Interplay of Data in Digital Economy and Merger Control Regime: A Conundrum without Solutions

Submitted: 10 December 2021
Revised: 12 January 2022
Accepted: 15 March 2022

Article submitted to peer blind review

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DOI: https://doi.org/10.26512/lstr.v14i2.41171

Abstract

[Purpose] The paper is an attempt by the authors to evaluate the feasibility of applicability of existing competition law framework to the growing platform economies and the resultant implications of personal data being collected by such entities.

[Methodology/approach/design] The present research is doctrinal in nature and the authors have adopted a comparative-analytical research methodology for evaluating the research questions. For the purpose of brevity, the authors have identified three research questions which shall form the basis of the research. *Firstly*, what is the inter-relation between the growing platform economy and merger control regime of a country. *Secondly*, what the possible avenues of concerns that may arise due to collection of personal data. *Lastly*, what are the possible enforcement challenges that would hampering the applicability of existing competition regimes to the digital platforms.

The authors have considered the jurisdictions of EU and India as the geographical scope for the research, whereas, the subject-matter scope of the present research is limited only to the facets of interaction between the merger control regime and the abusive conduct of a dominant enterprise in the arena of digital markets.

[Findings] The authors have made the following observations upon the conclusion of the study. *First of all*, the use and access of this data after the merger with companies with low turnover confer the acquiring enterprise a market power by which it can have an edge over its competitors in the market which will ultimately harm the competition in the market. *Second*, the digital market is data-driven, hence, collection of copious amounts of

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data, places the big-tech players in a position of control, allowing them indulge in exclusionary and exploitative conduct. *Third*, the assessment basis of combinations, more specifically in cases of data-driven mergers within the competition law needs a serious re-assessment, so as to include monetary value of data within the scope of assessment, as it is primary asset in such cases.
[Practical implications] The importance of this research lies in the acknowledgement accorded the issue and the existing loopholes with the current merger control framework concerning data-driven mergers. Hence, the assessment criteria provided within the paper for the data-driven mergers would effectively serve as a foundational study for the further evolution and development of a specific and concrete framework for regulating data-driven mergers.

Keywords: Digital Platforms. Data Concentration. Abuse of Dominance. Monetisation of Data. Third Party Tracking.

INTRODUCTION

The advent of Globalisation in the early 1990s led to increased interaction and integration of human resource and capital resource, leading to unwarranted implications of both positive and negative nature. This transition from an isolated world to an interconnected world at present has been greatly facilitated by the technological advances. However, the turn of the millennium witnessed a new global phenomenon i.e., digitization of the economy, which was characterised by a meteoric rise of the e-commerce and platform-based services (Stucke & Ezrachi, 2018).

The online platforms differ significantly in their operability in comparison to the traditional business models, and thus have carved out a separate niche arena for themselves. Owing to their primal differences, the considerations and attempts behind increasing their marketability also vary significantly, when these two business models are compared.

Unlike traditional brick-and-mortar businesses, which rely on considerations such as brand value, monetary strength, market reputation etc. to build their business, the platform business entities are completely reliant on their database created through collecting personal information of their consumers and thereafter monetising the same to generate revenue. Such data owing to their nature and relevance in terms of giving insight to an individual's psyche have been termed as 'Big Data' (Batistic & Laken, 2019).

In 2016, OECD (Organisation for Economic Co-operation and Development) made its first attempt of understanding "Big Data", (OECD Summary Discussion, 2017) and subsequently formulated the following attributes in its attempt to provide an inclusive definition of 'Big Data'.

1. Large dimensions of data sets.
2. Use of large-scale computing power and non-standard software to extract value from data in a reasonable amount of time (Volume, Value, Velocity and Variety) (Mauro, 2016).

Assessing the contemporary market trends which predicts an upward growth rate for the digital markets, the authors believe that it would be appropriate to stake a claim, that data would and should be considered akin to currency in the digital markets.

The authors believe that that in a digital economy the quantum of data held by an entity has a direct implication on its competitiveness. This belief is not entirely unfounded as the personal data collected from the consumers does plays a significant role. It not only allows the market players to form a better understanding of the consumers' psyche and thus, their preferences, but it also enables them to curate their services in accordance with the consumer needs and thus indulge in targeted advertising, which allows them to build a better market presence.

