VOLUME 16 ISSN 2456-9704

BIG DATA AND COMPETITION POLICY IN INDIA: AN ANALYSIS

By Nivetha K and Mummadi Jahnavi
From Alliance School of Law, Alliance University

ABSTRACT

The fast-paced development of information technologies in last few years has made us understand that data is the most important resource in our world today. With digitalization the resources of data have become highly accessible and is being exploited enough. In today's world the development is led by the data-driven firms who use a variety of techniques and technologies for processing and analysing large volumes of data. The business model of many of these firms relies on the use of data and analytics which constitute a major source of the firms' huge productivity. Greater access to and use of data create a wide array of impacts and policy challenges, ranging from privacy and consumer protection and other concerns, across public and private health, legal and science domains. The extensive growth of the online user data has also been of great benefit for the consumers. For example, there has been an increase in free or subsidised services and has fast-tracked innovation. Debates about what the use of big data means to the customers have increased. Another concern is whether big data usage has any anti-competitive aspect to it. Till date, data breach or abuse were dealt under Information Technology Act, 2000 which were mostly related to privacy concerns. The trend of big data mergers has grabbed the attention of competition law authorities across the world, and some measures have been taken to catch-up with this trend. In India, the competition policy is not well equipped to deal with big data generated anti-trust issues.

Keywords: Data-driven Innovation, Big Data, Anti-trust Issues, Relevant Market, Competition Policy.

1. BIG DATA AND ANTI-TRUST ISSUES

Big Data is commonly understood as the use of large-scale computing power and technologically advanced software in order to collect, process and analyze data characterized by a large volume, velocity, variety and value. These interdependent characteristics drive both the benefits and potential risks of Big Data from a competition policy perspective.[1]

The collection and use of personal data falls under the domain of data protection laws but the question is whether the competition authorities are concerned in use of big data and generally the role of competition authorities in case of big data is significant in case of mergers between data driven companies and as such use of data does not attract the competition provisions unless there is a breach of competition law. From a competition law perspective, a pertinent question that arises is whether the access and use of big data by enterprises can confer them

[1] OECD, 'Big Data: Bringing Competition Policy to the Digital Era' (2016) OECD Publishing < http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M%282016%292/ANN4/FINAL&docLanguage=En > accessed 20 January 2020.

with market power and a competitive advantage over their competitors.

The emergence of new business models, technologies and even markets creates particular challenges for antitrust enforcers. Tried and tested antitrust theories and practices may no longer withstand scrutiny in fast moving digital markets. Antitrust agencies may be tempted to develop novel theories of harm or seek additional powers to address real or perceived enforcement gaps.[2]

The scale and scope of data collection and use will only accelerate as we move into the era of big data fuelled with increasing amounts of information from the "Internet of Things."[3] It is clear that big data offers enormous potential commercial, social, and political gains. For example, McKinsey Global Institute has estimated that analytics enabled by big data could yield benefits for health care of up to $190 billion annually.[4] Big data enables business researchers and data scientists to do things "at a large scale, that cannot be done at a smaller one, to extract new insights or create new forms of value, in ways that change markets, organizations, the relationship between citizens and governments, and more." [5]

1.1 Big data as an asset

For big data to become the concern of competition laws it should be treated as an asset that a company can gather and use to increase their power in the market and engage in exclusionary practices. If it is considered as asset, question arises as to whether competition authorities should try and adapt enforcement tools to deal with the risk of big data as an asset.[6]

According to current competition law, the definition of relevant market does not consider data unless it is data itself that is being traded. The traditional market definition exercise only addresses existing competition for the specific services offered to users and advertisers on online platforms. There is a need for wider definition to include this market.

Pamela Jones Harbour, who was US Federal Trade Commissioner, started the discussion on the definition of data-related relevant markets. In her dissenting statement in response to the decision of the Federal Trade Commission to clear the

[2] Catriona Hatton, David Gabathuler and Alexandre Lichy, 'Digital Markets and Merger Control in the EU: Evolution not Revolution?' (2018) CPI Chronicle < https://www.competitionpolicyinternational.com/wp-content/uploads/2018/02/CPI-Hatton-Gabathuler-Lichy.pdf > accessed 20 January 2020.

