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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

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

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

[3]C. 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 factors[4] 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

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

[5]ibid.

[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.

[7]Geoffrey 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

[8]Fabiana 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.

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

[10]Bundeskartellamt, 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].

[13]C. Scott Hemphill (n 3)..