

Digital Economy, Data, and Dominance: An Indian Perspective

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Abstract

The emergence of data as an asset for firms in the digital era has raised several issues before competition enforcement authorities. This research article focuses on the role of data in platform markets. After discussing the significance and importance of data in the multi-sided markets and its procurement by platforms for their competitive advantage in the market, the authors point out the issues of network effects, economies of scale, positive feedback loop, etc., and how they create an entry barrier, ultimately harming competition in the market. The authors have also discussed the concerns relating to the definition of the relevant market in platform economies and the Competition Commission of India's (CCI) take on online and brick-and-mortar markets, tools used for defining relevant market, and how they are not very effective in this market. The final leg of the article discusses the impact of the data market on creating datapolies by amassing huge amounts of data and creating monopolies, making it tough for other players to survive or for new players to enter the market. The paper discusses the role of CCI, the European Commission, and other jurisdictions in tackling such situations, and the landmark judgements passed by them regarding these datapolies sums up authorities' stand on tackling issues in the market mostly governed by data.

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1. Introduction

Technological developments in the past three decades, post liberalisation, privatisation, and globalisation (LPG) reforms, have been overwhelming. Advancements in the internet have undoubtedly made life easier for people across the globe. Platforms such as search engines and social networking sites provide several services to users for free. While consumers do not pay any monetary considerations, they provide their data as consideration for using these services. These platforms sell the data to advertising agencies, who then use this data to analyse consumer behaviour and buying patterns and lure consumers with personalised and relevant advertisements (Roy, 2020). It is argued that this is beneficial for both the consumer as well as the businesses, since personalised advertising helps the consumer save time, effort, and money, while allowing the businesses to make profits from such investments, and thus, these practices are not abusive in terms of competition.

Further, online businesses, coupled with other technological sectors, have become part of a new economy in India. This new economy features high innovation and low marginal costs and network effects. To establish a competitive advantage in this market mostly driven by data, the player needs to attract users through technological advances, hence causing “network effects”. Network effects are present when a user’s efficacy deriving from the consumption of a good or service surges with the number of others buying the good or service. For instance, Facebook as a platform is only useful when there are other users on that platform; otherwise, the value of the network is zero. So, as the number of people on Facebook increases, the value of the platform increases. A network effect is of two types — direct network effect, when the value of a goods or service increases as the number of users grow, or indirect network effect, when the value of the network is raised as an increasing number of users of certain products lead to more complementary products or services (Inge, 2020).

Another method the goods or service provider adopts is by paying subsidies to users to entice them to use that product service. Companies with superior financial capitals use this strategy. In 2016, Reliance Jio entered the market of wireless mobile network service, providing free calls and internet to the users of Jio for one year. This caused a hue and cry in the telecom market, and Airtel filed a case against Jio for predatory pricing and penetrating the market. However, as per the relevant market of telecom service providers, Reliance Jio's market share was a mere 7%, and hence, it was not a dominant player in the market. The Commission noted, "In a competitive market scenario, where there are already big players operating in the market, it would not be anti-competitive for an entrant to incentivize customers towards its services by giving attractive offers and schemes. Such a short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered anti-competitive. In view of the foregoing discussion, the Commission is of the considered view that no prima facie case of contravention of Section 4(2) (a)(ii) of the Act is made out against Jio."¹ Many online platform players have started the practice of deep discounting and cashback offers to lure new users into establishing the network effect. Companies such as Ola, Uber, and Paytm incurred huge losses for two financial years when they entered the market in 2015/16 by subsidising rates or giving cashbacks and increasing the demand for the services; eventually, in the following years, they profited in billions (Parsheera, Shah, & Bose, 2017).

Even the Foreign Direct Investment (FDI) guidelines discuss price practices by online firms. It was mentioned that foreign investment would be granted if the firms maintain a level playing field and refrain from influencing sale price.²

This study explores the use of data by providers of online platforms, the use of data for competitive advantage, defining the relevant market in the digital economy, and how dominance with regard to data may be established regarding abuse of dominance cases involving online platforms in Indian competition law. The issues discussed in this article are of urgent attention, since their importance is likely to increase manifold in the future.