[3] Ohlhausen, Maureen K. and Okuliar, Alexander, 'Competition, Consumer Protection, and the Right (Approach) to Privacy' (2015) Antitrust Law Journal < https://pdfs.semanticscholar.org/541b/da97c6b1627943b4866915bb34d27e507008.pdf > accessed 20 January 2020.

[4] McKinsey Global Institute, 'Game changers: Five opportunities for US growth and renewal' (2013) McKinsey Global Institute < https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Americas/US%20game%20changers/MGI_US_game_changers_Executive_Summary_July_2013.ashx> accessed 20 January 2020.

[5] Ashley I. Naimi, Daniel J. Westreich, 'Big Data: A Revolution That Will Transform How We Live, Work, and Think' (2014) 179(9) *American Journal of Epidemiology*, < https://doi.org/10.1093/aje/kwu085> accessed 20 January 2020.

[6] Ibid at 1.

Google/DoubleClick -merger[7] in 2007, she expressed concerns about the combination of the datasets of the two companies. In order to enable a proper competition analysis of the data issues, she suggested to define 'a putative relevant product market comprising data that may be useful to advertisers and publishers who wish to engage in behavioural targeting'.[8]

Mergers and acquisitions happening in online sector seem to be increasingly motivated by the big data that can be obtained through such endeavour. In addition, particular types of conduct whereby incumbent providers try to leverage their strong market position or to extend their services to other markets may have as objective the accumulation of additional data to be used to improve their own platform.[9]

Because users commonly have free access to online platforms, they choose their provider on the basis of aspects other than price such as quality and the level of innovation that a service offers.[10] When it comes to online platforms, data should be treated as specialized asset which the competing platforms need to create its own services and to attract more advertisers. This concept will enable the courts and competition authorities to identify a relevant market for data in which potential of competition threats can be analysed.

1.2 Dominance through big data

While big data might come with some pro-competitive benefits, some characteristics that entail the necessity of why the big data needs to be controlled and regulated is discussed below.

1.2.1 Entry barriers

Data driven markets are typically characterized by low entry barriers, as evidenced by innovative challengers emerging rapidly and displacing established firms with much greater data resources than themselves.[11] While this cannot be applied to whole of the data market in general, it is mostly true. New entrants with innovative ideas can easily enter the market without the asset of big data backing them up. If the platforms click, then they can accumulate data easily for further development. As such, new entrants are unlikely to be at a significant competitive disadvantage relative to incumbents in terms of data collection or analysis.[12] So, lack of the asset of big data itself cannot be considered as an entry barrier.

Additionally, the unique economic characteristics of data mean that its accumulation does not, by itself, create a barrier to entry, and does not automatically endow a firm with either the incentive or the ability to foreclose rivals, expand or sustain

[7] Google/DoubleClick, FTC File No. 071-0170.

[8] Ibid at 7 .

[9] A.P. Grunes and M.E. Stucke, ' No Mistake About It: The Important Role of Antitrust in the Era of Big Data' (2015) Antitrust Source < https://pdfs.semanticscholar.org/e867/9a20c3d5f316fdfdaf4b94d43390b4c5dd71.pdf > accessed 21 January 2020.

[10] Microsoft/Skype, Case No COMP/M.6281; Microsoft/Yahoo! Search Business Case No COMP/M.572

[11] S. Tucker & Hill B. Wellford, 'Big Mistakes Regarding Big Data' (2014) Antitrust Source < https://ssrn.com/abstract=2549044 > accessed 21 January 2020.

[12] Ibid at 11.

its own monopoly, or harm competition in other ways.[13]

1.2.2 Data is inexpensive and easy to collect

Data is ubiquitous, inexpensive, and easy to collect.[14] The increasing use of internet and smartphones have resulted in endless data being generated on day-to-day basis where users leave behind traces of their needs and preferences. There are third-party sources which will provide you with storage and data processing as well. It is important to distinguish between the collection of raw data and the analysis any given firm puts the data through, which is what makes the data valuable. This is the firm's "secret sauce."[15]

1.2.3 Data is Non-exclusive

Data is non-exclusive and non-rivalrous. Entire world's data cannot be held and controlled by a single firm. If one firm collects some data, the same data can be gathered by another firm through some other means. "Multi-homing" is the norm among internet users—users can, and do, spread their data around the internet, using multiple different providers for multiple different services, or sometimes the same service.[16] This reduces the market power given by the big data and it sets it apart from other key inputs. It is to be noted that there are no exclusivity clauses in terms of service with users, and there are no structures (pricing or otherwise) that lock users into sharing their data with only one provider.[17]

1.2.4 Value of data is short-lived

The nature of big data is such that the value of it is high only when it is new and declines rapidly over time. It has a very limited lifespan. The returns on the particular set of data reduces over time.