However, the positive impact of collecting personal data of the consumers, do not necessarily discount the concerns associated with such data, which are not essentially limited to mere economic or privacy issues only. Rather, if the Cambridge-Analytica debacle, is to be analysed, a direct impact of big data, can be easily witnessed in the spheres of politics and democratic value (Boldyreva, 2018). The scandal highlighted major revelations made about Cambridge Analytica, which had harvested personal information of millions of Facebook user's data without their knowledge or consent and used it for political advertising (Boldyreva, 2018).

Thus, given the possible far-reaching implications of big data, there is a growing concern as well as a need for regulating the powers of Digital Platforms to collect and accumulate data. The Competition Regulators are constantly attempting to widen the scope of the competition framework, to regulate the market power of such entities (Sokol & Comerford, 2017).

In India, the recent boom in the digital platforms and other fintech companies over the last decade, dictated a reassessment of the regulatory framework concerning competition laws in the country, to cater to changing dynamics and technological integration (Srinivas, 2019). Resultantly, on January 8^{th,} 2020 Competition Commission of India (CCI) submitted a report on the Market study on E-Commerce in India where it highlighted the rapid growth and the rising importance of online trade-in of large no. of product categories. The report also attempted to gain a better understanding in terms of the functioning

of e-commerce/digital economy in India and its plausible implications on market and competition law (CCI Market Study, 2020).

In the current research, the authors will attempt to draw analysis from EU in terms of the legal developments and provisions concerning regulating the market competition in the digital sphere and thereafter attempt to the answer the question of whether India has the flexibility to include Digital markets and big data issues in our existing framework of competition laws and regulations or do we need to amend our laws specifically to deal with what digital markets necessitate.

CHAPTER I: INTERPLAY OF DATA IN DIGITAL ECONOMY AND MERGER CONTROL REGIME

The term big data was used for the first time in popular culture by John Mashey Though across the world we haven't defined big data properly and what it constitutes, but it can commonly be understood as using computing power on a large scale and technologically advanced software to collect, process and analyze data characterized by a large volume, velocity, variety, and value (OECD Summary Discussion, 2017).

In this paper, the authors have looked into the three already defined characteristics or features common to the attempts made to define big data. They being (Porche, 2014):

- ✓ Volume: The amount of data from Madrid sources.
- ✓ Variety: The type of data for that is structured semi-structured and unstructured.
- ✓ Velocity: The speed at which the data is generated.

Furthermore, three more features have been added to supplement the above characteristics:

- ✓ Veracity: Which implies the degree to which big data can be trusted.
- ✓ Value: Which is the business value of the data so collected.
- ✓ Variability: Which is how big data can be used and configured.

The significance of data in digital markets including e-commerce plays a very key role in delivering more precise advertisement targeting possibilities for multinational giants. The information and knowledge that can be derived from this data is a basis for individual players competitiveness and growth in digital markets, it is for this reason, they have been referred to as the '*currency of the new digitised economy*' (Stucke & Ezrachi, 2018). This, however, does not discount the possibility where the accumulation of big data leading to negative

welfare effects, in particular, having control over and being able to analyse large volumes of data may become a source of absolute and incumbent power within the market players in the digital economy (Schepp & Wambach, 2016).

But having stated the same, one cannot dismiss the pro-competitive effects of big data like the companies or business entities willing to provide heavily subsidized, often free, services to consumers as consumers allow those companies to monetize consumer data on the other side of their business, resulting in better service delivery, enhanced innovation and technology, and low entry barriers also in the concerned relevant market (Evans & Schmalensee, 2014).

Here what the authors concern is that these big tech companies use "data" as the radar system to track competitive threats which are upcoming companies in that specific industry and then they acquire these upcoming new entrants before they become significant threats and then become too big to fail. The use and access of this data after the merger with companies with low turnover confer the acquiring enterprise a market power by which it can have an edge over its competitors in the market which will ultimately harm the competition in the market.

This has necessitated for most advanced jurisdictions to currently explore the possible strategies to seize and address the concerns presented by the digital economy. Hence the interplay of Antitrust regulations and Data privacy laws with developments in the digital markets especially with strong network effects primary focus of the authors in the present research.

CHAPTER II: UNDERSTANDING THE IMPLICATIONS OF BIG DATA

Data as an antitrust issue has come into light in the current era is because of the dramatic change in the size and scope of data collected by firms these days. This chapter engages arguments where authors are trying to comment as to how Big Data can be used to perpetuate an unfair competitive advantage by enterprises and consequently distort competition and harm consumers.