The authors of this study have adopted a doctrinal approach to formulate this research, as follows: Firstly, primary sources of information such as statutes and case laws are used to ascertain and analyse current scenarios, and secondly, secondary sources such as reports by the government, reports by the review committee of competition law, OECD reports, EU competition law reports, articles, and papers written by eminent authors on this subject in India and other jurisdictions are gathered and analysed.

2. Literature Review

Grunes and Stucke (2015) stated that data plays an essential role in the strategic decisions of several companies. The companies are determined to acquire data advantage over their competitors. At present, data-driven mergers are increasing, and these data-driven business strategies and mergers have significantly raised the implications of privacy laws, consumer protection laws, and competition laws (Grunes & Stucke, 2015). This leads to issues related to the abuse of dominance in the digital era, owing to network effects, multi-sided markets, and the relevant market in the Indian context (Parakkal, 2019).

Further, a competitive advantage arises by using the data provided to online and multi-sided markets. Additionally, the economic character of the data affects platform economies by excluding competitors by amassing data (Graef, 2020). All this majorly contributes to the abuse of market power and brings us to the ownership of data and the power that data holds in the digital era. Surblyte (2015) discussed complex competition law questions posed by the digital economy that have come to light after the investigations against the platform markets. He also tried addressing the issue as follows: “The question thereby is whether a ‘more-behavioral-approach’ to competition law needs to be integrated into a competition law assessment.” However, there is sufficient explanation of the limitations of the behavioural approach, as Surblyte describes that such an approach “would not speed up competition law assessment,” and that the competence of behavioral approach cannot be overstated by reason of its “subjective nature.” Therefore, the central idea is the possible utility of the behavioural approach in the supplementation of the structural approach,

as against the replacement of structural approach by a behavioural one. The behavioural approach has substantial constraints that obstruct its sole implementation in competition assessment, thereby reasserting the essentiality of the structural approach, which is irreplaceable by the behavioural approach.

In continuance, Mandrescu (2017) discussed the implications of platform markets on the EU. Competition law majorly focused on Articles 101 and 102 and the modifications needed in the legislation to tackle the situation more effectively. Mohindroo and Mohindroo (2018) have also deliberated that the digital economy impacts competition law in the light of web search, social platforms, and e-commerce platforms. They further discussed competition law challenges posed by these platforms from an Indian perspective. Mehta and Kumar (2020) elucidated on different aspects of digital marketing issues surrounding the competition law regime of the country. The vast area of research talks about antitrust issues, the role of data, e-commerce concerns, concerns defining the relevant market, and more. Kaushik (2019) also discusses the basics of the digital economy and its interface with competition law. What are the challenges arising from it and what may be the possible solution?

Recently, the Ministry of Corporate Affairs published *The Report of the Competition Law Review Committee* (2019), which focused on major amendments required in the Competition Act, 2002, to tackle the current situations concerning competition in India. The major emphasis of the report was to incorporate amendments in light of the growing digital economy. From the above synthesis of existing literature, the authors of this study have formulated certain research questions which need urgent deliberation.

3. Research Questions

The authors have deliberated on the following research questions:

1. What is the role of data in the digital economy? Does data create competitive advantages?

2. What are the concerns for authorities in defining the relevant market in the digital economy?
3. What is the impact of economic principles such as network effect and economies of scale on competing in multi-sided markets?
4. What is the impact of data on competition-related issues of abuse of dominance in India, and how is CCI tackling it?

4. Research Objectives

The research objectives of this study are:

- To study:
 - a. the role of data in the digital economy
 - b. the competitive advantages created by this data
- To explore the concerns for authorities in defining the relevant market in the digital economy.
- To determine the impact of economic principles such as network effect and economies of scale on competition in multi-sided markets.
- To identify competition-related issues impacting the data vis-à-vis abuse of dominance in the context of CCI in India.