Therefore, any competitive advantage that data provides is fleeting, and entrants are unlikely to be significantly disadvantaged relative to incumbents in terms of data collection and analysis.[18]

1.2.5 Data Alone is Not Enough

Mere possession of data is not of much use, even if it is held in large volumes. It does not provide any competitive edge by itself. That can only be achieved through engineering talent, quality of service, speed of innovation, and attention to consumer needs.[19] For example, Tinder, which is an online dating

[13] Anja Lambrecht and Catherine E.Tucker, 'Can Big Data Protect a Firm from Competition?' (2015) < http://dx.doi.org/10.2139/ssrn.2705530> accessed 21 January 2020.

[14] Catherine Tucker, 'The Implications of Improved Attribution and Measurability for Antitrust and Privacy in Online Advertising Markets' (2013) 20(4) George Mason Law Review < https://heinonline.org/HOL/LandingPage?handle=hein.journals/gmlr20&div=38&id=&page=> accessed 21 January 2020 .

[15] D. Daniel Sokol and Roisin E. Comerford, 'Antitrust and Regulating Big Data' (2016) 23 George Mason Law Review < https://ssrn.com/abstract=2834611> accessed 21 January 2020.

[16] Ibid at 13.

[17] Andrea Renda, ' Searching for Harm or Harming Search? A Look at the European Commission's Antitrust Investigation Against Google' (2015) Ctr. for European Policy Studies < https://www.ceps.eu/system/files/AR%20Antitrust%20Investigation%20Google.pdf.> accessed 21 January 2020.

[18] Lesley Chiou and Catherine Tucker, 'Search Engines and Data Retention: Implications for Privacy and Antitrust' (2014) MIT Sloan Sch. of Management < http://ssrn.com/abstract=2441333> accessed 21 January 2020.

[19] Ibid at 15.

application launched in 2012 became a leader in the market even though it did not have any access to user data in the beginning. Giving personalized experience is the key to the functioning of these applications. Similarly, WhatsApp was able to take on more established messaging and social networks because of its low cost and easy-to-use interface.[20]

1.2.6 Highly Differentiated Platforms Need Highly Differentiated Data

Most of the online platforms are unique even if they are offering similar type of service. The data needed by platforms will be particular to its niche. Which implies that data that is crucial for one firm may be completely irrelevant for another firm. In such a situation, a firm's success will depend on collecting and processing data relevant to that particular niche. There is no competition for collection of the same data between the competitors. So, a new entrant can pick a niche where the already existing firms do not have the required data and can easily become an equal competitor in terms of valuable data collected.

It is evident from the above discussion that the characteristics of data are such that larger online firms cannot foreclose rivals from replicating the benefits of Big Data they enjoy, and that Big Data in the hands of large firms does not necessarily pose a significant antitrust risk. Examination of many firms suggest that to build a sustainable competitive advantage from Big Data, a firm needs to focus on developing both the managerial toolkit and organizational competence that allows them to turn Big Data into value to consumers in previously impossible ways, rather than simply amassing tremendous amounts of data.[21]

1.3 Abuse of dominance

While with regard to the above discussion it is possible to conclude that market power isn't necessarily obtained by big data and it doesn't give a decided competitive advantage, it is not as simple as that. Generic information about consumers like gender, age, location and profession are easy to be obtained. But the specific data that is necessary to compete on an equal footing with a prevailing search engine, social network or e-commerce platform provider may not be readily available to others. In a case against twitter, People Browser demonstrated that twitter data is not substitutable to user information from other social networks including Facebook. Particular types of user data may thus not be as widely available as claimed as a result of which it is not unlikely for an undertaking to have a dominant position in a certain market for data.[22]

There is a chance for the online platforms to turn to trade secret protect or intellectual property rights to prevent other from procuring confidential user data. While this doesn't directly relate to dominant position, the fact that the company is going an extra mile to protect such data indicate that it can be put to use in a way that could prove disadvantageous to rival or obstruct new entrants.

