

CONSIDERING DATA AS A PARAMETER FOR ESTABLISHING DOMINANCE UNDER THE COMPETITION ACT, 2002: LESSONS FROM THE EU AND THE US

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The advent of the digital age from 1995 onward, when internet first became open for the public at large, heralded an era of novel enterprises that were hitherto unheard of. It ushered in unique business models that catered to consumers in the farthest reaches of the planet. Over the last three decades, digitalization has transformed many sectors of our economies and forced a re-think of what “dominance”, “consumer harm” and other established principles of competition law mean. Datasets and algorithms are among the most important technological drivers of this change as they enable firms to be more innovative and efficient.

In its investigation on digital markets, the US’s Subcommittee on Antitrust, Commercial and Administrative Law Report highlighted how the accumulation of data can serve as a powerful barrier to entry for firms and exacerbate anticompetitive conduct in digital markets. Persistent data collection can potentially create information asymmetries and grant enterprises access to non-public information, giving them a significant competitive edge.ⁱ Having such a significant data advantage also enables dominant platforms to identify and acquire rivals early in their lifecycle, thus enabling killer acquisitions.ⁱⁱ Despite the numerous threats to competition posed by companies gambling in big data, the Competition Commission of India does not consider data while assessing dominance.

At present, under Indian competition law, the relevant considerations that the CCI must consider when analyzing a particular enterprise's dominance in the relevant market are enumerated within S. 19(4) of the Competition Act of 2002 (“Act”). The elements include the enterprise's market share, size and resources, the size and importance of competitors, the enterprise’s economic power including any commercial advantages over competitors, its vertical integration or sale or service network of such enterprises, the dependence of consumers

on the enterprise and so on.ⁱⁱⁱ According to the Act, a dominant position is held by one or more business undertakings or an association of business undertakings that hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production.

All of the aforementioned parameters are insufficient in a rapidly digitizing economy in which data is the new oil and technologies such as machine learning and data mining are enabling tech enterprises to provide cutting- edge and innovative products. They are also unhelpful in determining whether and to what extent big data and algorithms might have detrimental effects on the competitive functioning of markets. Therefore, using a cross- jurisdictional analysis that borrows from literature and cases published in the European Union (“EU”) and the United States of America (“USA”), the following paper will examine whether this approach of the CCI is appropriate or not. Conversely, given the innovative business models of companies in digital space, the paper will also seek to understand if it is feasible for data to be considered as a key criterion to determine dominance in all cases or whether a case-by-case approach should be preferred.

In India, the Personal Data Protection Bill, 2019 (“Bill”), which is modelled on the European Union General Data Protection Regulation (“EU GDPR”), defines data in very broad terms “to include representation of information, facts, concepts, opinions, etc.”^{iv}. As per the Bill, “Data can be of various types such as personal and non-personal; user and transactional; individualized and anonymized data”.^v Big Data, which is the focus of this paper, on the other hand commonly refers to a large volume of datasets comprising of different information.^{vi} More specifically, Big Data “is the information asset characterized by such a high volume, velocity, and variety to require specific technology and analytical methods for its transformation into value”.^{vii} In order to distinguish Big Data from data in general, various authors have adopted the approach of using the “3 Vs”, namely, “the *volume* of data, the *velocity* at which data is collected, used and disseminated; (and) the *variety* of information aggregated”^{viii}. Some scholars also use a fourth V: the *value* of the data.

The realization of Moore's Law, which has resulted in the availability of ever more powerful, smaller, smarter, and cheaper gadgets has aided in the increase in data *volume*.^{ix} This has

resulted in a reduction in the cost of collection, storing, processing, and analyzing data, while increased access to data has greatly facilitated the growth of platforms, e-commerce, and smartphone proliferation.^x According to *Stucke and Grunes*^{xi}, the speed with which some businesses receive, process, and analyze data is increasingly approaching real time.^{xii} The phenomenon, known as 'now-casting', arose from the capacity to utilize data in real time and entails taking a current event and using it to foresee things as they happen, such as a 'flu' epidemic being detected due to an increase in online searches for 'flu' cures.^{xiii}

The OECD has in the past raised concerns about how “now-casting” can be used to identify a possible competitor and be used by firms to gain leverage over new entrants, for example, by observing the number of downloads of an app from an app store and cross-referencing it with web usage or search preferences.^{xiv} With respect to the *variety* of data available, the OECD has pointed out how it has vastly increased due to the ability of tech firms to collect and process large amounts of data which allows companies to know not only customers' addresses, birthdays, and gender, but also information, such as household composition, dietary habits, purchasing history, frequency and duration of visits to physical and online stores, and so on.^{xv} This allows the company to not only price discriminate^{xvi}, but also target customers with marketing and behavioral advertising.^{xvii}

