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Big Data Mergers: An Analysis of European and Indian Competition Law Regime

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Abstract

In a digitally dominated economy, big data plays an integral role in furthering a company's commercial interest and is processed by firms to understand how to provide better products and services to consumers. To substantially enhance the datasets available with a business, mergers and acquisitions between entities have become common in recent times. While such growth increases the potential of innovations and enhances the economic growth of the merged entity, it also brings to light various antitrust dilemmas.

The paper discusses the competitive implications of such deals in the light of the European and Indian competition regimes. The European competition regulator has significantly contributed to the growth of the competition regime. With a few companies threatening to monopolize the European economy, it has become extremely vigilant in handling big data mergers. The Indian competition laws are at a nascent but are rapidly evolving stage and have been following the European competition approach to tacking big data mergers while keeping in mind any unique challenges posed by the Indian markets.

The paper also analyzes the various competition and allied issues that competition regulars consider while approving big data deals. Data privacy and consumer welfare are two issues that are becoming increasingly intertwined with competition law. The recent Google/Fitbit deal is an instance of the same, where privacy of health data concerns and consumers' welfare are two parameters that competition regulators consider.

Lastly, the article examines the lacuna in merger control of big data deals in India. It discusses the provisions added in the forthcoming 2020 amendment in the Indian Competition legislation to overcome the challenges posed by big data mergers and promote competition in markets.

Keywords

Data, Competition Law, Big Data, Big Data Mergers, Consumer Welfare

Imprint

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1. Introduction

Big data is characterized by volume, velocity, and variety and refers to the large volume of various data collected at high velocity (Organisation for Economic Co-operation and Development [OECD] 2017). Big data is beneficial to businesses as it facilitates a better understanding of consumers or trends in the market, which allows firms to enhance the goods and services provided [1]. With the advent of various technological innovations, the amount of big data stored and the rate at which it is processed has significantly increased over time. Further, another important aspect is how much data is used. It is used to allow companies to make effective decisions and interventions in the market [2].

As firms seek to accumulate larger data sets, a rise in big data mergers is witnessed. Big data mergers and acquisitions allow a company to inorganically grow and gain leverage over incumbent players in the market. Big data mergers are not, *per se,* anti-competitive. However, competition regulators have debated how to approach them since such deals can pose implications in various aspects of competition law and allied laws.

The European Commission (**EC**) has become increasingly aware that a handful of firms have accumulated large market share and now often have been dominating the market to prevent new competition from entering it [3]. The humungous datasets that have been accumulated over time through mergers and acquisitions have contributed to the same. As big data entities pose a threat to monopolize the European market, the EC has become vigilant in ensuring robust competition is maintained across markets [4].

The Indian regulator, Competition Commission of India (**CCI**), is a relatively new establishment compared to other antitrust regulators. Further, with Indian going through the liberalization and privatization

phase in the late 20th century, players have been seeking to enter the Indian market. Various markets are yet in a nascent stage in the Indian economy. The CCI has to perform the dual role of ensuring sustainable economic growth and sufficient incentives for new players to enter the Indian markets. The modern competition legislation in India is relatively new. Due to the lack of historical bases like in other jurisdictions like Europe and America, competition concerns are much higher in India [5].

2. Implications of Big Data Mergers

Big data mergers have lasting implications not only on competition law but on various allied laws such as data privacy and consumer welfare. The accumulation of data in the hands of one entity inevitably leads to data protection issues. Further, due to such monopolization, other incumbent players will not have an incentive to evolve their products and services, which might affect the consumers' right to free choice and force consumers a limited range of goods and services [6].

Despite the above, big data mergers cannot be classified under the *per se* rule since various economic advantages are tied to the same. Big data mergers prompt two entities. Their own data sets, prior experience in the market, financial and other resources come together. To create a better-merged product, the firms will inevitably spend their expenditure on innovation and research, which will compel other existing firms to constantly keep coming up with innovations and upgrades to stay relevant in the market. Consequently, big data mergers inevitably do promote innovation and growth in markets leading to economic prosperity [7]. Another implication of growth in the innovation of an enhanced set of products is that it will lead consumers to choose better goods and better choices in goods and services available for the varied consumer data preferred.

One may argue that consumers benefit from big data mergers since various services are provided free of consideration. However, in Matrimony.com v. Google (Case Nos. 07 and 30 of 2012), the CCI discusses how consumers are giving up their data, which eventually contributes to the datasets of these businesses as consideration [8].