Now the basic question that is needed to be answered here is whether the use and access of Big Data by various enterprises confer them a market power by which they can have an edge over their competitors? To be simply put, given the data analysis tools and the development of complex self - learning computational algorithms entail substantial investment, can the possibility of highly focused, highly concentrated market entry barriers due to the exposure to big data be discounted (Autorité & Bunderkartellamt, 2016).

Before answering the above question, an understanding regarding the working of such a system becomes rather pertinent. Explaining the same through

an example, let's say an enterprise has employed algorithms which analyses and records the search terms being entered by a user. Thereafter, a detailed user profile is created, which includes the whole collection of data obtained from applications such as data processing services and e-mails. These user profiles, which include unique and individual details, are then marketed to retailers and online marketers for target advertising. E-Commerce platforms, using such data, may collect information about the user's search history.

In such circumstances, there might arise two major implications, *first*, with regards to inequitable distribution of big data leading to a concentration of the market in a hand of few big market players and *secondly*, concerning the valuation of this data for determining the thresholds under § 5 of the Competition Act.

Unequitable Distribution of Data: A Precursor to Dominant Position?

Before discussing abuse dominance by data-driven mergers, it is pertinent to answer the following two questions, *first*, whether the accumulation of big data in a standalone capacity or conjunction with other relevant factors, lead to a dominant position? and *second*, whether the use of big data might result in a possible abuse of such a dominant position?

It is important to clarify at the outset that access to Big Data has the potential to play a pivotal role in improving the quality of the products and services. Access to the information about the consumer's preferences will enable the enterprises to streamline their efforts in developing products which are better suited for catering to the consumers' needs (European Data Protection Supervisor, 2014). The necessary conclusion that follows is that the enterprises having better access to such data will be in a better position to exploit and cater to the consumer needs, thereby, increasing their consumer base and consequentially their market presence. It is in this context, access to big data or big data accumulation becomes relevant in attaining a dominant position by an enterprise (Autorité & Bunderkartellamt, 2016).

For example, big search engines have the opportunity and ability to prioritize paid advertising over organic search results that are more appropriate, of better quality. More visibility shown more prominently on a search engine benefits both the advertiser and the search provider. Further ads increase the user click chances. That, in effect, implies a greater probability for the platform provider of a pay - per - click conversion, and a better chance for the advertiser to sell a product.

As a common knowledge, under the Competition Act having a dominant position is per se illegal, but its abuse is. In a scenario, where access to big data translates into a better quality of products and increased market presence, the

competition to accumulate data of such nature becomes inevitable. Such competition between firms become the root cause of concerns about big data and the plausible situation of abuse of dominance (OECD, 2016).

The smaller enterprises, due to lesser resources in comparison to their bigger and well-established competitors, are often on the receiving end of such competition and fail to gain access to a large amount of data and hence may not able to provide quality services in comparison to these larger enterprises.

As this data gap (which may also translate into the quality gap), widens between the bigger firms and its smaller competitors, it destabilises the *status quo* of the various players in the market, thereby, adversely affecting the existing competition in the market. The decreasing competition in the longer run undeniably strengthens the market presence of the bigger players leading to a concentration of market power and creation of a dominant position (Stucke & Ezrachi, 2016).

Further, broadening of the gap might also result in a smaller enterprise being unable to have sufficient volume of data, to deter its bigger rival from losing any degree of search efficiency in favour of increasing profitability on the paying side. The fact that a large search engine has exposure to a higher volume of data, and thus can improve quality to a much higher degree.

When this position is coupled with the dominant position being enjoyed by an enterprise, a reasonable implication may follow, that the possibility of compromising on the quality of services being compromised in favour of profiteering is rather high (EPDB, 2018).

Accumulation of Big Data and its Role in Stifling of Innovation

Where the value proposition of an enterprise is focused on the collection and monetization of user data, if that enterprise collects so much user data that it is reinforced, it can obtain both the capacity and the opportunity to use that data in various ways to remove potential challengers ((Stucke & Ezrachi, 2016). As this happens, smaller rivals are blocked from accessing the necessary data and there is reduced incentive for these enterprises to innovate and compete with larger dominant enterprises.

The best example of this situation real life is the TRIVAGO acquisition of TRIPL. This Hamburg-based company had developed an artificial intelligence-based platform an algorithm which can imitate the way a travel agent would recommend hotel experiences (Fox, 2017). Now Tripl algorithm makes recommendations based on the social media activity of a user, as well as similar user data in-ap. Tripl pulled interests data from Facebook ("I like kitesurfing") and a questionnaire ("Which of these are your vacation goals? Culture, Party, Relaxing, Romance, and Luxury?") to make destination and activity

recommendations based on what like-minded people tend to book (O'Neill, 2017).