As discussed previously, while Big Data has ushered in substantial benefits for both consumers and businesses alike, it has not come without a cost. Similar to “a network effect, data-rich accumulation is self-reinforcing” and can serve as major barrier to entry for smaller firms.^{xviii} Moreover, Companies that have better access to data can utilize it to better target users or improve product quality, attracting more users and, in turn, generating more data—creating a beneficial feedback cycle.^{xix} Moreover, while data is non-rivalrous (one party's use does not prevent or diminish its use by another party), firms may still use exclusionary tactics such as legal contracts and technical restrictions to exclude rivals from using their data.^{xx} An example of this the use of “most favored-nation” clauses in Amazon's e-books distribution agreements with publishers a few years ago. In June 2015, the European Commission opened investigation into these agreements and found them to be violative of Europe's competition policy because “such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services. The clauses may have led to less choice, less

innovation, and higher prices for consumers due to less overall competition in the European Economic Area (EEA) in e-book distribution^{xxxi}.

Apart from serving as a barrier to entry in digital markets, superior access to data can also increase anticompetitive conduct.^{xxii} This is likely to occur when a dominant platform serves as both a marketplace for third-party goods and a vendor of its own items on the same platform.^{xxiii} A dominant platform can mine economically important information from third-party enterprises to benefit its own competitive products through this dual function and can also utilize its market dominance to acquire more data from consumers, thereby jeopardizing their privacy.^{xxiv} Furthermore, as mentioned in the beginning, persistent data collection can create information asymmetries and grant firms access to non-public information such as information on user behavior and broader usage trends that enable the dominant platforms to track nascent competitive threats and identify and acquire rivals early in their lifecycle.^{xxv} The US's Subcommittee on Antitrust, Commercial and Administrative Law Report states that the reason this trend is concerning is because "upstart competitors are often data-rich but cash-poor, a combination that is unlikely under a price-centric framework to trigger antitrust scrutiny if the acquisition is priced below the relevant threshold for merger review"^{xxvi}. The Report gives the example of Microsoft to state how the corporation "sought to exploit its monopoly power in the market for personal computer operating systems by acquiring Netscape— rather than by foreclosing it—it is unlikely that antitrust enforcers would have taken action... this type of acquisition can tip the market in favor of a dominant firm, having the same ultimate effect as monopolistic conduct but escaping the antitrust enforcement that monopolistic conduct has triggered in the past."^{xxvii}

Currently, it is data protection legislation that governs and restricts the collection and commercial use of data.^{xxviii} It is founded on a basic right to defend one's privacy against the state.^{xxix} However, as can be deduced from the foregoing paragraphs, data plays an important role in skewing outcomes in the market for multi- sided platforms too and is thus important for competition policy as well. The German Monopolies Commission Report raised concerns about how the ability to conduct big data analysis can have a direct impact on the well-being of individual users because individual behavior can be better seen and tracked.^{xxx} For example, it is currently conceivable to set vehicle insurance rates that measure observed individual

behavior in traffic, or health insurance tariffs where payments are based on the outcomes of electronic monitoring of fitness and nutritional data.^{xxxii}

The evaluation and assessment of the ability of a firm to collect, organize, mine and harvest data is a significant superpower in the context of digital markets and not taking it into account as a parameter for establishing dominance will lead to significantly undervaluing a firm's competitive strength and its power to influence market outcomes. This is because there can be instances where a firm may exercise dominance even though it has a low market share by having access to a large amount of data under its control. The concept of using “*technological lead of an undertaking*”, and the existence of a “highly developed sales network” for determining whether an enterprise was dominant in a particular relevant market or not was recognized early in the 1979 decision of *Hoffmann-Ra Roche*^{xxxii}. In India, the CCI in the landmark decision of *Bharat Matrimony v Google* also highlighted the importance of considering Big Data while delineating the relevant market. Google's argument that it was a zero-price platform and that the “use of its search services did not involve any consideration/purchase of services” was rejected on the grounds that “in a two-sided market the data/information collected from the users on every search contributed to ‘big-data’ analysis and revenue to Google from targeted advertisements”.^{xxxiii}

The Competition Law Review Committee in its report to the Ministry of Corporate Affairs in 2019 strongly advocated for the inclusion of “*control over data*” under Section 19. Although Section 19 is inclusive in nature as it includes the provision “any other factor which the Commission may consider relevant for the inquiry”, an explicit mention of “data” is necessary in order to firmly establish the principle in the competition law jurisprudence in India and not make it subject to judicial discretion.^{xxxiv} Most nations also seem to be moving in this direction. For instance, a few years ago, Germany through the 10th amendment to the German Competition Law added Article 18(3a) to include “access to competition-relevant data” as an additional factor for assessing the market position of a company.^{xxxv}

More than anything else, the most concerning aspect of the misuse of Big Data is its effect on our democracies. Tim Wu, in his seminal book, “The Curse of Bigness” has pointed out how oversized corporations (with access to data concerning the most intimate aspect of our lives) seek to turn their massive economic power into political power and influence democratic

processes. In such a saturated economy, workers' rights are crushed, a reasonable minimum wage is denied, and all conditions that make life worth living- liberty, freedom, access to affordable healthcare and education- take a beating. Wu observes that the popular resentment that results from this provides a fertile ground for populists, nationalists, and fascists to emerge. In order to prevent this, it is extremely important that necessary steps are taken to reign in big tech corporations. And the first step perhaps would be to include the accumulation of Big Data in determining whether a firm is dominant or not.