[20] Ibid at 13.
[21] Ibid at 13.
[22] Graef, Inge, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38(4) World Competition: Law and Economics Review < http://dx.doi.org/10.2139/ssrn.2657732> accessed 22 January 2020.

The question is how the existence of a dominant position in a market for data can be measured and in particular how value can be attributed to data. Since the same set of data might be of different value to different firms it may be hard, if not impossible, to distinguish different pieces of information and assign value to each of them individually. Behavioral information might be of more value compared to generic information of the user as it will help to predict the future purchases. But it is quite challenging to assign value to data. A better way to evaluate the competitive strength of firms based on its big data would be look at its capacity to make money or other profits through the data. The revenue gained by a provider through licensing of data to third parties, delivering targeted advertising services or offering other paid products and services to customers having data as input indicates how successful it is in the market. Since the value of a dataset depends in particular on how it is employed by its owner and not merely on its sheer volume, market shares can be calculated in a reliable way by looking at the share of the total turnover earned by undertakings active in a potential market for a specific type of data.[23]

If data isn't directly involved in profit making, it is not possible to attribute value to the data (Example: WhatsApp). A possible solution is to look beyond the actual relevant market and look at potential competition as a substitute for actual dominance.

The European Commission has started to take into account potential competition rather than sticking to market shares alone, for assessing the dominance in markets that are highly dynamic in nature. In its Microsoft/Skype merger decision, the Commission argued that market shares only provide a limited indication of competitive strength in the context of the market for internet consumer communications services because of the nascent and dynamic nature of the sector as a result of which market shares can change quickly within a short period of time.[24] A similar reasoning may be applied in future cases involving online platforms such as social networks, search engines and e-commerce platforms that all form part of a dynamic sector.

2. SUFFICIENCY OF EXISTING COMPETITION POLICY

Big data has caught the attention of competition authorities due to two key developments. Firstly, a string of high-profile mergers and acquisitions in digital or internet markets raised the question of a possible competition impact of bringing together and gaining control over large data sets.[25] Secondly, there is a growing desire to better understand the possible (welfare) implications of big data for consumers and markets. A number of cases linked to big data have been considered by competition authorities in recent years. To date, there have been no cases that have found big data to be a basis for a theory of harm on antitrust grounds for mergers or conduct cases.[26]

2.1 Data-related anticompetitive conducts

[23] Ibid at 22.
[24] Microsoft/Skype Case No COMP/M.628.
[25] OECD, Big Data: Bringing Competition Policy to the Digital Era' (2016) OECD Publishing < https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf > accessed 22 January 2020.
[26] Ibid at 15.

The collection of big data does not by itself represent a threat to competition. Although use of data might in specific circumstances discussed below justify regulatory intervention of competition authorities.

2.1.1 Exclusionary conducts

Firstly, competition can be restricted, if the access to data is restricted by a dominant company in an anticompetitive manner. Such a restriction can evolve in different situations. A refusal to access data to a competitor can be anticompetitive if the data is considered as an "essential facility" to the activity of the company requesting access.

More precisely, according to the ECJ's rulings in "Microsoft", [27] an undertaking can request access to a facility and if the incumbent's refusal to grant access concerns a product which is indispensable for carrying on the business in question, if the refusal prevents the emergence of a new product for which there is a potential consumer demand and if it is not justified by objective considerations and if it is likely to exclude all competition in the secondary market then it can be threat to competition policy.

Other precondition is that data owned by the dominant company is truly unique and there is no possibility for the competitor to obtain the data needed to perform its service.[28] A refusal to allow access to data could also be anticompetitive if it is discriminatory, i.e. if a dominant company grants access to certain customers while denying access to customers of a downstream competitor.[29]

Anticompetitive data-driven strategies may also include preventing rivals from accessing data through exclusivity provisions with third-party providers or foreclosing opportunities for rivals to procure similar data by making it harder for consumers to adopt their technologies or platforms.[30] Exclusive agreements can exclude rivals, especially when they are concluded by dominant firms. A network of exclusive agreements might be even more problematic, not only under Art. 102 TFEU but also under Article 101 TFEU.[31]

And finally, data collected on a given market could be used by a company to develop or to increase its market power on another market in an anti-competitive way, e.g. by way of tied sales whereby a company owning a valuable dataset ties access to it to the use of its own data analytics services.[32] As it noted, such tied sales may increase efficiency in some circumstances but they could also reduce competition by giving a favorable position to that company which owned the

[27] GC, Microsoft, T-201/04.