Other factors, like weather forecasts and pricing, affect its recommendations, too (O'Neill, 2017). Though the acquisition deal was never made public TRIVAGO acquired this small company at the time when there were only two employees, co-founders Hendrik Kleinwaechter, and Christian Heimerl, respectively and the deal was only about $270,000, or €230,000, which is undoubtedly very small. Now the announcement from Trivago came just weeks after Booking.com revealed it had acquired a tiny software company called Evature.

Now, this example of a dominant firm with access to Big Data acquiring a small start-up which has the potential to become a competitor in future for this dominant firm acquired this start-up thereby stifling rising competition by limiting or preventing their access to necessary data, or by acquiring them like in this case. Where market leaders with deep pockets acquire potential or actual new entrants, a source of innovation is removed, and competition suffers and thereby stifling innovation eventually.

As it has been already observed by the CCI as well by the Hon'ble Supreme Court, a dominant position although not prohibited, yet, should be avoided as it often proves to be the antithesis to quality maximisation and innovation.[1] Thus, one can reasonably conclude that the larger firm in this scenario is not driven to innovate or to maximize quality for the consumer.

Excessive Data Accumulation and Threat of Abuse of Dominance

Section 4, Competition Act, 2002 provides that no dominant enterprise/group shall abuse its dominant position.[2] As an established practice within the Competition regulatory regimes globally, any abusive conduct amounting to creation of entry barriers or distortion of existing competition in the market, which can be attributed to the dominant position of a market player has been penalised by the Competition regulators.[3] Thus, given the possible impact of data accumulation by the big techs and their relevance in the determination of the market presence and strength of a particular, makes it a prime candidate for being regulated (Stucke, 2018).

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1 Matrimony.com Ltd v. Google LLC & Ors, 2018 CompLR 101 (CCI).

2 Competition Act 2002 § 4.

3 All India Online Vendors' Association v. Flipkart India Pvt. Ltd. Competition Appeal (AT) No. 16 of 2019; Matrimony.com Ltd v. Google LLC & Ors, 2018 CompLR 101 (CCI); XYZ v. Grasim Industries Ltd. (Case No. 62/2016); Shamsher Kataria v. M/S Honda Siel Cars Pvt. Ltd., 2014 CompLR 1 (CCI); Fx Enterprise Solutions v. Hyundai Motor India Ltd., Case No. 36&82/2014.

For the purposes of the present piece, the authors would be discussing the possible avenues of abuses that may arise due to data accumulation and would be primarily focusing their arguments on two particular phenomenon of abusive conduct that may arise as a corollary of leveraging of big data namely: *excessive data collection vis-a-vis 'excessive pricing'*[4] and *excessive data collecting vis-a-vis 'unfair trade practice'*.[5]

The literature and jurisprudence relating to possible abuse of Big Data in India are rather constricted, hence, the authors would rely upon the available literature for the EU regime, owing to its similarity with that of Indian competition regime.

Excessive Price as an Abusive Conduct vis-à-vis Excessive Data Collection

The basic premise of 'excessive pricing constituting an abusive conduct' is that all the commodities can be ascribed a monetary value. Thus, if the determination of the monetary value of any exceeds the notions of *reasonableness,* and the same is attributable to the dominant position being enjoyed by an enterprise, an adverse effect on competition is assumed in such instances (Malgieri & Custers, 2018; OECD, 2013).

Excessive pricing although may seem to be an ' *open and shut case of exploitation*', yet they could also be surprisingly difficult to prove in the courts, owing to the subjectivity in the meaning and the determination of the term '*excessive*' (Ezrachi & Gilo, 2009). While, the legal position concerning excessive pricing within the traditional forms of market is an established principle, but the question of '*whether excessive data collection vis-à-vis excessive pricing can be treated as an abuse of dominant position*', remains largely unanswered (Kerber, 2016).

An answer to the above question may be attempted by answering the following two corollary questions. *First*, why is there a requirement to ascribe a monetary value to the personal data sets? *Secondly,* what can be the possible considerations for determining and ascribing a certain value to the collected data sets?

The Rationale, Need and Issue with Data Monetisation

For answering the question concerning the requirement to ascribe a monetary value to the personal data sets, it is pertinent to form an understanding as to the use of any data sets collected by the digital platforms.

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4 Competition Act 2002 § 4(2)(a)(ii).
5 Competition Act 2002 § 4(2)(a)(i).

