

## **THE TECH TITANS AND ANTI-TRUST CONUNDRUM IN INDIA**

Author(s) Name - Trisha Shreyashi & Kumar Gourav

### **ABSTRACT**

Amazon, Facebook, Google, Apple, Microsoft, and Flipkart – the tech titans, or supposedly wicked monopolists that stifle competition, jump laws, and harm consumer interests. Against the backdrop of this fantasy world, there has been a gathering storm of probes initiated on these tech giants. The Competition Commission of India (CCI) has been quite proactive in bringing the heavens down with anti-trust investigations for about half a decade now, keeping the big tech on their feet. The trend, however, seems to have escalated quite alarmingly since the lockdown. More recently, an anti-trust investigation into Apple Inc.'s alleged abuse of its dominant position has been launched at the behest of information filed by a Rajasthan-based non-profit organisation namely "Together We Fight Society" (TWFS). It alleges that Apple has imposed on the app-developers, the mandate of paying an in-app fee of up to 30% for distribution of paid digital content and using its IOS-based payment mechanism. This alleged unfair move led to higher operational costs, thereby damaging market competition by discouraging new entrants. Apple has denied the allegations and stated that they command only about 0-5% market share in India, while Google commands 90-100%. Apple further argued that they charge less from small developers to eliminate unfair or excessive levies. CCI's earlier positions indicate that an entity could be held liable for abusive practices only if it is the single dominant entity in the said relevant market. This is further complimented by the observation in *Sonam Sharma v. Apple* (2013) wherein CCI refused to delineate a distinct relevant market for Apple iPhones as single-brand markets are rarely tenable. Therefore, the authors opines that the regulatory framework of the Competition Commission needs to be carefully analysed.

### **INTRODUCTION – CCI & its Regulatory Conundrum**

The CCI had probed Google and other tech giants time and again with allegations of abuse of their dominant position. Also, in 2020 for mandating the usage of Google Pay for making all purchases through the play store. In light of these investigations, it is important to acknowledge the "Epic" American juxtaposition and the European Gold Standard. The allegations that Apple faces before the American & European authorities are similar to the case as aforementioned. The Californian Federal Court in the case of *Epic Games v. Apple* (2021) observed that Apple's terms for payment of commission aren't anti-competitive nor is it a

monopolist in the gaming market. However, it noted that Apple's 30% commission rate was inflated which could have been potentially anti-competitive if it were not for technical flaws in the arguments made by Epic Games. It may be pertinent to mention that the Court found Apple's anti-steering restrictions forbidding app developers who direct consumers to third-party payment systems as anti-competitive, while upholding App Store's structure as legally tenable. Accordingly, an injunction was issued to eliminate this mandate and Apple discarded the practice globally. However, such injunction shall not apply to its App store policies, one of which is the impugned issue before the CCI today.

Similarly, Apple faced similar charges before the European Commission (EC) at the behest of a complaint made by Spotify app in 2020 for the same issue as mentioned above. The EC found Apple to be a dominant entity in music market, preliminarily. Inferring from the past decisions, EC has been proactive in strict enforcement of competition rules against the big tech, making it unlikely for Apple Inc. to walk away scot-free. CCI has also been embroiled in investigating Flipkart & Amazon, for complaints of similar grounds of abuse of dominant market position. Prior to that, it had taken *suo moto* cognizance over Whatsapp's new privacy policy and user agreement. It is fascinating how the Commission differed from its own stance it gave with regard to the privacy policy changes of Whatsapp in 2016 wherein it had opined that issues of privacy do not fall within the jurisdiction of the Commission. CCI justified the change in stance by stating that it is the 'take it or leave it' nature of the 2021 privacy policy changes which constitutes the abuse of the dominant position held by Whatsapp in the tech market, which allows it to take up the matter.

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Authorities ought not to forget that corporate giants like big tech were once small startups. While some instances of curtailing competition could be true, all tech titans ought not to be perceived as corporate sharks. They foster and sustain innovation as is the case of Facebook acquiring Whatsapp. One could infer from the aforementioned instances that some grudge could be misdirected against big-tech, capitalism, and free markets rather than crony capitalism and competition distorting regulations. This stems from a fundamentally misconceived idea that larger firms are monopolies and anti-trust breaks them up. The framework for Indian competition law needs to upgrade itself to an economy fueled by technology. Thereby, it is pertinent to underscore the fallacies in facilitating a regulatory roller coaster that leads to a loss of innovation and competition.

The larger questions that the Indian authorities ought to keep in view while deciding on such matter are: -

- i. Whether the substance and framework for antitrust law for the technology sector in the future would be based on overhauling the basic objectives with little use of incremental approach and betting on bold plans instead?
- ii. Whether deconcentrating American commerce in a growing 'techonomy' like that of India aids in applying an effects-based approach over a rules-based approach, a libertarian approach that CCI has been underscoring?