ENDNOTES

ⁱ Investigation of Competition in Digital Markets, Majority Staff Reports and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020.

ⁱⁱ Ibid.

ⁱⁱⁱ Section 19(4) Competition Act, 2002

^{iv} Suvan Kumar, "The Role of Big data In Establishing the Dominance Under The Indian Competition Law" (*The Law Blog*, 8 July 2020) <<https://thelawblog.in/2020/07/08/the-role-of-big-data-in-establishing-the-dominance-under-the-indian-competition-law/>> accessed 18 May 2022.

^v Ibid.

^{vi} Directorate for Financial and Enterprise Affairs, 'Big Data: Bringing Competition Policy to the Digital Era', DAF/Comp(2016)14, 27 October 2016, p.5, [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf)

^{vii} Big Data: Bringing competition policy to the digital era, Background Note by the Secretariat (OCED), DAF/COMP(2016)14, p 5.

^{viii} Ibid.

^{ix} Ibid p 6.

^x Ibid.

^{xi} Stucke, M.E. and A.P. Grunes (2016), *Big Data and Competition Policy*, Oxford University Press, United Kingdom; Stucke, M. E. and A. P. Grunes (2015), "Debunking the Myths Over Big Data and Antitrust", *CPI Antitrust Chronicle*, University of Tennessee Legal Studies Research Paper, No. 276, <http://ssrn.com/abstract=2612562>.

^{xii} (n 5) p 6.

^{xiii} Ibid.

^{xiv} Ibid.

^{xv} Ibid.

^{xvi} Brad Howarth, 'How Tesco's loyalty card transformed customer data tracking', CMO, 21 May 2015.

^{xvii} (n 5) p 6.

^{xviii} Investigation of Competition in Digital Markets (n 1) p 42.

^{xix} Ibid.

^{xx} Ibid p 43.

^{xxi} Antitrust: Commission accepts commitments from Amazon on e-books, Press Release, 4th May 2017, European Commission, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223 accessed 18 May 2022.

^{xxii} Investigation of Competition in Digital Markets (n 1) p 43.

^{xxiii} Ibid.

^{xxiv} Ibid.

^{xxv} Ibid.

^{xxvi} Ibid p 44; Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions at 53* (Yale Sch. of Mgmt. Working Paper, Apr. 2020), <https://ssrn.com/abstract=3241707>.

^{xxvii} Investigation of Competition in Digital Markets (n 1) p 44.

^{xxviii} Competition policy: The challenge of digital markets, Special Report No. 68, Special Report by the Monopolies Commission pursuant to section 44(1)(4) of the Act Against Restraints on Competition (Germany) 2015, p 4.

^{xxix} *Ibid*; *Justice K.S. Puttaswamy and Anr. vs. Union of India* (UOI) (2017) 10 SCC 1.

^{xxx} Competition policy: The challenge of digital markets (n 28) p 28.

^{xxxi} *Ibid*.

^{xxxii} *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, ECLI:EU:C:1979:36.

^{xxxiii} Sahitya Muralidharan, “India – Matrimony.com v. Google: A Cat on the Wall Approach to Intervening in the Expanding Digital Space” (*Kluwer Competition Law Blog*, 20 March 2018)

[http://competitionlawblog.kluwercompetitionlaw.com/2018/03/20/india-matrimony-com-v-google-cat-wall-approach-intervening-expanding-digital-](http://competitionlawblog.kluwercompetitionlaw.com/2018/03/20/india-matrimony-com-v-google-cat-wall-approach-intervening-expanding-digital-space/#:~:text=In%20its%20decision%20passed%20on,in%20the%20intermediation%20agreements%20with)

[space/#:~:text=In%20its%20decision%20passed%20on,in%20the%20intermediation%20agreements%20with](http://competitionlawblog.kluwercompetitionlaw.com/2018/03/20/india-matrimony-com-v-google-cat-wall-approach-intervening-expanding-digital-space/#:~:text=In%20its%20decision%20passed%20on,in%20the%20intermediation%20agreements%20with) accessed 17 May 2022.

^{xxxiv} Suvam Kumar, The Role of Big data In Establishing The Dominance Under The Indian Competition Law, (*The Law Blog*, 8 July 2020) <https://thelawblog.in/2020/07/08/the-role-of-big-data-in-establishing-the-dominance-under-the-indian-competition-law/> accessed 17 May 2022.

^{xxxv} *Ibid*.