5. Result and Discussion

5.1 “Data” in the Internet Economy

Consumer data is important for any business, be it online or brick-and-mortar, but more so for online businesses, as their business models are based on acquiring and monetising personal data. Still, there is no comparison of the scope and quality of gathered data in online business compared to brick-and-mortar shops (Goldfarb & Tucker, 2012). “Data is considered the new oil,” as coined by Clive Humby, the British mathematician (Charles, 2013). In a very broad sense, every piece of information is “data,” but data can also be differentiated in many forms, such as personal data, non-personal data, new and old data, valuable and invaluable data, etc. (Körber, 2016). The role of data has gained significance in the “Two-sided/ Multi-sided Business Models,” in which a platform such as Google search is operated from two sides — on the one hand, from advertisers who

monetarily compensate Google, and on the other hand, the consumer who pays through their data. Search engines, social networks, and e-commerce platforms act as intermediaries between different customer groups and can be considered multi-sided platforms. The important aspect which creates a multi-sided business is an indirect network effect that overlaps with different customer groups (Filistrucchi, Geradin, & Damme, 2013). So, when customers join one side of the market platform, the value of the other sides of the platform increases automatically.³

One fact which remains undisputed is that the company that controls data shall dominate the economy in the future, whether it is personal data or non-personal data. The new draft e-commerce policy of 2020 also raises concerns that a few companies emerge as leaders and exercise control over a big part of the information repository, which can lead to the emergence of monopolistic tendencies and subversion of competition, which is a threat to fair competition (Sharma, 2020). The Indian government came up with The Personal Data Protection (PDP) Bill, 2018 along the lines of the European Union General Data Protection Regulation 2016,⁴ which defines personal data as “Any data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information.”⁵ But there should be relative criteria to distinguish personal and non-personal data. Understanding the importance of non-personal data in the future, the Ministry of Electronics and Information Technology appointed a committee of experts on Non-Personal Data Governance Framework under the chairmanship of Kris Gopalakrishnan, the former executive vice-chairman of Infosys. The committee submitted their report in July 2020, in which it defined non-personal data as, “When the data is not ‘Personal Data’ (as defined under the PDP Bill), or the data is without any Personally Identifiable Information (PII), it is considered Non-Personal Data.” It also mentioned the definition given by the European Commission (2019): “Guidance on the Regulation on a framework for the free flow of non-personal data in the European Union.”⁶

5.2 Data as a Competitive Advantage

The currency for online platforms need not always be money. In various cases, it is data (Stucke, 2018). We discussed the importance of data for firms and the methods they employ to collect the same. Multiple online platforms can collect relevant information and data at a low collection cost, storage, and analysis (Tucker & Wellford, 2014). The data which search engines, social networks, and e-commerce platforms use are unique and not readily available.⁷ The purpose for which these platform firms invest so much capital in developing free services for users is for data, since it is not easily and readily available (Grunes & Stucke, 2015). The effect of exclusive access to data and data collection is subject to “economies of scale” (Mehta & Kumar, 2020), which give rise to competitive advantage (Vicente, 2016). Economies of scale and network effects lead to entry barriers that protect the position of the already existing player in the market and makes it tough for a new entrant to find a position in the market (Shapiro & Varian, 1999). For a platform to gain advantage in the market, it needs to collect and process real-time data and past user information. We can notice that platforms like Facebook collect real-time data and process it according to the viewer’s choices, so the content changes according to the user’s preferences operating the platform, and they analyse such data for all users. Google amounts to the best search engine because of its large base of returning users, enabling it to immediately adapt to new user preferences and provide the requisite data quickly (Toole & Athey, 2013). Thus, the pace of procuring and developing this personal data is the major reason any company obtains significant market power and gains an advantage in the market (Ezrachi & Stucke, 2016). *The Economist* has pointed out the dominance of Facebook, Google, Amazon, and Apple concerning the amount of data they have and proposed a phrase: “BAADD (too big, anti-competitive, addictive, and destructive to democracy) to Worse” concerning the creation of data monopolies (Smith, 2018). It is often said that, apart from relevant and recent data, the firm needs a well-functioning algorithm to operate an online platform successfully, but Peter Norvig, chief scientist at Google, was quoted saying, “We don’t have better algorithms than anyone else. We just have more data” (Asay &

Reily, 2010). The amount of such data held by the platforms creates entry barriers and other competition concerns for the authorities to look at.