[28] Damien Geradin and Monika Kuschewsky, Competition law and personal data: preliminary thoughts on a complex issue (2013) Tilburg Law and Economic Center < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2 2 16088> accessed 21 January 2020.

[29] Case of Cegedim, French Competition Authority, Decision n° 14-D-06.

[30] Allen P. Grunes and Maurice E. Stucke, ' No Mistake about it: The Important Role of Antitrust in the Era of Big Data' (2015) University of Tennessee Legal Studies Research Paper No. 269 < http://ssrn.com/abstract=2600051> accessed 21 January 2020.

[31] European Commission, "Google", case no. 38740.

[32] Competition and Markets Authority, 'The Commercial Use of Consumer data' (2015) UK Government < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use _of_consumer_data.pdf> accessed 21 January 2020.

dataset over its competitors on the market for data analytics.

2.1.2 Data used for price discrimination

Data can also be a vehicle to facilitate price discrimination.[33] Indeed, by collecting data about their clients, a company receives better information about their purchasing habits and is in a better position to assess their willingness to pay for a given good or service. Price differentiation by itself does not necessarily raise competition concerns. Setting differentiated prices is a key element of competition. Provided that it has market power, the company would then be able to use that information to set different prices for the different customer groups it has identified thanks to the data collected. [34] Thus, price discrimination alone cannot attract the antitrust issues but the company also need to have a market power.

2.1.3 Merger and Acquisitions

Lastly, the collection and access to data can raise concerns in the assessment of merger cases. For a company, a merger can be a strategy to obtain access to new data by acquiring or merging with another company that possesses relevant data. In data-related markets such a merger could increase the concentration of relevant data and restrict entry and expansion for new companies. The Competition law becomes relevant only if the concentration of the data leads to abuse of dominance.

The OECD reports that in sectors related to data, "the number of mergers and acquisitions (M&A) has increased rapidly from 55 deals in 2008 to almost 164 deals in 2012" [35] Furthermore, a merger in data-related markets can also give rise to vertical or conglomerate effects if the merger increases the ability and incentive of a large company to restrict up- or downstream competitors' access to data. In any of these scenarios, competition concerns are more likely the more difficult it is for competitors to replicate the information extracted from the relevant data.

2.2 Role and effectiveness of competition policy

There are few significant cases for the study of effectiveness of the competition policy in case of big data. FTC's analysis in Nielsen/Arbitron demonstrates, current antitrust analysis is well equipped to consider the likely effects on incentives to innovate deriving from mergers between firms in big data spaces.[36]

2.2.1 Microsoft/Yahoo! Search Engine (2010)

Microsoft announced in 2010 to acquire Yahoo! Search Engine. Microsoft was active

[33] Newman, Nathan, 'The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google' (2014) 40(2) William Mitchell Law Review < http://dx.doi.org/10.2139/ssrn.2310146> accessed 21 January 2020.

[34] Bruno Lasserre and Andreas Mundt, 'Competition Law and Big Data: The Enforcers' View' (2017) Italian Antitrust Review < https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Competition_Law_and_Big_Data_The_enforcers_view.pdf?__blob=publicationFile&v=2> accessed 24 January 2020.

[35] OECD, Data-Driven Innovation: Big Data for Growth and Well-Being, 2015), OECD Publishing < http://dx.doi.org/10.1787/9789264229358-en.> accessed 21 January 2020.

[36] Nielsen Holdings, Inc., No. C-4439 .

in the design, development and supply of computer software, while the Yahoo search business subject to the transaction encompasses the internet search and the online search advertising businesses of Yahoo.

The main issue was that after merger there will be an increase in the concentration which would significantly impede effective competition in the relevant markets. The Commission reported that, Google had more than 90% market share of the online advertising market and that the activities of Microsoft and Yahoo in this market amounted to less than 10% market share. The Commission examined the potential impact of the merger on the different market players, namely internet search users, advertisers, online publishers and distributors of search technology.
The Commission after examining approved the merger and concluded that the merger has no negative effects on competition but they also expect it to increase competition in internet search and search advertising by allowing Microsoft to become a stronger competitor to Google.