'Value Creation' can be considered as the ultimate and rational goal of any organisation. While, the same can be easily understood in brick and mortar set up, where value creation may be understood in terms of streamlining of business operations and ensuring optimal use of resources to enhance the profitability and efficiency of the organisation (Porter, 1998). The value creation in any organisation is reliant upon creating a Value Chain (Prajogo, 2008). However, in a data driven environment, where the primary resource of an entity are the data sets collected by it, the traditional notions of value chain, by virtue of being product-centric in their approach often fail to adequately address the issue of novelty arising with intangible assets such Data (McAfee & Brynjolfsson, 2012).

Thus, as a derivative of the traditional Value Chain, a newer notion of Big Data Value Chain (BVDC) has subsequently emerged, which is divided into five discrete steps (Faroukhi, 2020).

- Data acquisition: refers to the process of obtaining raw data;
- Data pre-processing: refers to the processes of data validation data integration to further facilitate the storing of the Data;
- Data storage: refers to storing and management of large-scale datasets;
- Data analysis: refers to the use analytical tools for modeling, inspection and mining of data to extract value;
- Data visualization: refers to meaningful representation of complex data to show hidden patterns

Thus, the development of BVDC has enabled the entities to use data as tangible assets which could be utilised as exchangeables or saleables (Faroukhi, 2020). The shift in approach of the entities has thereby necessitated the need for monetisation of Data.

Data Monetisation and Issue of Excessive Pricing

Data monetisation aims at revenue generation in tangible form i.e., in forms which can easily expressed in computable terms, from the otherwise intangible form of data collected from the consumers (Najjar & Kettinger, 2013). This translates into two distinct mechanisms, *explicit monetisation*, wherein the data collected is shared or sold to third parties, who thereafter use the data for advertisement purposes; or through *implicit monetisation*, i.e., the company uses the data to further streamline its own services in accordance to the peculiarities of the consumers' needs (Wixom & Ross, 2017).

However, there are certain specificities involved in the data monetisation, that the business world is struggling with i.e., what should be basis of ascribing monetary value to any particular data set. This brings us to our second question

i.e., what are the possible considerations for ascription of monetary value to data.

While data is sometimes referred to as the currency of the data-driven economy, the structure of the data varies considerably from that of the real currency (Stucke, 2018). This difference in characteristics, particularly about the lack of data scarcity and imitability – means that legal provisions based on the monetary remuneration criterion cannot simply be applied to data without a significant change in value (Körber, 2017).

By expressing the value of personal data in monetary terms, it is also possible to lose sight of the non - monetary values associated with the data, such as privacy (Malgieri & Custers, 2018; Kerber, 2016).[6] It is therefore clear that there are considerable pitfalls in in determination of the basis for ascribing a certain monetary value to the data.

At this juncture, however, the authors consider it appropriate to note that there is a rather important caveat to this analogy: the value of personal data depends very much on the specific subject that needs to be assessed on its monetary value, for example, for the data collector and the person whose data is at issue (Bania, 2018; Kalimo & Mejcher, 2017). It may therefore be difficult to agree on the price of the data.

The Continuing Conundrum of Data Monetisation and Excessive Pricing

The authors would now delve into the issue of *excessive pricing* with a rather important admonition that as already discussed in the foregoing paragraph even though data has been referred to as a commodity, however given the given the peculiarities involved in the collection of data, agreeing on a specific price threshold which could be used for determining excessive price may be difficult. However, considering a situation where the above discussed caveat is accepted and a in furtherance of the same, a price is agreed upon for a particular data set, then what could be best possible course of action for determination of excessive pricing?

In the digital platform economy, the concern of excessive pricing arises as a corollary effect of the third-party tracking[7] on the users (Ezrachi & Robertson, 2019; Purra & Carlsson, 2016). The underlying premise is reliant on the analogy drawn between the economic value of physical good and the monetisation of

6 Constitution of India 1950, Art. 21; Justice K.S. Puttaswami v. Union of India, (2017) 10 SCC 1.

7 Third - party tracking is a practice that allows a researcher to gather large amounts of personal usage data from a variety of first-party outlets in the online environment and across platforms such as smartphones , tablets and laptops, and servers, ultimately creating a detailed user profile.

Data' in the arena of the digital market (Budzinski, 2017). EU competition law allows for such an analogy where the criteria for excessive prices as set out in the case laws – namely: the *excessive nature of the price as compared to the economic value of the product* and the *unfair nature of the price*[8] – are met by an excessive collection of data (Bania, 2018).