5.3 Relevant Market and Market Dominance Issues

Technology and new-age markets were discussed at length in the Injeti Srinivasan Report of the Competition Law Review Committee⁸, highlighting the importance of the facets of growing digital markets. It is a welcome step, and the draft amendment bill of 2020 is expected to tackle digital market issues. This would be remarkable for the international best practice of competition law. The traditional market or brick-and-mortar market analysis is very different from online platforms or digital markets (Deo & Verma, 2018). There are numerous issues and challenges faced by competition authorities, which are discussed below.

➤ *Defining the Relevant Market*

As discussed earlier in this article, digital markets comprise two-sided and multi-sided market platforms, such as Facebook and Amazon, among others (Evans, 2008). These interactions of these platforms amongst themselves and with customers cause concern for regulators (Mohindroo & Mohindroo, 2018). The market definition is associated with identifying goods or services, causing competitive pressure that different firms in the market deal with (Whish & Bailey, 2018); it is also associated with market power assessment. Because of this, the process of defining the market becomes of utmost importance.⁹

Earlier, the Competition Commission of India (CCI), in the case of *Ashish Ahuja v. Snapdeal*,¹⁰ defined the relevant market as including both online and offline market channels and concluded that online and offline markets are different channels of the same distribution product. Hence, they are not different but a single market.¹¹ In *All India Online Vendors Association and Flipkart India Private Limited & others*¹² (CCI Order Quashed by NCLAT in March 2020),¹³ CCI changed its stance with respect to online and offline market and segregated between online and offline markets. CCI delineated the relevant market as “services provided by online marketplaces for selling of goods in India”. In a very recent case, *Federation*

of Hotel; India Pvt. Ltd (MMT) & Other Restaurant Associations of India (FHRAI) and MakeMyTrip,¹⁴ CCI was of the opinion that the magnitude of harm caused by anti-competitive activities might be determined by further investigation in the case, and while dealing with the allegation of abuse of dominance under the legal framework of Section 4 of the Competition Act, determined the relevant market to be the “market for online intermediation services for booking hotels in India” and continued segregation of the two markets. The Competition Law Review Committee on this aspect has suggested changes in Sections 19(6) and 19(7) dealing with relevant geographic and product market factors. The committee was of the opinion of making the specific provisions in these sections more inclusive and expanding the scope of market delineation to cover developments in the digital economy.¹⁵

In the traditional market, tools such as Critical Loss Analysis (CLA) and Small but Significant Non-Transitory Increase in price (SSNIP) are used to determine dominance in the relevant market. Both these tests determine the substitutability of a product if there is a small but significant increase in price. The question determined is whether the loss in demand affects the profitability when the price increases (Auer & Petit, 2015). But these tests are most problematic because of the pricing nature of multi-sided markets and may not provide a satisfying solution (Ince & Dogan, 2019). Another issue in defining the market is that the authority may miss out on the relationship of a multi-sided platform with other platform markets. Taking the example of the case of *Vinod Kumar Gupta v. WhatsApp Inc.*,¹⁶ the Commission took the relevant market to be “the market for instant messaging services using consumer communication apps through smartphones”. The market definition adopted by CCI in the case mentioned above was similar to that of the European Commission’s (EC) decision on the Facebook/WhatsApp¹⁷ merger, in which EC, in its market analysis, included narrower involved markets, i.e., the market for consumer communication services, social networking services, and online advertising services, which wasn’t the case in CCI’s judgement (Bose, 2017).

For online platforms, the relevant market is currently defined around the certain goods or services provided to users and advertisers, as most platforms do not provide data to the third party and use it to improve the experience of their users so that there is no trade, and hence, no market can be identified. In the merger case of Facebook and WhatsApp, the European Commission stated that “it had not investigated any possible market definition with respect to the provision of data or data analytics services, since neither of the parties involved was active in any such potential markets.”¹⁸ Under the present competition law regime, a correct market definition looks out for the existence of supply and demand of data for the goods or services. Later, in 2017, as soon as data trading was done between WhatsApp and Facebook and WhatsApp changed its policy, the Commission fined Facebook 110 million euros for providing misleading information to the Commission in their 2014 investigation.¹⁹