2.2.2 Microsoft/LinkedIn (2016)

Microsoft planned to acquire LinkedIn in 2016. In its investigation, the European Commission focused on three areas in particular: professional social network services, software solutions for customer relationship management, and online advertising services.

The Commission decision in Microsoft/LinkedIn is noteworthy as it touches upon several interesting issues. First, Microsoft/LinkedIn was the first merger cases in which the Commission defined the relevant market for professional social networking (PSN) services. Second, the Commission dwelled on the role of Big Data in the context of merger review cases. Third, Microsoft/LinkedIn is one of the rare conglomerate merger cases that in the recent decisional practice of the Commission have been found likely to give rise to competition concerns.[37]

In this case, the Commission defined a narrow relevant market for professional social networking services (PSN).In order to set the boundaries of the relevant market for PSN services, the Commission had to establish whether and how this market could be distinguished from the market for social networking (SN) services and whether the enterprise social network services belong to the market for PSN services. PSN present different functionalities, feature and usage cases.
To address the Commission's concerns about foreclosure, the parties committed to

- Allow competing PSNs to maintain current levels of interoperability with Microsoft's Office suite of products.
- Grant competing PSNs access to Microsoft Graph, a gateway for software developers.
- Ensure that PC manufacturers and distributors would be free not to install LinkedIn on Windows and allow users to remove LinkedIn from Windows, should PC manufacturers or distributors decide to preinstall it.

[37] Michele Giannino, 'Microsoft/LinkedIn: What the European Commission Said on the Competition Review of Digital Market Mergers' (2017) < http://dx.doi.org/10.2139/ssrn.3005299 > accessed 23 January 2020.

- Refrain from retaliating against any PC manufacturer for developing, using, distributing, promoting, installing or supporting a Windows PC application for competing PSN providers.

The Commission accepted these commitments in its Phase 1 proceedings and subsequently cleared the merger, without the need for an in-depth investigation. The European Commission granted phase 1 approval of the transaction on 6 December 2016, making the commitments mandatory for a five-year period.[38]

2.2.3 Facebook/WhatsApp Merger Case

2.2.3.1 European Commission

In August 2014, Facebook, which is active in social networking, consumer communications and online non-search advertising services, notified the Commission of its plans to acquire the consumer communications services provider WhatsApp. European Commission examined Facebook's acquisition of WhatsApp and cleared the transaction without conditions. The Commission's investigation focused on three areas: (i) consumer communications services, (ii) social networking services, and (iii) online advertising services.[39]

The EU Commission cleared the transaction on 3 October 2014, after assessing its impact on the internal market in relation to the following services:[40]

(i) Consumer communications services: The Commission found that Facebook Messenger and WhatsApp were not close competitors and that consumers would continue to have a wide choice of alternative consumer communications apps post-merger. Although consumer communications apps are characterized by network effects, the investigation showed that a number of factors mitigated the network effects in this case.

(ii) Social networking services: The Commission concluded that, no matter what the precise boundaries of the market for social networking services are, and whether or not WhatsApp is considered a social network, the companies are distant competitors.

(iii) Online advertising: The Commission concluded that, regardless of whether Facebook would introduce advertising on WhatsApp and/or start collecting WhatsApp user data for advertising purposes, the transaction raised no competition concerns. This is because, besides Facebook, a number of alternative providers would continue to offer targeted advertising after the transaction, and a large amount of internet user data that are valuable for advertising purposes not within Facebook's exclusive control would continue to exist.

Later in the year 2017, the European Commission has been fined 110 million

[38] Amaury Le Bourdon, 'Acquisition of LinkedIn by Microsoft: the Commission publishes its decision' (2017) CMS Lawnow < https://www.cms-lawnow.com/ealerts/2017/06/acquisition-of-linkedin-by-microsoft-the-commission-publishes-its-decision?cc_lang=en > accessed 22 January 2020.

[39] Vicente Bagnoli, 'The Big Data Relevant Market As a Tool for a Case by Case Analysis at the Digital Economy: Could the EU Decision at Facebook/WhatsApp Merger Have Been Different?' (2017) Ascola Conference < http://dx.doi.org/10.2139/ssrn.3064795> accessed 22 January 2020.