## 1. BRIEF OF INVESTIGATIONS BY CCI INTO BIG-TECH CORPORATIONS

### 1.1. Google

An anonymous party filed a complaint on 20<sup>th</sup> February, 2020 against Google in relation to their policies surrounding Google Play to CCI. The CCI ordered DG on 9<sup>th</sup> November, 2020, to initiate an investigation against Google for anti-competitive activities and to determine whether the developers have to use Google Play's billing system to distribute their apps through Google Store and to pay a service fee of 15-30% on the sale of digital goods as a service fee.<sup>1</sup>

Furthermore, on October 6, 2021, respondent No. 2, Alliance of Digital India Foundation (ADIF), is said to have submitted an application with the Commission under *Section 33* of the Competition Act, requesting that the Commission prohibit the petitioners' Google Play Billing Clarifications.

The investigation is currently ongoing and the Google has approached the Karnataka HC for seeking to quash the order of CCI to reject disclosing the name of developers/start-ups suffering harm from the said policy.<sup>2</sup> Google has also increased the compliance date to 31<sup>st</sup> October 2022.

### 1.2. Amazon

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<sup>1</sup> Mustafa Plumber, 'Google Moves Karnataka High Court Challenging CCI Order In Case Related To Play Store Payment Policy' (28 December 2021) <https://www.livelaw.in/news-updates/karnataka-high-court-google-india-private-limited-cci-google-play-store-payments-policy-188469> accessed 31 December 2021.

<sup>2</sup> Google India Private Limited v. Competition Commission of India, WP 24277/2021.

Last year, the CCI initiated a probe after the trade association Delhi Vyapar Mahasangh claimed that Amazon and Flipkart had entered into exclusive sales deals with smartphone manufacturers to sell particular phones through a handful of favored retailers.<sup>3</sup>

The Mahasangh also claimed that Amazon and Flipkart gave selected merchants preferential treatment by giving them higher search rankings and promising to pay for a portion of the discounts that such merchants would offer during major sales events like Flipkart's Big Billion Days and Amazon's Prime Day.<sup>4</sup>

The CCI highlighted that agreement between smartphone companies and online platforms, which resulted in a few dealers selling specific phones solely on a single platform, warranted a probe, as did purported linkages between the platforms and these sellers.<sup>5</sup>

CCI identified indications of vertical arrangements in the form of “preferred vendors” and “preferential listings” of such sellers on both Amazon and Flipkart in its prima facie judgment requesting inquiry by the DG. In the context of violations of Section 3(4) of the Competition Act, 2002 in the Inter-platform, intra-platform, and inter-channel distribution, which can be found to be causing an appreciable adverse effect on competition in India, given the substantial market power held by both of these online platforms.<sup>6</sup> It was challenged in Karnataka HC and Supreme Court, but both declined to interfere stating that the challenged order was in the nature of an administrative directive requiring no previous notice or hearing to Amazon and Flipkart, and denying any intervention in the CCI's order.<sup>7</sup>

### 1.3. Facebook

On March 24, 2021, the CCI took *Suo moto* notice and launched an investigation into WhatsApp and Facebook. This was in response to WhatsApp's recent disclosure to customers of changes to its privacy policy and terms of service, allowing the company to share user data with its parent company, Facebook. The CCI has come to the preliminary opinion that

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<sup>3</sup> Karunjit Singh, ‘Explained: Issues in Antitrust Probe against Amazon and Flipkart’ (*The Indian Express*, 11 August 2021) <https://indianexpress.com/article/explained/explained-sc-ruling-on-antitrust-investigations-into-amazon-flipkart-its-impact-7446970/> accessed 31 December 2021.

<sup>4</sup> Ibid.

<sup>5</sup> Vaish Associates Advocates, ‘Can Amazon Be Tamed in India -Antitrust Probe -Will It Be Forced To Change Its Modus Operandi In India?’ (1 November 2021) <https://www.mondaq.com/india/antitrust-eu-competition-/1125694/can-amazon-be-tamed-in-india-antitrust-probe-will-it-be-forced-to-change-its-modus-operandi-in-india> accessed 31 December 2021.

<sup>6</sup> Ibid.

<sup>7</sup> Amazon Seller Services Private v. CCI, Writ Petition (No. 3363/2020).

WhatsApp's new privacy policy and terms of service appear to be an abuse of dominance that violates the Competition Act of 2002.<sup>8</sup>

The CCI recognized, among other reasons, that privacy is a key non-price characteristic of competition in which market actors compete, and that the contested data sharing between WhatsApp and Facebook degrades such non-price criteria. Surprisingly, in reviewing WhatsApp's 2016 privacy policy update, the CCI discovered that violations of the Information Technology Act 2000 and the right to privacy do not fall under its scope.<sup>9</sup> However, the CCI has reasoned in the present proceedings that the 2016 upgrade did not breach the Competition Act since it enabled users to opt out of sharing information with Facebook, whereas the 2021 change does not.