When it comes to traditional markets, the authorities rely majorly on market share to assess market power, thus making it necessary to have a precise market definition. But this can't be followed in delineating the relevant market in digital multi-sided markets. Due to the structure of such markets influenced by network effects, positive feedback loops, etc., the market definition becomes a tedious process. Calculating market shares is not easy because the nature of the market is such. Hence, we cannot solely rely on market share in determining market power (Ince & Dogan, 2019). The authorities may look upon other economic factors such as network effects as an entry barrier, and positive feedback loop as a means to determine the increase in market power when defining the market becomes tedious through traditional tools (Cremer, de Montjoye, & Schweitzer, 2019). Another challenge would come from vertically integrated companies such as a virtual market operator (like Amazon), also functioning as an online retailer (such as Solimo, which is a brand owned by Amazon through which it sells its merchandise). In such cases, access to strategic information of other competitor retailers and consumer behaviour may lead to distortion of competition. In such markets, a vertically integrated company could adjust product range and price due to the availability of such critical information as against its rival non-

vertically integrated retail firms. Therefore, such a vertically integrated firm would stand to gain from such discriminatory access to information. Policymakers must also take this possibility into account.

➤ *CCI and Issues Involving Dominance in the Digital Era*

Dominance is not bad per se, but its abuse is.²⁰ The dominant enterprise cannot use its dominant position²¹ to engage in anti-competitive endeavours to uphold its position in the market.²² Since the establishment of CCI, it has established what constitutes abuse by dominant firms through numerous cases. As per the Act, the Commission employs the two-step test to determine whether the enterprise in question is dominant in the relevant market (through the factors provided in the Act),²³ and if it is, whether it is abusing its dominant position.²⁴ India's major challenge with respect to competition issues concerning dominance is the cropping up of platform markets that have established a firm position in the Indian markets. With the evolving digital space in the market, the issues relating to competition are also on the rise, posing, in itself, a new challenge altogether for the authorities to ponder. The Commission with regards to the abuse of dominance in the digital era has given some landmark judgements (Parakkal, 2019).

The CCI in the Google online search bias case²⁵ noted that "for a search engine it is extremely important to be able to 'crawl' the web and index the data."²⁶ Google has already crawled the web concerning servers and technology and has enormous and incomparable data, which proves prohibitive for other new entrants in the search engine market. In this case, CCI held Google to be abusing its dominant position, as it indulged in the unfair practice of displaying advertisements without any relevance, thus violating Section 4(2)(a)(i) of the Act. Additionally, there was an unfair imposition on the users of search options for flights by display and placement of Commercial Flight Units with a link to Google's specialised search option. Also, the partners seeking access for advertisement on Google were in a foreclosure agreement and asked not to use search services provided by competing search engines, which violated various provisions of Section 4 of the Act.²⁷ Similar judgements have been passed

against Google in other major jurisdictions as well (Scott, 2017). In the second case²⁸ against Google in the year 2019, CCI ordered a probe for abusing its dominant position in clear violation of Section 4 of the Act, as CCI formed a *prima facie* opinion against the mandatory pre-installation of the Google Mobile Services²⁹ suite, which corresponds to unfair trading conditions in violation of Section 4(2)(a)(i) and has strengthened the already dominant position of Google (Agarwal, 2019). CCI took the relevant market as the “market for licensable smart mobile device OS in India,” similar to that of European Union’s decision on the same aspect³⁰ and held Google dominant, as Android accounted for 80% of the market (Asher, 2019). For the third time,³¹ in May 2020, CCI started looking into another allegation that Google is abusing its dominant position to promote its mobile payments app unfairly. It was said in the allegation that Google showcases its payment app more prominently in the Google app store, giving it an advantage over other apps.