3. Data

Data privacy was often perceived as something, which is exclusively under the jurisdictions of privacy regulators. However, as various big data mergers disclosed, privacy is an inextricable part of mergers and acquisitions. It often may be used to further business agendas by not respecting the privacy of consumers. Antitrust regulators are increasingly becoming aware of the interplay between the same. Recently the big tech companies, GAFA, prominently known to be the abbreviation form of Google, Apple, Facebook, and Amazon, were questioned by the American Congress (Romm, 2020) on various aspects, *among other things,* their implications on the markets and the questionable privacy policies which allow entities to unfairly monopolize the market by compromising user and seller data across digital platforms [9].

3.1. European Perspective

European antitrust regulators refused to consider issues arising out of privacy in competition cases. Initial cases such as the TomTom/Tele Atlas (Case No COMP/M.4854*)* and Google/ DoubleClick (Case No COMP/M.4731*)* analyzed competition issues in isolation to privacy issues. However, a significant shift was seen in the EC's approach in Facebook/WhatsApp. Although the EC held that data protection rules were outside its scope of jurisdiction, it did acknowledge that personal data has a part to play in the market of online advertising (Case No COMP/M.7217) [10]. Subsequently, in the recent Microsoft/LinkedIn case, it further blurs the separation approach it had once adopted to consider data protection as a non-price parameter in competition law (Case M.8124). Apart from the EC, the German Competition regulator, Bundeskartellamt, went ahead to attribute further importance to privacy in competition law by holding Facebook liable for abusing its dominant position due to Facebook's policy of collecting consumer data from third-party apps (Bundeskartellamt, 2019). While data privacy regulators continue to have jurisdiction, there is also an increased consideration about the extent to which EC should take into account privacy-related issues while examining the incentive it may pose for two big data entities to merge [11].

3.2. Indian Perspective

Compared to the European regime, the Indian regime has a relatively restrictive approach to considering privacy in competition regulations. In Matrimony.com v. Google (Case Nos. 07 and 30 of 2012), the CCI observed that the importance of big data can be equat-

ed to that of oil in the 20th century and is increasingly used by firms to target advertisements and produce its revenue [12]. However, in Vinod Kumar Gupta v. WhatsApp Inc., the CCI held that privacy concerns under the Information Technology Act, 2000 are beyond its purview (Case No. 99 of 2016). Thus, the CCI is yet to adopt a broader approach to competition law vis-à-vis data protection like its European counterpart. However, since Competition law in India is still at a nascent stage, CCI will eventually adopt a similar stance as the European regulator [13].

3.3. Leveraging Dominance

Leveraging refers to a dominant firm in its existing market, seeking to enter a new market by misusing its dominance and bypassing competition (Roy & Kumar, 2016). Recent trends of tech companies, which are dominant in their existing market, seek to enter different markets by inorganically growing through mergers and acquisitions with companies, which are incumbent players in the markets. Merging the pre-existing dominance of such Tech companies with the data that the other firm already possesses has resulted in various antitrust issues [14].

3.4. European Perspective

As noted in Tetra Park International SA v. Commission (Case C-333/94P), Article 82 of the EC Treaty provides that there must be an associative link between the dominant position and the alleged abusive conduct. An instance of an entity accumulating market power and entering different markets would be that of Facebook. Facebook, being a big tech, practices what is infamously known as killer acquisition. It strategically acquires or merges with firms, which can be its competition in the future to quell the competition at the beginning stages only [15]. Facebook's acquisition of WhatsApp and Instagram are the most prominent ones, which has allowed the company to enter the messaging market and solidify its presence in the social media market. EC initially allowed these acquisitions since they did not pose a great anti-competitive threat when concluding the deal. However, as we witness now, Facebook has solidified a huge consumer database by inorganically growing its company. As a result, the EC is questioning whether such deals were let off too easily. The recent Facebook/GIPHY acquisition is facing stricter scrutiny by regulators all over the world [16].