While dismissing claims of abuse of dominant position in August 2020, the CCI noted that exploitation of sensitive customer data may generate antitrust concerns as well as data protection problems.<sup>10</sup> The CCI's Market Study on Telecom Sector, issued earlier this year, was the most important development in this area.<sup>11</sup> The CCI discovered through this study that privacy can take the form of a non-price parameter of competition and that diluting the parameters for privacy protection inadvertently leads to an abuse of dominance, implying a lack of consumer welfare.<sup>12</sup>

#### 1.4.Apple

The Competition Commission of India directed the Director General to conduct the investigation within 60 days, stating that Apple's in-app payments system is required for paid apps and in-app purchases, restricting app developers' ability to choose a payment processing system of their choice, especially since it charges a commission of up to 30% for app purchases and in-app purchases.<sup>13</sup>

<sup>8</sup> In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, CCI, Case No. 01 of 2021.

<sup>9</sup> Shri Vinod Kumar Gupta, Chartered Accountant v. WhatsApp Inc., CCI, Case No. 99 of 2016.

<sup>10</sup> Harshita Chawla v. WhatsApp and Facebook, CCI, Case no. 15 of 2020.

<sup>11</sup> 'MARKET STUDY ON THE TELECOM SECTOR IN INDIA- Key Findings and Observations' (Competition Commission of India 2021) [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf) accessed 30 December 2021.

<sup>12</sup> Apurv Pratap Singh and Hrishav Kumar, 'Antitrust Regulators v. Big Tech: The Battle Reaches India' (*Oxford Law Faculty*, 22 July 2021) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/07/antitrust-regulators-v-big-tech-battle-reaches-india> accessed 31 December 2021.

<sup>13</sup> Manish Singh, 'India Antitrust Watchdog Orders Investigation into Apple's Business Practices' (*TechCrunch*, 31 December 2021) <https://social.techcrunch.com/2021/12/31/india-antitrust-watchdog-orders-investigation-into-apples-business-practices/> accessed 31 December 2021.

The CCI began investigating the issue after a complaint was made by *Together We Fight Society*, a non-profit organization in Rajasthan. According to the group, Apple's policy, which prohibits app developers from utilizing a third party or their own payment system, has a substantial impact on the profits they produce.

CCI orders the investigation holding that at this point, it appears that the lack of competitive constraint in mobile app distribution is likely to affect the terms under which Apple provides app developers with access to its App Store, including commission rates and terms that prevent certain app developers from using other in-app payment systems.<sup>14</sup>

- **Orders under section 26(1) of the competition Act**

On the 22nd of June, 2021<sup>15</sup>, an investigation was launched based on information filed by Kshitiz Arya and Purushottam Anand against Google LLC, Google India, Xiaomi, and TCL India Holdings. They alleged that Google abused its dominant position in the smart TV market by entering into anti-competitive agreements with Xiaomi and TCL to sell TVs with proprietary Google apps, and based on the informants' evidence submissions, it was concluded that Google had abused its dominant position

The Competition Commission of India opened an investigation into WhatsApp on March 24, 2021<sup>16</sup>, regarding its updated terms of service and privacy policy, in Suo Moto Case No.1 of 2021, against WhatsApp and Facebook (now known as Meta), that users were required to accept their new privacy policy, which shared data with Facebook, which formed a prima facie case due to the "take it or leave it" nature of the new policy, and an investigation was ordered.

On November 9th, 2020, *XYZ v. Alphabet Inc*, Google LLC, and its Ireland and Indian Subsidiaries<sup>17</sup> were announced. Google was accused of abusing its dominant position in the market by unfavorably recommending its apps to consumers and unfair monopoly in the manner governing payments and in-app purchases through its store, similar to the prior case. It was determined that there was a prima facie case of misuse of its dominating position, and the DG was ordered to investigate the malpractices committed.

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<sup>14</sup> Together we fight society v Apple Inc., CCI, Case No. 24 of 2021.

<sup>15</sup> Kshitiz Arya v. Google LLC, 2021 SCC OnLine CCI 33

<sup>16</sup> WhatsApp LLC, In re, 2021 SCC OnLine CCI 19

<sup>17</sup> XYZ v. Alphabet Inc., 2020 SCC OnLine CCI 41

On January 13, 2020, the Delhi Vyapar Mahasangh resolved to sue Flipkart and Amazon<sup>18</sup>. According to the informants, Flipkart and Amazon have vertical deals with their preferred suppliers, who were controlled indirectly by the firms themselves. Furthermore, these corporations allegedly offered steep discounts on products sold by vendors who were affiliated with them in some way, as well as preferred listing for these merchants, who would have exclusive tie-ups and private labels, thus limiting competition. In these cases, a *prima facie* violation was found, and an investigation was launched.

On August 9th, 2019<sup>19</sup>, a decision was reached in the case of Matrix Info Systems against Intel Corporation and Intel Technology. The informant was a parallel importer of Intel microprocessors, and he said that Intel changed its warranty policy to only cover products purchased in India, rather than globally. It was determined that Intel Chipsets' India-specific warranty violated regulations restricting market commerce and denying parallel importers access, necessitating an investigation.

