

GAFAM IN INDIA. IS CCI READY FOR THE BATTLE AHEAD?

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ABSTRACT

Despite being a non-financial metric, data is pertinent to the discussion of online platforms since it is essential to all online platforms. When it comes to online platform services like product alerts, catalogues, search results, and customer databases, users may see data as the "price" they have to pay. Data collection by online platforms gives rise to practices like price discrimination, predatory pricing, and self-preferencing. Data collection and the digital economy are fundamentally impacted by the rise of GAFAM (Google, Apple, Facebook, and Amazon) corporations, which are leading the Fourth Industrial Revolution by offering their users the combined output of the physical, biological, and digital worlds. These digital behemoths have abused their power to harm small businesses and customers who entrust them with their personal information under the guise of providing easily accessible, innovative, and effective services. These companies analyse data and develop new processes and products to beat the competition. The GAFAM has redefined traditional business models, affecting every aspect of the life of an ordinary person. In the modern world, "GAFAM rules the world today" has become a given. The Competition Act, 2002 is insufficient to address the issues, even with the amendments made in 2022. Even if data-driven enterprises have an unconventional effect on the market and customers, it does not allow CCI to view them in a different way. Thus, the steps taken are insufficient to amend the act and put an end to these unfair business practices.

INTRODUCTION

The emergence of the digital economy, whose foundation is DATA, has profoundly altered the dynamics of contemporary society. It is a resource that corporations are utilising to enhance their dominance and power. This concept has transformed traditional relationships between individuals, businesses, and customers. Its introduction has enabled a flexible and effective market ecology that is accessible across multiple time zones and locations. In addition, the border between the physical and digital worlds is blurring due to data collection, organisation, and analysis, or what we refer to as the Internet of Things. (IoT). This automates and anticipates

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essential data processing tasks. The emergence of GAFA (Google, Apple, Facebook, and Amazon) corporations, which are at the forefront of the Fourth Industrial Revolution by providing their users with the combined output of the physical, biological, and digital worlds, is fundamental to data collection and the digital economy. Under the pretence of offering easily accessible, cutting-edge, and effective services, these digital behemoths have misused their influence to hurt small businesses and customers who entrust them with their personal information. To outperform the competition, these businesses analyse data and create new products and procedures. The GAFA has impacted every aspect of a layperson's life by redefining conventional business models. "GAFA rules the world today" has become a truism in the contemporary world.¹

The four major tech companies take advantage of customers and rivals while posing as trailblazers of innovation, affordability, and easy access to high-quality products for consumers. In essence, these businesses gather information (or purchase it), evaluate it, and then create products and initiatives to outperform all competitors in the market. The investigation of GAFA was unified by their dominance in their respective markets, which they had acquired through data accumulation. It appears that developed nations, such as the US and EU, are battling the negative effects of online platforms' collection of data. The four internet giants are expanding their operations in India at a rate that has never been seen before, and now is the perfect moment for India to protect its market and economy from suffering from similar anti-competitive problems in the future.

ABUSE OF THE HEGEMONIC POSITION

Data is relevant to the discussion of online platforms even though it is a non-monetary metric because data is the lifeblood of all online platforms. Users may view data as the "price" they must pay to access online platform services such as catalogues, search results, product alerts, and customer databases. Online platforms' data collection leads to the emergence of practices such as predatory pricing, price discrimination, and self-preferencing. But until now, competition watchdogs around the world had been using the consumer welfare yardstick, which had spared the big tech companies from antitrust scrutiny.²

¹ Abhishek Unnithan, Killer Acquisitions in the Digital Market, Metacept- Communicating the Law, accessible at <https://metacept.com/killer-acquisitions-in-the-digital-market>

² Dhriti Mitra, GAFA – An Economy of Untamed Capitalism <https://cbcl.nliu.ac.in/competition-law/gafa-an-economy-of-untamed-capitalism/>