In another landmark case of abuse of dominance, Vinod Kumar Gupta, the informant, filed an information before the Commission alleging anti-competitive activity by WhatsApp by its privacy policy, which was changed by WhatsApp two years after the merger with Facebook and was allowed by the European Commission in 2014,³² as Facebook submitted a strong statement that there should be no sharing of data post-merger. However, in 2016, WhatsApp changed its privacy policy under which subscribers had to share their details with Facebook. The European Commission slammed a fine of 110 euros against Facebook for misleading the Commission. The other allegation by the informant Vinod Gupta was that WhatsApp is indulging in predatory pricing by making the services free of cost. The informant also framed allegations with respect to privacy and how it violated provisions of the IT Act. Still, the Commission was of the opinion that this subject matter was not under their ambit.³³ While analysing the case, CCI dismissed the case on WhatsApp’s argument that they gave the subscribers the option to opt out. The sharing is done to increase efficiency, and content shared on WhatsApp is encrypted and cannot be accessed by a third party. WhatsApp should have been fined in this case as the subscriber was not given an opportunity to make an

informed choice to leave the platform after the policy was updated. Also, the reasons given by the platform were contradictory (Bose, 2017). Acting upon the same, in 2021, CCI took *suo motu* cognizance of the matter after the change in the privacy policy of WhatsApp once again, where they revoked the option of opting out, which may lead to infringement of consumers' privacy.³⁴ CCI found WhatsApp to be dominant in the instant messaging services market, as it is installed by approximately 96% of smartphone users. The new privacy policy not allowing consumers to opt out was creating a "lock-in" effect due to the networks effect of the app. CCI's order was challenged in the Delhi High court³⁵ on the grounds that a matter already dealing with such issues is *sub judice* in the Supreme Court. Still, the High Court refused to intervene in the investigation order of CCI, as the matter is not outside the purview of CCI's jurisdiction and the issues pending in the Supreme Court are vaster. This had to happen to look at the background of the events since 2014, when the merger happened. CCI also made it very clear in the case of Vinod Gupta that the only reason they are not investigating the case against WhatsApp was the option of opting out for the consumers (Sharma, 2021).

The Hon'ble Supreme Court of India recently decided the case relating to abuse of dominance by cab aggregators. It started when Meru filed a case against Uber with CCI. In data-driven platforms, services are provided at a cost that attracts consumers to increase the network effects the greater the number of customers, the greater the profit. *In Re: Meru Travel Solutions Private Limited (MTSPL) v. Uber India Systems Pvt. Ltd.*,³⁶ Meru alleged that Uber was indulging in predatory pricing and offering deep discounts, adding up to the already subsidised prices, and they were also giving huge incentives to drivers to keep them attached to the network. The relevant market taken by the Commission was the "market for radio taxi services in Delhi". The informant also submitted a report to establish dominance by Uber. Still, the Commission, on the grounds that it was not reliable and similar, rejected it. The Commission also mentioned that, in another case, a contrary report to this was also submitted. On the issue, if Uber holds a dominant position, CCI was of the opinion that Uber has a competitor in Ola in the relevant market, and

their fluctuating market share showed that they are competitive in the market, and hence, the case was dismissed.³⁷ Meru filed an appeal in the Competition Appellate Tribunal (COMPAT).³⁸ While analysing the case, COMPAT changed the relevant geographic Market from Delhi to Delhi-NCR as there is a lot of movement of these cabs in this region. COMPAT also relied on the fact that CCI has the power to make a *prima facie* view³⁹ and it should have taken it when the material with facts was presented. Additionally, if there were contrary reports, it would have been a good reason to order an investigation. COMPAT ordered for an investigation by the DG on the grounds of the deep discounts and incentives provided by Uber and was of the opinion that it was done to expand the network and business. On this order of COMPAT, Uber filed an appeal in the Hon'ble Supreme Court of India.⁴⁰ The court decided that there is no reason to interfere with the investigation order of COMPAT, and it is difficult to say that there is no *prima facie* case of abuse of dominance. The deep discounts and losses faced per trip by Uber point towards the intention to eliminate competition from the market. Although the Hon'ble Court didn't discuss the pricing in the platform markets, it is a relevant issue that needs to be looked into in the future by authorities (Chandola, 2018).

The Hon'ble Supreme Court dismissed the appeal, directing the DG to complete the investigation. On 14 July 2021, CCI reconsidered the allegations on Uber in light of the DG's investigation, where the relevant product market was the market for radio-taxi services, the relevant geographic market being Delhi-NCR, similar to the findings pertaining to relevant market in the previous order of the Commission.