Excessive Data Collection vis-à-vis Unfair and Discriminatory Conditions in the purchase or sale of Goods and Services

Article 102(a) TFEU, not provides for 'directly or indirectly imposing unfair purchase or sale prices' but also of 'other unfair trading conditions' and thus opens the door to the development of further harm theories under the provision. Both of these types of abuses are identified under the same heading of Article 102(a) TFEU, indicating that they are closely related to each other: unfair prices are merely a subcategory of the broader notion of unfair trading conditions. For this very reason, many of the analytical subtleties discussed above are also relevant to the excessive collection of data as a stand-alone category of abuse. Hence, it can be referred to the as necessary adaptation of the provision to digital ecosystems (Zingales, 2017).

The central question relating to the definition of privacy policies as an abuse of rights due to unfair trading conditions is then centred on the question of whether such privacy policies are to be regarded as unfair within the meaning of Article 102(a) TFEU (Körber, 2017). As a result, some thought needs to be given to what characterizes fair rather than unfair trading conditions about third - party monitoring. In several cases involving exploitative abuses, the Court of Justice and the European Commission have set out criteria for establishing what makes trading conditions unfair (OECD Summary Discussion, 2017).

In SABAM (1974), for instance, the Court found that a collecting society engages in such unfair trading conditions where it' imposes on its member's obligations which are not necessary for the attainment of[the agreement's] object and which thus encroach unfairly upon a member's freedom to exercise his copyright.[9] The European Commission interpreted the SABAM test as requiring an assessment of whether [the statutes of a collecting society] exceed the limits that are necessary for effective protection (indispensability test) and whether they limit the freedom of the individual copyright holder to dispose of his work no more than is necessary (equity).[10]

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8 Apple/Shazam, Case No. COMP/M.8788 (2018); Facebook/WhatsApp, Case No. COMP/M.7217 (2014); United Brands v. Commission, Case No. 27/76, ¶ 252.

9 BRT v. SABAM, Case No. 25/74, ¶ 15.

10 GEMA Statutes, [1981] OJ L94/12, ¶ 36.

Similarly, in DSD (2001), the Commission held that 'unfair commercial terms occur where an arrangement in a dominant position fails to comply with the principle of proportionality'.[11] The Commission emphasized that this norm was not adhered to where the contracting partner of the dominant company, as in DSD, had only an option between embracing unfair commercial terms or setting up its own scheme.[12] This indicates that the bargaining power between the contracting parties, as well as the particular conditions imposed on the weaker party by the stronger party, must be evaluated.

In the case of excessive data collection, when assessing the excessive nature of data collected via third-party tracking, one may need to consider the blatant asymmetry between trackers and users in terms of their respective bargaining power (Borgesius & Poort, 2017). Relying on DSD, it can be said that a user's choice lies between setting up their own social network, emailing system, or online search–or agreeing to the dominant service provider's extensive third-party tracking. This is further aggravated by the lock-in restrictions that users experience in the face of a lot of online platforms ((Zingales, 2017).

According to the available literature, '*unfairness*' within the meaning of Article 102(a) TFEU was also regarded as encompassing '*clauses that are unjustifiably unrelated to the purpose of the contract, unnecessary restrictions on the freedom of the parties, disproportionate, unilaterally imposed or seriously opaque*' (Colangelo & Maggiolino, 2018). In the case of personal data, unfairness concerning the collection of data may result from third – party monitoring that goes beyond the reasonable expectations of users at the time they consent to this practice, considering the context in which the data is collected (Bania, 2018).

Therefore, consideration must be given to whether such business models constitute legitimate means of doing business or whether they amount to exploitative practices when large amounts of personal user data are collected by a dominant platform provider.

Facebook v. Federal Cartel Office (Germany): A Trial Case for Abuse of Dominance vis-à-vis Excessive Data Collection

Background

The first test case for excessive data collection through third - party tracking is underway in Germany: in its decision of 6 February 2019, the German Bundeskartellamt examined the terms of service of Facebook under competition law because they allow Facebook to collect large amounts of user data from

[11] Duales System Deutschland (DSD) [2001] OJL166/1, ¶ 112.
[12] Duales System Deutschland (DSD) [2001] OJL166/1, ¶ 114.

outside its social network. The Bundeskartellamt considers that this infringes the principles of European data protection, in particular as users are not aware of the extent to which Facebook may collect personal data on them – possibly rendering users ' consent ineffective.[13]

The bone of contention in the was the data collection through the third - party sources, including digital services owned by Facebook (e.g., WhatsApp or Instagram) or any other third - party websites and applications running Facebook APIs (application programming interfaces), such as the Facebook login option, the Facebook 'like-button' or Facebook analytical services. As soon as a third party runs Facebook APIs, Facebook collects data from its users – even if the user does not use any of those features, and whether or not the user has blocked web tracking. These data sets can thereafter be amalgamated with the Facebook data of the particular user.