These tech giants have abused their power to harm local businesses and consumers who trust them with their personal data under the guise of providing accessible, innovative, and efficient services. These companies analyse data and develop products and processes to beat the competition. The GAFA investigation focused on data-driven market dominance. Google and its tech quadropoly billionaires Apple, Amazon, and Facebook cannot be tamed by any government except the US or EU. When Tencent, Alibaba, and Baidu are added, their market capitalization rises to \$3.72 trillion, surpassing Germany's \$3.6 trillion GDP. Google was investigated for using its search engine dominance across multiple digital platforms, stealing data from third parties on its ad network, and boosting its own content traction, while Facebook was questioned for its constant acquisitions of potential competitors. Amazon's CEO was informed of the company's use of third-party seller data to create rival products, which resulted in obvious data exploitation when Amazon launched home brands like AmazonBasics to offer generic products at lower prices, eliminating competitors. Apple's software and app distribution was under investigation. Google, Apple, and Facebook's game-changing acquisitions garnered attention.³ GAFA enters new industries and dominates them using its market dominance in one. Facebook has an e-wallet platform and a cryptocurrency library. GAFA, with its large investments in financial services, could become the future of finance if unregulated. These internet giants use "price customisation" and "differential pricing" to exploit customers. Based on research and personal preferences, the same website's prices for identical goods may vary. The Indian Newspapers Society (INS) says media organisations don't know Google's total advertising revenue or their share. The CCI found that, superficially, these abuse of dominant position claims fall under the Competition Act of 2002 and warrant a thorough investigation by the Additional Director General. The ADIF joined a CCI investigation into Apple's app market dominance in May. Apple's commercial operations in the country were investigated by the CCI last December for antitrust violations.⁴

LEGAL FRAMEWORK IN INDIA

While Google, Apple, Facebook, and Amazon have all been the subject of numerous complaints in India, the Competition Commission of India (CCI) has also suo moto ordered an investigation into the businesses' operations. In the Indian market, large tech companies are

³ Mint, US tech giants too powerful, antitrust panel chair warns, July 29, 2020, available at <https://www.livemint.com/companies/news/us-tech-giants-too-powerful-antitrust-panel-chair-warns-11596046864337.html> (Last visited on December 17, 2020).

⁴ Francesca McClimont, "CCI takes Google Android case to Supreme Court" <https://globalcompetitionreview.com/article/ci-takes-google-android-case-supreme-court>

notorious for their anti-competitive behaviour. For instance, Google has repeatedly been accused of anti-competitive behaviour in India. The accusations have included search bias, unfair advertising policies, and preferential app promotion. The US Antitrust Committee is also investigating these exact same allegations.

In the year 2011, in the case of *Sonam Sharma v. Apple Inc.*,⁵ The complainant had claimed that Apple was forcing iPhone users to choose only specific network providers by abusing its dominant position in the smartphone market. The Indian competition regulator rejected the complaint because it believed that iPhones could not be distinguished as a separate product category when determining the relevant market. On the other hand, *Umar Javed v. Google LLC*⁶ marked the beginning of Indian big data jurisprudence when the CCI acknowledged that iPhones are a distinct product market from Android products. It is a positive step that CCI has finally acknowledged the architecture of the modern marketplace; on the other hand, it needs to move quickly to control the market failures caused by GAFA and set strict antitrust standards.

Regarding laws, the Competition Act, 2002, Section 19⁷, gives the CCI the authority to look into any claims of anti-competitive behaviour that contravene Section 3 or Section 4 of the Act. The factors that CCI must take into account when conducting any inquiry or investigation are also outlined in Section 19. But none of the parameters seem to take into account the power that data-policies wield. Furthermore, India conducts an ex-ante merger review, in which the criteria outlined in Section 20(4) of the Act are used to evaluate the merger. However, both technology and traditional businesses must adhere to the same set of rules. As a result, the Act does not give CCI the tools it needs to evaluate data-driven businesses that affect the market and consumers in unconventional ways.

The definition of "price" under Section 2(o)⁸ of the Act is sufficiently expansive to include personal information and preferences disclosed to the participants in the digital market, according to the Competition Law Review Committee Report (CLRC Report). Furthermore, the committee thought that control over data was covered by Section 19(4)(b), which establishes the parameters for evaluating a firm's dominance and includes "resources of the

⁵ *Shri Sonam Sharma vs Apple Inc. USA & Ors.*, 2013 SCC OnLine CCI 25 : [2013] CCI 19 : (2013) 114 CLA 255

⁶ *Umar Javeed, Sukarma Thapar, Aaqib Javeed vs. Google LLC and Ors.*, Case 39 of 2018 CCI.GOV.IN

⁷ The Competition Act, 2002, §19.

⁸ The Competition Act, 2002, §2(o).

enterprise." It was also believed that Section 19(4) was broad enough to take "network effects" into account when assessing a firm's dominance. While the CLRC Report is a positive start, the recommendations are merely symbolic until CCI approves and implements the recommendations.

The Indian Competition Regime's approach to overcoming potential antitrust issues arising out of big tech giants is indistinguishable from the ex-ante merger review analysis of any other company. The term ex-ante aptly describes the Indian merger regime as it requires the parties to the combination to notify the Commission after meeting a certain threshold set out under Sections 5⁹ and 6¹⁰ of the Competition Act, 2002('Act'). Fulfilling these thresholds guarantees the combination to be approved to an extent. If the combination looks to cause an Appreciable Adverse Effect on Competition ('AAEC'), the Competition Commission of India ('Commission') conducts an investigation into the matter under Section 20(4)¹¹ of the Act.