Umar Javeed, Sukarna Thapar, and Aaqib Javeed against Google LLC and Google India's case were decided on 16<sup>th</sup> April, 2019.<sup>20</sup> The informants alleged that Android was a free open-source software, but for utilising apps and framework by Google, manufacturers had to enter into multiple agreements with Google, many of which were allegedly anti-competitive, and that they allegedly bundled and made the installation of its applications and GMS suite mandatory, which amounted to an unfair condition on manufacturers while also leveraging Google's dominant position, which required an investigation by the DG.

The case of Velankani Electronics against Intel Corporation was decided on April 16, 2019.<sup>21</sup> The informant was a server manufacturer that needed to create its own server boards, of which the processor is a key element, and needed design files from Intel to do so, which it delivered to the informant but then revoked for no apparent reason. Intel had a dominating position in the processor market, which it had abused by refusing the informant access to its files in order to prevent the creation of custom CPUs for its chipsets, prompting an investigation.

- **Orders under Section 26(2) of Competition Act**

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<sup>18</sup> Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited, 2020 SCC OnLine CCI 3

<sup>19</sup> Matrix Info Systems Private Limited v. Intel Corporation, 2019 SCC OnLine CCI 31

<sup>20</sup> Umar Javeed v. Google LLC, 2019 SCC OnLine CCI 42

<sup>21</sup> Velankani Electronics Private Limited v. Intel Corporation, 2018 SCC OnLine CCI 87

The case of *Baglekar Akash Kumar v. Google LLC & Google India* was decided on January 29th, 2021.<sup>22</sup> Because of the dominance of its programmes, it was said that Google was a dominant player in practically every aspect of technology, including phones, laptops, PCs, and other gear. However, no anti-competitive behaviour was discovered due to the informant's failure to provide sufficient evidence of Gmail's and Google's superior market positions.

On September 11th, 2020, the case of *Lifestyle Equities CV & Lifestyle Licensing B.V v. Amazon Seller Services, Amazon Export Sales, and Cloutail India Private Ltd*<sup>23</sup> was decided. The Informants, who were the owners of the Beverly Hills Polo Club Brand (BHPC), claimed that the opposing parties offered fake BHPC at an unfairly discounted price, resulting in a large volume of online traffic to Amazon's site to buy these products, lowering the informants' brand value significantly. It further claimed that Amazon exploited its clout to offer deep-discounted products for particular brands and that it had gone into anti-competitive agreements, erecting trade barriers. The "anti-competitive" agreements were not exclusive in nature and were open to working with competing web platforms, therefore there was no violation of the rules.

The case of *Harshita Chawla and Others vs. WhatsApp and Facebook* was decided on August 18, 2020. WhatsApp was accused of monopolising the messaging business and coercing customers by incorporating WhatsApp Pay with its software, which was unethical. Because the sheer existence of the app does not lead to transactions and there was no proof of coercion on WhatsApp's behalf, the case was rejected.

On November 8, 2018, the case of *KC Marketing v. OPPO Mobile*<sup>24</sup> was decided. The informant worked as an OPPO phone distributor under an agreement that allegedly prohibited sales outside of the sales territory and levied hidden expenses. The informant had not provided evidence of any VAT evasion or overdue dues; hence no case of non-compliance was found.

All India Online Vendors Association against Flipkart India Private Limited and Flipkart Internet<sup>25</sup> case was decided on 6<sup>th</sup> November 2018. It was alleged that Flipkart was engaging in preferential treatment to certain sellers, but it was concluded that no case of contravention was found since the agreements entered into by Flipkart were not imposing restraints on sellers and that e-commerce was still in its nascent stage, which needed careful intervention.

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<sup>22</sup> *Baglekar Akash Kumar v. Google LLC*, 2021 SCC OnLine CCI 2

<sup>23</sup> *Lifestyle Equities C.V. v. Amazon Seller Services Private Limited.*, 2020 SCC OnLine CCI 33

<sup>24</sup> *K.C. Marketing v. OPPO Mobiles MU Private Limited*, 2018 SCC OnLine CCI 94

<sup>25</sup> *All India Online Vendors Association v. Flipkart India Private Limited*, 2018 SCC OnLine CCI 97

Tamil Nadu Consumer Products Distributors Association against Fangs Technology Private Limited and Vivo Communication Technology Company<sup>26</sup> case was decided on 4<sup>th</sup> October 2018, citing unfair clauses in distribution agreement by the Informant. It was concluded that due to insufficient evidence presented, no contraventions were found.

Vinod Kumar Gupta against WhatsApp Inc<sup>27</sup> case was decided on 1<sup>st</sup> June, 2017. The informant alleged that since WhatsApp was acquired by Facebook, its users were forced to share their details to continue using it, since it had a dominant share in the world market, alleging that users' data could be sold. It was decided that no case existed against the OP, since many other free or low-cost alternatives were available and thus, the market barrier allegations did not hold any substance.