In relation to the allegation of abuse of dominance, CCI affirmed DG's investigation and held that, given the strong competition from Ola, Uber was in no manner dominant in the market, and lower prices being offered by Uber cannot be considered abuse of dominance unless such dominance was distinctly established.

Substantiating the legality of lower prices, which was the strategy employed by both Ola and Uber, CCI relied on *Fast Track Call Cab Private Limited and ANI Technologies Private Limited*,⁴¹ that lower prices offered by radio-taxi services are mere strategies to increase network effects and

attract consumers and therefore, cannot be considered anti-competitive, thereby reaffirming the series of previous decisions by CCI on alleged abuse of dominance, where such abuse cannot be established unless it follows a categorical establishment of abuse of dominance.

6. Conclusion and Suggestions

The challenges posed by the digital economy and data-driven markets is going to increase in the future. It is important for the Commission to make efforts to look at such cases in a more detailed manner to focus on ongoing affairs about digital monopolies that are being treated as standards of competition assessments in other jurisdictions. The different digital companies such as Google, Amazon, Uber, and Apple are turning into data monopolies. This will be a serious threat for other smaller players or new entrants in the market, adversely affecting the market. The purpose of these datapolies is to eliminate competition from the market and create entry barriers for new entrants and rule the market. Specifically, in the Indian market, where the government is trying to promote small startups, the role of CCI in keeping these firms in check becomes more important. We have already assessed how the economics of these new-age markets causes entry barriers and issues of abuse of dominance in the market. As suggested by various scholars in more established jurisdictions, the authorities should qualify “data” as a factor for market dominance, as the data in these platform markets as the tool for determining dominance should be seriously thought of, and the Competition Law Review Committee report has played a vital role by advocating for the scrutiny of the mergers taking place on account of their network and data wealth rather than assets. This simply means that data should be qualified as a parameter or asset to judge the dominance of the firm in the market. By implementing it, in the future, the Commission may not miss the scrutiny of mergers of data giants such as Facebook and WhatsApp due to the lack of threshold limits. The data is no more a non-rivalrous good, and every market player is now analysing data on a real-time basis to gain competitive advantage in the digital space. Data should be used as a consideration and equivalent to price when it comes to defining the relevant product

market in which the price of goods and services are taken as a tool. The Commission should look at the issue of defining the relevant market in the dominance cases in multi-sided markets from a different perspective. Network effects, positive feedback loops, multi-homing, etc., should be considered in determining the market for these platforms, as the traditional tools are often burdensome to apply. Under the current regime, dominance has to be established in a relevant market of goods and services. But for an entity to be characterised as a “data dominant enterprise,” there is a need to delineate a “market of data” corresponding to every good or service. Moreover, such a herculean task would be complicated when the data corresponds to multiple goods and services or the value of the data itself is “short”. Hence, policymakers must provide guidelines on these issues to ensure procedural consistency in CCI’s approach in such cases. The Commission needs to be proactive as always. The discussion over new age markets in the Competition Law Committee Report and suggestions over amendments keeping in mind the growing digital space was a welcoming step for competition. The suggestions are incorporated in the Competition Amendment Bill of 2020. The creation of entry barriers in the market or abnormal market power due to data would largely depend on the “type or variant of data involved” and its inherent characteristics, which would directly impact its value in a particular transaction or context. As an example, in a market of third-party data, the dominant enterprises selling data may employ exclusionary tactics such as tying, exclusive contracts, discriminatory pricing, etc., which could result in the creation of entry barriers. The cost involved in procuring, maintaining, and processing data can become a reason for employing such strategies. Therefore, adequate amendments must be made to the Competition Act 2002, allowing CCI to deal with such incidences effectively. While pronouncing the orders, the Commission should also involve IT experts and data scientists to better understand new-age markets. Efficient competition enforcement is a very important factor; otherwise, it will not be easy to control the economic power of growing giants in platform economies. Where a particular category or set of data is categorised as an “essential facility,” refusal by a dominant enterprise to provide access to it may amount to

abuse of dominance. However, there is no law or rule which can force a dominant enterprise to share such “essential” data with its competitor in the same relevant market. In such a scenario, the competing entity would have to satisfy a very high and vague standard of “indispensability” of such unique data. If regulated effectively, the digital market has features that can increase competition compared to the traditional market. CCI is well-armed to handle cases of dominance in the present digital economy.