3.5. Indian Perspective

Unlike the European Competition regime, the associate market link does not have to be established in the Indian Competition law as discussed by the CCI in MCX Stock Exchange v. NSE of India Ltd. (Case No. 13/2009). The recent WhatsApp Pay order would be an example of alleged leveraging of dominance to enter an emerging market by a big data entity (Harshita Chawla v. WhatsApp Inc., Facebook Inc., and Case no. 15 of 2020). WhatsApp had introduced the pre-installation of WhatsApp pay along with the WhatsApp messaging feature. It was challenged before the CCI that WhatsApp, backed by Facebook-owned significant consumer data due to its dominance in the market for Over-The-Top (**OTT**) messaging apps through smartphones [17]. It was alleged that WhatsApp was exploiting the dominance and trying to bypass competition to enter the market for Unified Payment Interface (**UPI**) enabled digital payment applications in India. The CCI did hold WhatsApp *prima face* dominant in the OTT market. However, it also considered that the UPI market was nascent. There was a presence of enough competition with incumbent players like Google Pay and PayTM. It held that pre-installation did not mean mandatory usage of the payment feature. People could still opt to avail themselves of just the messaging services. Thus, WhatsApp would not be able to leverage its power and abuse the dominance it enjoyed [18].

Thus, the CCI took into consideration the market power of the entity and the fact that various markets are merely emerging markets in the economy. Competition needs to be promoted by allowing such entities to enter the market.

3.6. Google/Fitbit

The recent big data deal would be Google and Fitbit, which has various regulators scrutinizing it in light of the increased awareness of the potential implications big data has on the markets. The acquisition represents a traditional case of a big data merger, which has potential implications on antitrust and data privacy, and consumer welfare. The acquisition has been reviewed by the Australian Competition and Consumer Commission, which released a Statement of Issues outlining their concerns (Australian Competition and Consumer Commission [ACCC] 2020) [19].

The Commission noted that Google claimed it would not utilize the personal data of Fitbit to further

Google's stake in the market. However, big data entities are known to mislead regulators regarding this.

The most relevant example would be that of Facebook/WhatsApp (Case No COMP/M.7217). Facebook had, before the merger, assured the European Competition Commission that it would be unable to merge WhatsApp customer data. However, subsequently, WhatsApp introduced significant changes to its privacy policy. It had surfaced that Facebook had knowingly provided misleading information to the regulators (European Commission [EC] 2017). Albeit a fine was imposed, it did not adversely affect Facebook. Thus, the ACCC noted that big data companies could not be taken for their word. A proper regulation mechanism has to be put in place to ensure the data is not merged subsequently [20].

ACCC noted the implications of this deal in the markets of online advertising and wearables. It stated that Google would receive much information about their customers due to this acquisition, which would make it favorable to online advertisers. It already has a dominant position in the stated market. It can potentially be able to monopolize and use unfair methods to curb competition. Further, having access to such health data would also deter other upcoming health appliances from a fair chance of flourishing in the market.

Google already provides its applications to certain wearable brands. If it were to acquire Fitbit, it would introduce its applications in Fitbit and have the potential to reduce competition in the emerging wearable market eventually.

The EC also initiated a probe in the matter (European Commission [EC], 2020). The two considerations of the EC during this investigation is the fact that firstly, Google acquiring Fitbit, the database maintained by Fitbit about its users' health would be with Google, and secondly, the technology of Google to develop a database similar to Fitbit's one to lessen the competition in wearables market substantially. (European Commission [EC], 2020) Google had a strong market position in online advertisement services. (European Commission [EC], 2020), which would have a potential impact on the online search, display, and ad-tech markets.

Like the ACCC concerns, the EC also pointed out the implications in the digital health sector and Google's ability to decrease the interoperability of its operating system with other wearables.

The EC will continue its investigation of the same and adjudicate the matter by the end of the year, similar to the ACCC [21].

It is yet to be seen whether the matter will be notified in India. However, considering India's wearable market is still an emerging market with the potential of players to enter and dominate and that Google already has a dominant position in various other Indian markets, the matter should be scrutinized by the CCI. The deal can affect not only online advertising markets but also the wearables market in India.

4. Results and Discussions

As per the Competition Act, 2002 (**Act)** those mergers, which meet the threshold under Section5 will be scrutinized as per Section 6. However, in the digitally backed economy, various companies often elude the traditional thresholds. Various deals that have serious implications on the Indian economy in recent times, such as Facebook/WhatsApp and Snapdeal/Free charge, were not scrutinized by the CCI since they did not match the traditional threshold Act. Thus, there is a need that is felt to scrutinize the deal value of a deal. It focuses on whether the value of a transaction exceeds the set threshold.