- **Order under Section 27 of the Competition Act**

Matrimony.com ltd and Consumer Unity and Trust Society against Google LLC, Google India and Google Ireland<sup>28</sup> involved clubbing of 2 cases, was decided on 31<sup>st</sup> January 2018 with both informants alleging that Google promoted its own companies by mixing their results in organic searches and abusing its dominant position in ads placed on unfair terms and conditions with websites. Google was found to be in contravention of the rules, which included abusing dominance with regards to universal results and unfair negotiation terms with ads on Google.

Vishal Gupta with Albion Info Tel Limited against Google LLC, Google Ireland, and Google India<sup>29</sup> case was decided on 12<sup>th</sup> July 2018. Both informants were engaged in remote tech services and used AdWords by Google for advertising. They alleged that Google's bidding process for AdWords was opaque and unfair, with unfair conditions being imposed on advertisers. Since google had suspended Informant 1's AdWords account to launch Google Helpouts, they also alleged that it was a denial of market service. However, on an investigation by the DG, CCI did not find any rules being flouted and dismissed the case, except for a single dissenting opinion.

## **2. MECHANISM TRIGGERING PERVASIVE BEHAVIOUR AGAINST BIG-TECH CORPORATIONS**

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<sup>26</sup> Tamil Nadu Consumer Products Distributors Association v. Fangs Technology Private Limited, 2018 SCC OnLine CCI 95

<sup>27</sup> Vinod Kumar Gupta v. WhatsApp Inc., 2017 SCC OnLine CCI 32

<sup>28</sup> Matrimony.com Limited v. Google LLC, 2018 SCC OnLine CCI 1

<sup>29</sup> Vishal Gupta v. Google LLC, 2018 SCC OnLine CCI 56

Big tech companies are now even more important in today's digital world, even more since the pandemic has led to people relying even more on the internet for doing their jobs. This has led to many players in the online space, which includes online shopping platforms such as Amazon, Flipkart, etc; big software and tech companies such as Google, Apple, Intel, etc. Many of these corporations are an indispensable part of many people's lives; almost every person uses the Google search engine for searching for any query they have.

Considering the earlier investigation filed by the CCI against Google against the mandatory preinstallation of the GMS suite into the free and open-source android system which included confidential details were allegedly leaked to the media while in CCI's custody, which it denied.<sup>30</sup>

The Competition Act of 2002 brought India's competition legislation up to pace with those of other countries on the world stage, but the challenge of putting its restrictions into practice remains. In the years 2018-19, CCI's imposed penalties extend up to ₹357.85 crore, but only ₹1.41 crore in penalties was collected till 31<sup>st</sup> March 2019, which is the result of many of these cases pending appeals in the NCLAT, which lead to a disappointing number in penalties that have been collected by the CCI.<sup>31</sup> With regards to the European Union, Google was fined over €8 billion by the European Commission for anticompetitive behaviour from 2017 to 2019 and its original decision was that Google's practices had restricted free and fair trade practices, reduced competition, and harmed consumers.<sup>32</sup>

Furthermore, due to its focus on pre-COVID times, when physical businesses operated and their web domain was not widely used, India's Competition Act, of 2002 is rapidly becoming obsolete. However, this is no longer the case with the COVID-19 outbreak, as practically every firm was forced to fully connect with the online domain, necessitating a tighter oversight over antitrust acts undertaken online. As a result, the Competition Act of 2002 must be changed to align with antitrust rules in the United States and the European Union.

## 2.1. USA

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<sup>30</sup> Express News Service, Google approaches Delhi HC against CCI report leak The Indian Express (2021), <https://indianexpress.com/article/cities/delhi/google-delhi-hc-cci-report-leak-7529529/> (last visited Dec 31, 2021).

<sup>31</sup> Arjun Srinivas, Why antitrust is a jumbo Indian problem mint (2021), <https://www.livemint.com/news/india/why-antitrust-is-a-jumbo-indian-problem-11596375452543.html> (last visited Dec 31, 2021).

<sup>32</sup> Google appeal EU's 8 billion dollar antitrust penalty, MARCA (2021), <https://www.marca.com/en/lifestyle/us-news/2021/09/27/615209aa46163f98bd8b4608.html> (last visited Dec 31, 2021).