DUSSELDORF'S JUDGEMENT

On appeal to the higher forum in Düsseldorf,[14] the Court rejected the view of the Bundeskartellamt on the abuse of domination and the violation of the GDPR rules. The Court explained that the legal provisions aimed at protecting the weaker party to an unequal contractual relationship do not necessarily seek to address the imbalance that arises from the 'market power' of the stronger party, but rather a bilateral imbalance inherent in the nature of such relationships (e.g., the employer in relation to the worker, the seller in relation to the consumer, and the data controller in relation to the consumer). The Court stressed that the concept of exploitation, as the term 'technical competition law', refers to the exploitation of consumers as a result of dominance. Therefore, exploitation cannot be proved without showing that it would not be possible in the absence of dominance.

Having clarified the need for a causal link between dominance and allegedly exploitative behaviour, the Court continues to examine whether it can be argued that Facebook is able to establish a link between the subscription of the social network and the processing of additional data because its social network services are indispensable for consumers. The Court held that it is not reasonable to claim that Facebook provides essential services to consumers on the grounds that these services do not cover essential needs and that a significant proportion of the German population prefers not to make use of these services at all.

In the light of these data, the Court held that consumers had a rational choice of allowing Facebook to use their personal data in return for the provision of

13 Facebook, Case No. B6-22/16 (Bundeskartellamt Decision).
14 Facebook, Case VI-Kart 1/9 (V) (Düsseldorf Decision).

zero-price services financed by advertising. In the view of the Court, the absence of other alternatives may not justify the presumption that consumers have no choice but to allow Facebook to process additional data in order to benefit from its social network services.

Finally , the Court also stated that the Bundeskartellamt erred in assuming that consumers acceptance of Facebook's terms and conditions without reading them is an indication of their dependence on Facebook and thus a reflection of Facebook's ability to exploit consumers by abusing its dominant position. On the contrary, this was simply due to consumers' indifference to the processing of additional data by Facebook and their belief that the benefits of subscribing to Facebook's social network outweighed any potential disadvantages that could arise from the processing of additional data.

Merger Review in Digital Markets: Strengthening Antitrust Enforcement

The ubiquity and impact of big data are very much given and appear in the current digital markets (Peyer, 2017). Some official feel that and believe that the antitrust principles for traditional mergers and data-driven mergers are the same. For mergers specifically, competition authorities work on prediction basis. The focus hence for antitrust regulatory authorities should be to concern themselves with the impact and effect of these mergers in concentrated markets (Wasastjerna, 2018).

'Big Data' and the Plausibility of Abuse of Dominance: A Merger Control Perspective

There is an intense economic debate evolving in the last decade or so whether the current regime of merger control effectively protects against the potential harm to competition and innovation that may result from acquisition by dominant companies of small, young, innovative companies with little turnover at the time of their acquisition, but highly competitive potential (Schäfer & Van Es, 2017). There has been a gradual increase in the number instances of the Digital platforms acquiring hundreds of companies and most without facing any scrutiny from antitrust regulators (Sokol & Comerford, 2016).

It is necessary to differentiate the merger control regimes prevalent in the traditional markets and the prevalent regime in the digital market. Due to the long-drawn transfer process involved in the acquisition of physical assets, any delay in intervention by the part of competition regulatory authorities is not that harmful.

However, in a market which is data-driven, along with strong tendencies towards monopolization any mistake in approval of a merger or missing an important merger which could have harmful effects for a healthy competition

can condemn an industry to turn into a monopoly. Further, the wide-ranging impact, these data-driven acquisitions often having a political flavour attached to as witnessed in the Cambridge Analytica case, mistakes could be irreversible (Hern, 2018).

With regards to the Indian authority under the Competition Act 2002, the main reason for the regulation of mergers by Indian Competition regulators is to remove the potential threat to competition in the market, the primary motivation behind the ex-ante regulation of the mergers. Consequently, the identification and reversal of anti-competitive results after the transaction is rarely sought. However, the Act falls short of effectively regulating mergers in the digital market, as it is not very often the case that such mergers come within the prescribed threshold of turnover or asset criteria.