[40] European Commission, 'Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover' (2017) <https://europa.eu/rapid/press-release_IP-17-1369_en.htm > accessed 22 January 2020.

euros ($122 million) for providing "misleading information" about its acquisition of messaging service WhatsApp.[41]

2.2.3.2 Germany

In Germany the Bundeskartellamt initiated in March 2016 a proceeding against Facebook - Facebook Inc., USA, the Irish subsidiary of the company on suspicion of having abused its market power by infringing data protection rules with its specific terms of service on the use of user data. The initial suspicion was that Facebook has abused its possibly dominant position in the market for social networks violating data protection provisions consisted in the use of unlawful terms and conditions that could represent an abusive imposition of unfair conditions on users. According to the Bundeskartellamt, some indications of market analysis show that Facebook has a dominant market position in the separate market for social networks, collecting a large amount of personal user data from various sources and creating user profiles Facebook facilitates its advertising customers on targeting sharply their businesses.[42]

On 7 February 2019, the German Competition Authority (Bundeskartellamt) issued a statement on its decision to impose wide-ranging behavioural restrictions on Facebook and its data processing activities. The Bundeskartellamt's decision is not yet final. Facebook has one month to appeal the decision, and has issued press statements confirming that it will be seeking to challenge the decision.[43]

2.2.3.3 India

In *Vinod Kumar Gupta* v. *WhatsApp Inc.*[44], a Chartered Accountant filed a case against WhatsApp Inc. alleging contravention of provisions of Section 4 of the Competition Act, 2000. It was contended that since January 2016 WhatsApp has waived off its subscription fee of US$0.99 per annum and is providing the service for free. The subscription fee being the only source of revenue since WhatsApp follows no-ads product strategy, it was alleged that WhatsApp is sourcing funds from its parent company i.e. Facebook and hence it is abusing its dominant position by indulging in the practice of predatory pricing because in this manner the company is trying to provide services which is below the cost and has the ability to reduce or eliminate the competition.

The sole contention raised against privacy policy was that it has contravened Section 4 by mandating the users to agree with its privacy policy and hence enforcing them to share their account details with "Facebook". For the issue concerned the Commission determined the relevant market as "the market for instant messaging services using consumer communication apps through smartphones in India" and accepted the

[41] Arjun Kharpal, 'Facebook fined $122 million by EU for giving 'misleading information' about its takeover of WhatsApp' (New Delhi, 18 May 2017) < https://www.cnbc.com/2017/05/18/facebook-fine-eu-whatsapp-takeover.html> accessed 21 January 2020.

[42] Ibid at 38.

[43] James Vincent, 'Facebook ordered to stop combining WhatsApp and Instagram data without consent in Germany' (7 February 2019) < https://www.theverge.com/2019/2/7/18215143/facebook-whatsapp-instagram-third-party-user-data-combined-banned-germany-fco-competition > accessed 21 January 2020

[44] 2017 SCC OnLine CCI 32.

dominant position held by WhatsApp. In this regard the Order specifically noted that 96% of the smart phone devices in India had WhatsApp installed on them and that 51% and 56% of internet users in India where active on WhatsApp and Facebook respectively, every day.

The Competition Commission of India concluded that WhatsApp did not indulge in any anti-competitive practice. The Commission stated that there was no indulging in predatory pricing as WhatsApp has waived off its subscription fee of US$0.99 because of the fact that the other competitors in the relevant market like Hike and Viber were providing the same services for free of cost which appears to be a standard practice in the business. Moreover, there wasn't any switching cost, moving from one consumer communication app to another is convenient since almost all of them are freely available, they have simple user interface, information about them is free accessible and they can co-exist on the same handset.