Antitrust regulators in the United States recognize the relevance of Big Data and the potentially negative impacts of data concentration, which occurs when several technological businesses own or control access to enormous amounts of data and are able to monetize such data.<sup>33</sup> At the same time, US antitrust regulators are grappling with exclusionary behavior such as refusals to deal and market power tying by giant data-driven corporations. Furthermore, while Big Data is important across industries, corporations get distinct competitive advantages depending on the kind of data and industry, making it difficult to build a new universal method for resolving competitiveness problems.<sup>34</sup>

As a result, Big Data antitrust enforcement in the United States is more likely to arise in the context of merger evaluations. Data is already considered by US antitrust regulators in the context of merger filings, and in Big Data mergers, they analyse whether the combination of the firms would impair competition by creating barriers to entry for new market participants.<sup>35</sup> In the near future, US antitrust enforcers are unlikely to tackle data privacy concerns under an antitrust regime since they have regularly proclaimed privacy issues to be within the authority of the Federal Trade Commission's (FTC's) Consumer Protection Bureau rather than a competitive issue.<sup>36</sup>

The US Supreme Court concluded in its 2018 American Express case that some two-sided platforms constitute a single market, and that the determination of whether specific restrictions imposed on one side of the platform are anticompetitive must assess both sides of the platform in a balancing test.<sup>37</sup> When balanced against the competitive benefits afforded to American Express credit card customers, the Supreme Court determined that the anticompetitive harm that may emerge from arrangements American Express had with businesses accepting its credit cards was not anti-competitive.<sup>38</sup>

While individual acquisitions may not constitute a danger to competition, when these acquisitions are combined, they may have anti-competitive consequences. In the field of

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<sup>33</sup> Timothy Cornell & Abigail Cessna, 'Do Not Pass Go: A New Card in US Antitrust Enforcement of the Tech Titans' (2019) 15 *Competition L Int'l* 227.

<sup>34</sup> *Ibid.*

<sup>35</sup> Press release, 'FTC challenges Reed Elsevier's proposed \$4.1 billion acquisition of Choice Point, Inc', *Federal Trade Commission*, 16 September 2008, <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-reed-elseviers-proposed-41-billion-acquisition>.

<sup>36</sup> Maureen K Holshausen and Alexander P Okuliar, 'Competition, consumer protection, and the right [approach] to privacy', 80 *Antitrust Law Journal*, 121 (2015).

<sup>37</sup> *Ohio v American Express Co*, 138 S Ct 2274 (2018).

<sup>38</sup> *Ibid.*

artificial intelligence (AI), for example, Google has bought more than a dozen AI businesses over the last decade.<sup>39</sup> Unsurprisingly, other major technology companies have made several purchases in this field.<sup>40</sup>

US antitrust regulators have historically maintained a hands-off approach to enforcement against technology businesses, claiming a desire not to stifle innovation via overzealous enforcement. The antitrust agencies are now focusing more on the technology industry. The FTC launched its Technology Task Force and the Division announced an inquiry into internet platforms within a six-month timeframe. If previous probes are any indication, future inquiries into technological corporations might take years.

## 2.2. EU

The European Union Commission has investigated a number of major tech firms. The European Commission started watching big tech more than two decades ago. As the digital economy has evolved, antitrust issues have been pushed to the forefront of the Commission's policy agenda. When it comes to serious technological difficulties, however, competition authorities must address the unique characteristics of high-tech markets that set them apart from “conventional” markets.

Significant market shares in tech markets, for example, may not signify market dominance because they can suddenly become worthless due to the introduction of a competitor's new, innovative product. The Commission acknowledged this directly in its decision on the Facebook/WhatsApp merger. .<sup>41</sup>

Access limits to internet platforms have also been a point of contention, as seen by significant recent instances such as Google Android.<sup>42</sup> This issue included, among other things, Google Play Store is linked to Google Search and Chrome online search functionality, barring competing search applications and browsers from being pre-installed. The Google Shopping case<sup>43</sup> focused on Google's practice of suppressing or degrading product results from rival

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<sup>39</sup> 'The race for AI: Google, Intel, Apple in a rush to grab artificial intelligence start-ups', *CB Insights*, 27 February 2018, <https://www.cbinsights.com/research/top-acquirers-ai-startups-ma-timeline/>.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Facebook/WhatsApp*, case COMP/M 7217, Commission Decision C (2014) 7239 (2014), paragraph 99.

<sup>42</sup> *Google Android*, case AT 40099, Commission Decision of 18 July 2018.

<sup>43</sup> *Google Search (Shopping)*, case AT 39740, Commission Decision 2018/C 9/08 (2018) OJ C 9/11.

comparison shopping services, while the Google AdSense<sup>44</sup> case evaluated Google's rivals in online search advertising's ability to post search advertising on third-party websites.

When it comes to mergers, data has also been carefully considered. In the case of Facebook/WhatsApp, the European Commission considered whether Facebook would have gained access to WhatsApp data.<sup>45</sup> The European Commission examined Microsoft's capacity to utilize data as input to develop a service while possibly hindering rivals' access to data needed to make comparable changes to their competing products in Microsoft/LinkedIn case.<sup>46</sup>

Acquisition of possible rival small and medium startups or expanding ventures is a factor that has helped giant tech businesses to constantly extend their influence.<sup>47</sup> This approach, known as a 'killer acquisition,' goes unnoticed by antitrust authorities since such deals are not frequently captured by the regulatory thresholds for mergers based on turnover or market share. According to Unlocking Digital Competition, a report commissioned by the United Kingdom Government's Digital Competition Expert Panel, Amazon, Apple, Facebook, Google, and Microsoft completed around 250 acquisitions in the last five years.<sup>48</sup> However, according to the study, "none of these mergers were voluntarily announced to the CMA [the UK's Competition and Markets Authority], and none were brought in for inquiry."<sup>49</sup>

The takeover of a lesser rival may also result in an abuse of the dominant position, a strategy adopted by the European Commission in the *Continental Can* case over 40 years ago when merger control regulations did not exist.<sup>50</sup> It may be claimed that this generates an examination of the intent behind the acquisition endeavour, but disclosure orders are procedural instruments for dealing with this evaluation. Furthermore, it should not be forgotten that abuse is defined by the substance of the activity and its possible consequences, independent of intent.