However, the Competition regulators also have to consider that such deals often lead to innovation and contribute to the growth of the economy. In Matrimony.com v. Google (Case Nos. 07 and 30 of 2012), the CCI considered this fact. It discussed that digital economy markets include innovation cycles. Public intervention in such markets should be proportional to the fact that it does not restraint such innovation. However, at the same time, the market is regulated [22].

Regulators have to consider the amount of data that an entity will possess once a said big data merger goes through. In the recent Apple/Shazam case (Case M.8788), one of the main concerns of EC was the amount of commercially sensitive data that Apple would acquire due to the acquisition. Commissioner Margret Vestager said that data is the key in the digital economy. It is important for deals, which include important sets of data to be reviewed [23]. It considered whether the commercially sensitive data of consumers, which Apple would be able to access due to the acquisition, would allow it a competitive edge in the music market (European Commission [EC], 2018) [24].

Thus, there has to be a balancing line between regulators to ensure that innovation is guaranteed in mar-

kets. There is no inherent bias against such big firms and mergers of the same. However, at the same time, regulators have to be careful and ensure that they do not exploit the dominant position that they have achieved in the market. As new start-ups are coming up rapidly in various markets, they have to be ensured that they have a fair chance of competition with incumbent payers and the entry barriers are not so high [25].

Breaking up Big Tech companies is a proposition that has been suggested recently to control the unfathomable dominance that some firms have acquired in the economy till now. However, this has not been a very common trend that regulators adopt, which may lead to a discouraging message to companies that have genuinely, through merits, acquired dominance and market power in a particular market. Big Data mergers are something that is a reality in the economy. The contemporary competition regime in the world has to be adjusted accordingly [26].

5. Forthcoming Indian Competition 2020 Amendment

The traditional way to regulate only those mergers in which the asset or the turnover crossed a particular threshold according to the Section 5 of the Competition Act, 2002 (**Act**) has been falling short of considering the potential implications of a big data merger. As a result, this has been introduced in the Draft Competition Amendment Bill, 2020 (Ministry of Corporate Affairs, 2020) [27]. Germany and Austria have introduced such provisions in their national legislations. However, the EC has resisted so far since it believes too many transactions will be captured due to this provision (European Commission [EC] 2019). Whether this provision will have a positive effect on the Indian economy is yet to be seen. Since India has shifted towards a free-market economy, the concern of the EC that it may capture too many transactions should be one that Indian legislators should consider. However, at the same time, a type of regulation must be introduced to ensure big deals do not go unnotified like in the past. It would be interesting to see the implications that this provision will have in Germany and Austria in the future and then understand it from an Indian context [28].

The forthcoming data privacy legislation, such as the draft Non-Personal Data Report (Ministry of Electronics and Information Technology [MEITY], 2020), may also imply the Competition Law regime in India. However, it is to be seen to what extent this would affect the CCI.

6. Conclusion

Antitrust regulators have often been criticized for not considering the potential effects of a big data deal on the markets. European legislators have recognized the harmful implications that big data mergers have in monopolizing the economy and scrutinizing the potential ones with greater detail. The market scenario in India is different from that of Europe, which is relatively established. India is still a growing and nascent market with developing Competition Laws. India would want to invite big investments such as the recent Facebook/Jio (Competition Commission of India [CCI], 2020). There has been further news of Google investing in the home-grown Reliance Company (Ghosh, 2020). While these are deals that are welcoming news to further the Indian economy, the Indian regulators must learn from past big data deals of Europe, which have had adverse effects, and scrutinize such activities in India. Such deals and investments cannot be at the cost of harming the Indian economy in the long run and raising entry barriers for new players to enter.

While big data mergers do lead to innovation and growth, they also can cause serious implications in the long run. Further such deals cannot be approached from a strict competition view. The markets and businesses have become interconnected, and CCI should consider the effects of data to its extent affecting competition and not straight out preclude itself from the ambit of the Information Technology Act, 2000. It is yet to be seen if the forthcoming 2020 Amendment has a positive implication in preventing particular deals from eluding the thresholds. Further, the Indian government has acknowledged the importance of data in the economy. It has introduced various legislations such as the Personal Data Protection Bill and the Non-Personal Data Report, which may also have future implications in how companies handle consumer data. Big data mergers need to be assessed carefully, keeping in mind past mergers and the future implications they may hold.

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