new-antitrust-probe-into-google/> accessed 20 July 2021.
[54] Case AT. 39740 — Google Search (Shopping) (European Commission, 27 June 2017) <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740> accessed 21 July 2021.
[55] 'Commission Decides not to Oppose the Production by Tabacalera of its own Cigarette Filters' (European Commission, 8 May 1989) <https://ec.europa.eu/commission/presscorner/detail/en/IP_89_330> accessed 21 July 2021.

welfare, CCI must assess the issue on a case-by-case basis depending on the ultimate effects of the practice.

There exists considerable doubt over the Indian regulator's approach towards cases associated with self-preferencing, on account of the inconsistent approach of the CCI towards cases related to abuse of dominance. CCI has inconsistently held practices under Section 4 of the Act to constitute a 'per se' restriction in some cases and an 'effects-based restriction' in others. Therefore, formulating relevant thresholds and a clear legal test for prohibiting self-preferencing only in cases of anti-competitive effects are extremely necessary. The CCI must distinguish between the practices using a competitive advantage from those creating anti-competitive exclusionary effects to clarify the threshold on self-preferencing.

C. Predatory Pricing

In the US, legal discourse on the practices of the Big Tech is in the interim. Investigations are being conducted to understand how the antitrust laws must be evolved to meet the challenges posed by the threat of Big Tech. An antitrust specialist, Lina Khan, believes that to ensure a competitive landscape, platforms and commerce should be separated.[56] This proposition bears a resemblance to the suggestions for India's e-commerce policy, which curbs platforms like Amazon and others forming part of the big tech from leveraging the marketplace to learn from customer demand and produce similar products; however, these are not enough to keep a check on the growing monopolistic tendencies of technology companies.[57]

VI. CONCLUSION

While the panacea of antitrust law is the magic potion to address market failures in other markets, the intricacies and complexities of the digital markets seem to defy easy prescriptions.

A. The Way Forward for India

Market distortion effects, invasion of privacy, manipulation of choice-formation through data aggregation, and misinformation are commonplace. There is a lack of sufficient data protection laws and the absence of a nuanced understanding in the context of digital

[56] Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119(4) Col. L. Rev 973 [hereinafter *Lina Khan*].
[57] Sarayu Natarajan (n 40).

markets.[58] This may bring an imbalance to the level-playing field in the market because network effects produced by the big-tech cause a surge in the costs for entering the market for other players. Dismal levels of enforcement capacity in India[59] further aggravate the existing situation.

The scope of measures for exploiting consumers by the Big Tech has widened and is no more limited to merely predatory pricing and negatively impacting consumer's choices. The concept of digital space has opened up new forms of anti-competitive effects and consumer exploitation resulting from measures other than price, such as wrongful use of personal data. Therefore, consumer welfare needs to be understood through issues like limited accountability, lack of choice, and most importantly, privacy invasion through *(mis)use* of personal data.[60]

The CCI needs to understand that access to data on the part of big tech, in turn, strengthens entry and access barriers to digital markets for the other players. It is also imperative that Indian regulation of the big tech must consider privacy concerns as well as data safety and protection.[61] India must also maintain its perception of big tech in consonance with the socio-political realities. Such discernment will reflect concerns that are specific to India.

The Indian legal framework, as it stands today, needs to undergo evolution to effectively regulate the power-hungry realm of big tech. The competition law framework must undergo integration with other laws such as the Information Technology Act and rules thereunder, the Telecom Regulatory Authority of India Act etc. to fill any gaps. The digital spectrum comprises technological advancements occurring every day, and the Indian competition framework must be dynamic and flexible enough to match the dynamism of a digital spectrum.

The new way to share data in a safe, secure and protected manner is "data trusts".[62] Such data trusts afford a structure for storing data in a safe database system. The use of data by corporate entities is managed and supervised by trustees. Such data trusts can prove to be

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[58] Lina Khan (n 56).
[59] Aditya Bhattacharjea 'India's Competition Policy: An Assessment' (2003) 38 Econ. & Pol. Weekly 34.
[60] Sarayu Natarajan (n 40).
[61] Priya Dialani 'High Time We Regulate Big Tech Companies to Protect our Privacy' (*Analytics Insight*, 11 November 2020) <https://www.analyticsinsight.net/high-time-we-regulate-big-tech-companies-to-protect-our-privacy/> accessed 25 July 2021.
[62] 'Data Trusts: A new tool for data governance' (*Elementai)* <https://hello.elementai.com/rs/024-OAQ-547/images/Data_Trusts_EN_201914.pdf> accessed 28 July 2021.

instrumental in capturing any cases of malpractice and misuse of data. In the context of sectors where there is an acute lack of competition and consumers are left without a choice and any alternatives, India must test the viability of such data trusts, at least on a pilot basis. Such a pilot project could help in fostering innovation and ensuring the privacy of the citizens.[63]

B. Combatting Big Tech Operations in Regulatory Vacuum

Gaps in the Indian competition regulatory framework and consumer inclinations towards the tech space due to the convenience factor have afforded a monopoly-like situation to the big tech. Therefore, an alarming need arises to create a regulatory framework providing consumer safeguards. The regulatory paradigm must holistically cover other aspects of law and follow a multi-disciplinary approach to be successful.

India is currently suffering the brunt of a regulatory vacuum wherein the tech companies continue to violate laws without facing any ramifications for their continued violations. They are acquiring dominance and power in the market by sliding through the regulatory gaps. Considering the existing lacunae and other factors like the current pandemic, there has been a new demand altogether in the tech space due to the wide-scale adoption of technology. In this regard, a holistic competition regulatory framework is an urgent need.

All in all, a fresh approach on the part of CCI to effectively regulate big tech in India calls for better legislative tools and policy measures along with interim remedies to address new forms of abusive conduct and to scrutinise the digital platforms.

"The CCI has only been reactive thus far; prudence and proactiveness are essential toolkits in these times where user harms come in undefined ways."[64]

[63] Sarayu Natarajan (n 40).
[64] Archana Sivasubramanian (n 36).