### 2.3. India

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<sup>44</sup> *Google Search (AdSense)*, case AT 40411, Commission Decision of 20 March 2019.

<sup>45</sup> N (15).

<sup>46</sup> *Microsoft/LinkedIn*, case M 8124, Commission Decision C (2016) 8404 [2016].

<sup>47</sup> Rino Caiazza, 'Recent Developments in EU Antitrust Enforcement against Big Tech' (2019) 15 *Competition L Int'l* 181.

<sup>48</sup> *Ibid.*

<sup>49</sup> Digital Competition Expert Panel, *Unlocking digital competition*, March 2019, p 91 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf), last accessed 31<sup>st</sup> December, 2021.

<sup>50</sup> *Europemballage Corp and Continental Can Co v Commission*, Case 6/72 (1973) ECR 215.

The CCI, like its counterparts in other countries, is currently debating whether its action in digital markets is justified where empirical evidence of harm exists, or whether to modify the existing framework of the Competition Act, 2002 in anticipation of possible issues with digital market practices.<sup>51</sup> A study of the CCI's large tech rulings suggests that it is cautious about utilizing the Act as the principal instrument for regulating technology companies access to Big Data.<sup>52</sup> Although it is actively monitoring this sector, the CCI appears to have chosen a “wait and see” strategy over aggressive intervention so far.<sup>53</sup>

Although the CCI has investigated digital platform activities, its approach to market definition, and particularly online platform markets, is evolving. The CCI used the two-sided structure of Flipkart's operation to define the market as “services supplied by online marketplace platforms” in the Flipkart case.<sup>54</sup> Nonetheless, in *Matrimony.com v Google* (Google Search case), although acknowledging that Google functioned in a two-sided platform market, where one side (search) would not exist without the other (advertising), the two-sided nature of Google's search and advertising model was rejected in favor of two independent relevant markets of ‘online general web search services’ and ‘online search advertising services’.<sup>55</sup>

In the tech industry, user data has supplanted market shares as the go-to metric for assessing dominance used by competition regulators.<sup>56</sup> The CCI stated in the Google Search case that Google is rewarded by ‘eyeballs,’ that is, user data serves as a payment for its search services.<sup>57</sup> The CCI compared the value of ‘data’ to the value of ‘oil’ in the twentieth century. While the CCI, like other antitrust enforcement agencies, sees access to user data as a significant driver in digital and platform markets, the CCI's worry about access-related market power tends to be alleviated in situations where there is evidence of sufficient user multihoming.

For example, the CCI found that consumers are consistently and smoothly multihomed between several service providers in separate charges of abuse of power against WhatsApp<sup>58</sup> and domestic cab aggregator, Ola.<sup>59</sup> According to the CCI, the ease of multihoming imposes

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<sup>51</sup> Aditi Gopalakrishnan, Hemangini Dadwal, Krithika Ramesh & Rajshree Sharma, 'Recent Developments in Big Tech Regulation in India' (2019) 15 Competition L Int'l 191.

<sup>52</sup> Ibid.

<sup>53</sup> *All India Online Vendors Association v Flipkart* (Flipkart case), case No 20 of 2018.

<sup>54</sup> Ibid.

<sup>55</sup> *Matrimony.com v. Google*, Case No 7 and 30 of 2012.

<sup>56</sup> *Belaire Owners' Association v. DLFLtd*, case No 19 of 2010.

<sup>57</sup> *Matrimony* (n 37).

<sup>58</sup> *Vinod Kumar Gupta v. WhatsApp Inc* ('WhatsApp case'), case No 99 of 2016.

<sup>59</sup> *Fast Track Call Cab Pvt Ltd v. ANI Technologies*, case Nos 6 and 74 of 2015.

sufficient competitive restrictions to mitigate data aggregation issues. When investigating online dominance, the CCI is also not afraid to look at competitive restraints from offline players.<sup>60</sup>

In the Google Search case,<sup>61</sup> the CCI discovered:

- (1) The visibility (and subsequent performance) of other search/travel websites is affected by the location of the commercial unit for Google Flights at the top of the page.
- (2) The 'more search results' link at the bottom of the unit directs users to Google's specialized search results page, denying them further options.

The CCI's solution was to advise Google to properly designate the 'more search results' link as going to a Google result page.