While dealing with the contention regarding abuse of dominance by introduction of privacy policy, the Commission noted that WhatsApp did provide the option to opt out from sharing user account information within 30 days of agreeing to the privacy policy as against the allegations of the informant and in fact the content is protected by end-to-end encryption from the service provider or any other third party. Under the policy the contact list of the user account is shared with Facebook to improve online advertisement and "the Facebook family of companies" use the information to enhance infrastructure and delivery system, securing systems and fighting spam.[45]

2.3 Analysis

After analyzing the above cases, it can be concluded that there is a role for competition authorities in case of big data. The competition authorities in various jurisdictions have interpreted the competition policy widely when dealing with the big data concerns, whereas the Competition Commission of India have failed in taking into consideration the factors which are prominent in bid data i.e., the network effects, predatory pricing in *Vinod Kumar Gupta* v. *WhatsApp Inc.*[46] and thus the CCI failed to keep up the objective of its establishment. Indian law does not allow the convergence of competition and privacy concerns, the European Commission rightly accords centrality to consumer welfare in accounting for privacy concerns in its evaluation of mergers. Anti-competitive effects of data aggregation affecting the quality of services or goods offered as well as privacy protection by the concerned companies will be part of a deal's competition assessment by EU regulators.[47] CCI has failed to into privacy as a pricing factor to decide a case of bigdata cases. Ergo, there is need for wider interpretation of the laws existing as they are sufficient enough to deal with the big data generated antitrust issues.

[45] Varun Agarwal, 'Predatory pricing and data integration concerns' (2017) SCC ONLINE.

[46] 2017 SCC OnLine CCI 32.

[47] Anupriya Dhonchak, 'Datafication and the Privacy Blindspot in Indian Competition Law' (2018) Kluwer Competition Law < http://competitionlawblog.kluwercompetitionlaw.com/2018/12/04/datafication-and-the-privacy-blindspot-in-indian-competition-law/ > accessed 23 January 2020.

3. CONCLUSIONS AND SUGGESTIONS

3.1 Conclusion

When we think about anti-trust issues with respect to big data, there are points and reasons for it to be considered anti-competitive and not anti-competitive. If we look at Big data with the traditional competition law and strictly interpret them, it might not constitute any anti-trust issues. But, that would be a wrong approach for analysing an entirely new concept. Rather than looking into the existing laws, we have look at the objective behind the Competition law itself. The goals of the competition law is to promote competition in the market and to ensure the consumers are benefitted from such competition. Even though, there are not many cases where the existing laws found any anti-trust issues with big data, we can safely say that there are indirect threats to competition. In the era of big data, conventional principles may not hold good as they did before. This warrants a new approach which takes into account the dynamics of the digital market. It is concluded that big data imposes anti-trust issues.

Up until now, whenever a question involving data arose, the competition commission considered it to be an issue if data protection laws. They did not look at it from the competition law perspective. But the situation has changes as recently the competition authorities have pronounced their decision such as in Microsoft/Yahoo! Search Engine, Microsoft/LinkedIn, Facebook/WhatsApp Merger Case. After analysing the above cases, it can be concluded that there is a role for competition authorities in case of big data. The competition authorities in various jurisdictions have interpreted the competition policy widely when dealing with the big data concerns, whereas the Competition Commission of India have failed in taking into consideration the factors which are prominent in bid data i.e., the network effects, predatory pricing in *Vinod Kumar Gupta* v. *WhatsApp Inc.*

3.2 Suggestions

The emergence of new technologies, business models, and even markets creates challenges for antitrust authorities. The existing antitrust theories and practices are no longer effectively applied in the fast moving digital markets. Antitrust authorities have to develop novel theories of harm or seek additional powers to address real or perceived enforcement gaps in this era of Big Data. When it comes to online platforms, data should be treated as specialized asset which the competing platforms need to create its own services and to attract more advertisers. This concept will enable the courts and competition authorities to identify a relevant market for data in which potential of competition threats can be analysed. The Competition authorities have to take into account potential competition rather than considering market shares alone, for assessing the dominance in markets that are highly dynamic in nature.

The various competition law authorities have evolved new theories to assess the anti-competitive conduct in case of data driven firms. Although, the Indian law does not allow the convergence of competition and

privacy concerns, the European Commission rightly accords centrality to consumer welfare in accounting for privacy concerns in its evaluation of mergers. Anti-competitive effects of data aggregation affecting the quality of services or goods offered as well as privacy protection by the concerned companies will be part of a deal's competition assessment by EU regulators. CCI has failed to into privacy as a pricing factor to decide a case of bigdata cases. Ergo, there is need for wider interpretation of the laws existing as they are sufficient enough to deal with the big data generated antitrust issues.

*****