Implications of data are manifold on competition and one of how it manifests itself is in horizontal mergers where data is input for delivery in certain service. Data can be an important factor to look into consequences of how a merger affect the competition in the market. The authors are trying to explore the idea that an enterprise might buy up a rival or a potential competitor in the specific industry or market where both exist, just have control over its data even if the turnover of the enterprise is very low. Some researchers have argued, that multinational large companies can use data as a radar system to track competitive threats shortly after they take off and then acquire these new entrants before they become significant competitive threats (Stucke & Grunes, 2015).

The authors feel that especially for Indian competition regulatory authorities to be more vigilant in approving mergers where there is low turnover and high data, as the sole purpose for that merger can be to get the valuable data of the upcoming enterprise and monopolise that data in a way that the acquiring enterprise becomes a dominant player in that market. One can say here that consumer data, has become the new raw material of business: an economic input almost on a par with capital and labour.

Data Monetisation and its interplay in the Merger Control Regime

The concept of monetization of the data in the form of targeted advertising sales for antitrust purposes is not suspected to be harmful, but rather "economically-rational, profit-maximizing behaviour," which has resulted in consumer benefits (Lerner, 2014). As the main objective of antitrust regulations is also for companies to have the ability to offer high-quality services to consumers for free or subsidized rates which are considered to be a procompetitive effect of Big Data monetization, not anticompetitive harm (Evans and Schmalensee, 2014). The issue however still exists, as being a very

nascent regime, there are a lot of speculations about the methods of evaluating the monetisation process of the big data.

This has turned out to be more complicated as it has completely unsettled the existing regime concerning merger control. They're essentially two facets to this issue, firstly, the current definition of the term '*assets*' and secondly, the procedural aspects of determining the ascribed value of a particular piece of information. The present merger control regime while valuing the threshold amount of merger transactions, interprets '*assets*' as tangible or intangible assets of quantifiable nature such as fixed assets and quantifiable IP rights or licenses.

This approach, when applied to data based companies, becomes untenable as these digital companies, often operate on remote servers and their primary assets is the data that has been accumulated by them. Thus, when valuing the merger deal, the data being non-quantifiable (as per the present understanding) is often left out of the purview of evaluation, thereby, resulting a significantly reduced asset amount, which invariably put such mergers outside the purview of scrutiny by the antitrust regulators. The recent merger between WhatsApp and Facebook can be a great illustration of the same.

CONCLUSION

Personal Data has assumed a rather central position in the contemporary times, and its centrality transcends beyond the mere contours of competition law. Thus, at this juncture of technological boom, debating the relevance and importance of the personal data of an individual in the opinion of the authors is a foregone conclusion.

However, a more relevant debate, given current circumstances would be venturing into the realm of economics of data. The questions concerning the basis of Data quantification and more specifically the principles of conversion that should be employed for the determination of the monetary value of the personal data sets, remain unanswered and have gradually assumed a position of discomfort with the legal frameworks of competition law globally.

While there is room for improvement on several fronts, the issues aren't rooted in a systematic incompatibility between competition law and data in our opinion. Nor does data represent a new, never-before-seen phenomenon which does not the resources to handle regulation law. The existing state of competition law offers the Commission with an opportunity to write well-argued and accurate rulings for any reason it is faced with.

If the approaches of the regulators are to be understood, it can be rather easily stated that they probably are not doing enough, in terms of

accommodating the challenges of the digital markets in terms of regulating the collection and pricing of data. However, the authors believe that, such an assessment wherein the regulators are entirely held responsible for being non-responsive to the contemporary developments would be rather harsh.

This should not be understood as a conclusion in the state of competence of those involved in making previous acquisition decisions but should be interpreted as follows: data as a resource in the assessment of competition has only recently been put into the spotlight as something important, and it is only fair that time of research is required before experienced in the handling of data-based knowledge is available.

Further, the applicability of the existing pre-defined standards to the digital market, might seem a lucrative option and may even be considered as the easy way out. However, given the significant differences between the two markets i.e., brick and mortar market and the digital market, the urge to avail such an option should be controlled as the same might result in the creation of an unrealistic and impractical regime, which is untenable in the longer run.

The authors would conclude by stating that at the present the competition law is still in the level of digital infancy and therefore, the level of competitive data evaluations can only get higher and higher with the expanded debate and awareness regarding data. Therefore, the best way to approach such a situation, would be the watchful integration of the digital economy with that of the Competition regime, which should be based upon the adaptive and flexible application of Competition Law.

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