According to the CCI's interpretation, any sort of action by a dominant organization that may be perceived as exploitative of users is likely to violate the Act, without necessary assessing for factual proof of harm. The CCI specifically declared that in circumstances involving exploitative behaviour inflicted on a customer, "the sheer existence of such conduct" may be sufficient to qualify as abuse of power under the Act.<sup>62</sup>

### **CONCLUSION AND SUGGESTIVE REMARKS**

A large segment of our Indian population regularly uses software, search engines and applications developed and maintained by extremely powerful and wealthy multinational corporations such as Amazon, Alphabet, Apple, Meta (formerly known as Facebook), Intel, etc. Almost all of us use Google as a search engine for our daily purposes of searching news, photos, visiting websites, downloading songs, watching movies, and a lot of other functions. Amazon has recently stepped into the Indian market with its new Prime feature, which gives consumers access to a large number of movies, original series, songs, and priority shipping. All at a convenient price. Meta, the company behind Facebook, owns almost every facet and major social media apps that we use such as WhatsApp, Facebook, Instagram, and Messenger.

Because of government prohibitions around the world, many people began utilizing the service more regularly after COVID. As a result, Amazon's profits surged by a stunning 220 %

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<sup>60</sup> *Cloudwalker Streaming Technologies Private Ltd v Bennett, Coleman and Co Ltd*, case No 46 of 2015.

<sup>61</sup> *Matrimony* (n 37).

<sup>62</sup> *Indian National Shipowners 'Association v Oil and Natural Gas Corporation Ltd*, case No 1 of 2018,

compared to pre-COVID periods<sup>63</sup>. Other online retail sites, including Flipkart, Nykaa, Myntra, and others, have experienced similar surges in online internet traffic.

Many of the incidents discussed above include anti-competitive behaviour by large tech companies compelling developers to use their own payment systems, allowing them to profit from commissions on transactions made through their apps.

The American Innovation and Choice Online, a Bill that was discussed in the earlier section is a step that India could take to prevent big tech companies from unfairly promoting their own products, which is seen by many of the antitrust cases in the first section being related to these companies abusing their dominant position in the market by favoring certain sellers, who are also alleged to have tie-ups and internal connections with these firms.

At a time when the EU is setting the standard for data protection and privacy regulations around the world, the Indian draft of the Data Protection Bill is trying to match the GDPR's clarity and concentrated approach to data protection. As noted in the previous section, it is far from flawless even after being sent to a standing committee for refinement.

There is a need for a focused and clear approach by the Indian government towards harmonising the market and reducing the gap between a big tech firm and a small tech firm. Moreover, Indian anti-trust laws must be amended to take cognisance and issue penalties for corporate monopolies. For most of their history, the major four US internet behemoths—Amazon, Apple, Facebook, and Google—have been seen as scrappy start-ups. Consumers adored their products, authorities mainly ignored them, and competitors were purchased or went out of business.

Over the last half-decade, a small group of activist academics and lawyers has advanced a novel argument: New-age internet companies frequently engage in anti-competitive behaviour not by cartelizing and raising prices, but by keeping consumer prices low, or even free, and exploiting this to achieve dominance across multiple business verticals.

With a handful of internet corporations expected to control 30% of global GDP by 2030, the key question for many authorities across the world is this: Is free (or inexpensive) too high a price to pay in some specific circumstances?

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<sup>63</sup> Karen Weise, Amazon's profit soars 220 percent as pandemic drives shopping online. *Nytimes.com* (2021), <https://www.nytimes.com/2021/04/29/technology/amazons-profits-triple.html> (last visited Dec 31, 2021).

In India, Reliance Jio pioneered a form of this concept by providing free services for nearly a year following its 2016 launch. We have never considered drafting legislation against anything that is free in India. We never imagined such a day would arrive. However, digital monopolies, whether free or not, might have major consequences for individuals and democracies.

India has two options: accept progressive new antitrust techniques that may come from the ongoing global churn and help build more innovative markets or adopt a limited nationalistic stance and define the problem as solely a “foreign” monopoly issue.

In the coming years, e-commerce is going to be an especially perilous minefield. According to a recent CCI market analysis, Flipkart and Amazon engaged in anti-competitive behavior through techniques such as substantial discounts. The practice of exclusive collaborations between smartphone manufacturers and e-commerce companies has also been under regulatory criticism. With the epidemic boosting internet purchasing and therefore upping the stakes, and Jio pitching itself as an Indian challenger to American behemoths, disputes are only going to arise.

The CCI faces the difficult task of balancing antitrust enforcement while not inhibiting innovation or growth in 'India Tech.' Although it is crucial for any fledgling regulator to learn and execute global best practices, it is also critical for the CCI to be conscious of the Indian market's uniqueness, stage of growth, and competitive conditions. Given the CCI's broad powers, it is critical that the CCI examine conduct using an evidence-based method. The first findings of the CCI's in-depth e-commerce industry investigation indicate that it is leaning toward a cautious rather than interventionist strategy.

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