Endnotes

¹Bharti Airtel Ltd. and Reliance Industries Limited, Reliance Jio Infocomm. Ltd.; Case no. 03 of 2017, Competition Commission of India.

²DIPP (2016, March 29). Press Note 3.

³As the number of Facebook users increases, for instance, more advertisers will be inclined to buy (additional) advertising space on Facebook, since they will reach a larger number of potential buyers.

⁴Art. 4(1) of the EU General Data Protection Regulation 2016/679 (GDPR): ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an person is one who can be identified, directly or identifiable natural indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

⁵Section 3(29), The Personal Data Protection Bill, 2018.

⁶Firstly, data that never related to an identified or identifiable natural person, such as data on weather conditions, data from sensors installed on industrial machines, data from public infrastructures, and so on. Secondly, data, which were initially personal data, but were later made anonymous. Data which are aggregated and to which certain data transformation techniques are applied, to the extent that individual specific events are no longer identifiable, can be qualified as anonymous data.

⁷*Supra n. 3*

⁸The Committee was established by the Ministry of Corporate Affairs, Government of India, to bring up issues in the law and to propose

amendments to the Act of 2002, http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf

⁹*supra* n. 9

¹⁰Competition Commission of India, Case No. 17 of 2014.

¹¹Also see Competition Commission of India, Case No. 80 of 2014, Competition Commission of India, Case No. 23 of 2016.

¹²Competition Commission of India, Case No. 20 of 2018.

¹³Competition Appeal (AT) No.16 of 2019.

¹⁴Competition Commission of India, Case No.14 of 2019.

¹⁵*supra* n. 27

¹⁶Competition Commission of India, Case No. 99 of 2016

¹⁷Case No. Comp/M7217, decision dated 3.10.2014

¹⁸Case No COMP/M.7217 – Facebook/WhatsApp, October 3 2014, para. 72

¹⁹European Commission, Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover. Retrieved from

https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369

²⁰Provisions relating to Abuse of Dominance, Advocacy Series 4, Competition Commission of India, https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf

²¹Section 4, explanation (a): “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to – (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favor.

²²See Section 4 of Competition Act, 2002.

²³See Section 19 (4), (6) and (7) of Competition Act, 2002.

²⁴Google Inc. & Ors v. Competition Commission of India & Anr., (2015) 127CLA367(Delhi)

²⁵Matrimony.com Limited & Ors. v Google LLC & Ors. and Consumer Unity Trust Society v Google LLC & Ors; (Case Nos. 07 and 30 of 2012).

²⁶Competition Commission of India, case no. 7 of 2012, Para 122

²⁷4(2)(a)(i), 4(2)(c), and 4(2)(e)

²⁸Competition commission of India, Case No. 39 of 2018.

²⁹CCI noted that a wide range of applications such as Google Maps, Google Chrome, and YouTube were only available through GMS on Android phones, which had to be pre-installed by the manufacturer and couldn't be availed directly by end-users.

³⁰Case AT.40099 – Google Android, Commission Decision of July 18, 2018.

³¹The Times of India, (2020). Google faces antitrust case in India over payments app: Report, Retrieved from http://timesofindia.indiatimes.com/articleshow/76038619.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

³²Case No. Comp/M7217, decision dated 3.10.2014 ('Acquisition Approval')

³³A separate case for privacy is in Delhi High Court, Karmanya Singh Sarren and Other v. Union of India [W.P.(C) 7663/2016]

³⁴*suo motu* Case No. 1 of 2021.

³⁵W.P.(C) 4378/2021 & CM 13336/2021

³⁶Case No. 96 of 2015.

³⁷Section 26(2) of the Competition Act, 2002.

³⁸Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016.

³⁹Section 26(1) of the Competition Act, 2002

⁴⁰Uber India Systems Pvt. Ltd v Competition Commission of India, Civil

⁴¹Appeal No. 641 of 2017

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