STEPS TAKEN TO CURB GAFA IN THE WORLD

Competition regulators which include the CCI in India, the EC in Europe, and the FTC in the US, as well as national government policymakers, are becoming more aware of how Big Tech conglomerates like Amazon, Google etc. affect competition. This may lead to regulatory or legislative action to break up these digital giants into smaller companies (as proposed in the US) or regulate their business practices. (as in the EU)¹². The ongoing evolution of AI with machine learning capabilities of super platforms like WhatsApp and Facebook has already generated a global debate on the more effective use of competition law as the key tool for addressing super platforms, with abuse of dominance against exclusionary conduct, the enforcement of which initially concerns whether to order super platforms to make their data accessible to their competitors. CCI should consider the US's digital market competition report. On October 6, 2020, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law focused on "GAFA"—Google, Apple, Facebook, and Amazon—dominance. The Subcommittee found that GAFA—called "dominant platforms" by the House report—have monopoly power due to their role as "gatekeepers" of key distribution channels. The CCI's recognition of these new issues is encouraging. The CCI noted in its

⁹ The Competition Act, 2002, §5.

¹⁰ The Competition Act, 2002, §6.

¹¹ The Competition Act, 2002, §20(4).

¹² Politico, EU antitrust probe targets Amazon's 'dual role', July 17, 2019, available at <https://www.politico.eu/article/eu-antitrust-probe-targets-amazons-dual-role/> (Last visited on December 17, 2020).

telecom market study that "data privacy can take the form of non-price competition and abuse of dominance can lower privacy protection... and that an aspect of data in the context of competition in the digital communications market is the conflict between permitting access and protecting consumer privacy." The CCI noted that WhatsApp and Facebook data sharing violates non-price competition criteria, including privacy. The 2016 upgrade allowed users to opt out of sharing data with Facebook, but the 2021 upgrade does not.

The CCI alleges dominance abuse in WhatsApp's revised terms of service and privacy policies. The 2002 Competition Act prohibits its "take it or leave it" nature. (the "Competition Act").¹³ The Indian antitrust regulator has never considered privacy before. The CCI found in its Market Study on the Telecommunications Sector (the "Market Study") that privacy can be a non-price competition parameter and that diluting privacy protection criteria resulted in an abuse of dominance because it implied a lack of customer welfare. The CLRC Report defines "price" as personal information and preferences disclosed to digital market participants. The US House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law investigated Amazon, Apple, Facebook, and Google for a year and a half before introducing five antitrust bills in 2021 to limit their competitive power.¹⁴ The proposed law emphasises these companies' ability to attract new customers and promote their products. These plans could force large technology companies to restructure. The US Federal Trade Commission also sued Facebook for illegally acquiring Instagram and WhatsApp, two competing social media platforms, and maintaining its monopoly. Facebook was investigated for antitrust in 2021 by the European Commission and the UK Competition and Markets Authority. These investigations examined whether the company distorts classified advertising competition using information from competing services.¹⁵

The Federal Cartel Office's January 2019 ruling against Facebook was significant. The court found the company's terms of service abusive and against German competition law. It also banned the contested terms and conditions, which allowed Facebook to share data with WhatsApp, Instagram, and third-party apps. Restriction was lifted. The Cartel Office considers Facebook's extensive collection of user data without consent and subsequent sharing across all

¹³ <https://ica.nic.in/images/FOIRNews/WhatsApp-NewData-Privacy-Policy-MM-Sharma.pdf>

¹⁴ Roger McNamee, A historic antitrust hearing in Congress has put big tech on notice, July 31, 2020, available at <https://www.theguardian.com/commentisfree/2020/jul/31/big-tech-house-historic-antitrust-hearing-times-have-changed> (Last visited on December 17, 2020).

¹⁵ Regulation of Data-driven Market Power in the Digital Economy: Business Value Creation and Competitive Advantages from Big Data available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759664

its services an abuse of power. The German Federal Court of Justice upheld the Cartel Office order. The Cartel Office's appellate court, the Higher Regional Court of Duesseldorf, has requested a preliminary ruling from the European Court of Justice, delaying proceedings. The European Court of Justice has been asked to clarify whether the Federal Cartel Office can adjudicate data privacy breaches under the General Data Protection Regulations. The Competition Commission of India isn't the first antitrust body to investigate WhatsApp's revised privacy policy. Turkey and Argentina's competition authorities are investigating WhatsApp and Facebook's revised privacy policies and terms of service. The Italian Competition and Markets Authority fined WhatsApp 3 million euros (3.6 million dollars) for requiring users to consent to Facebook sharing their personal data. The US Federal Trade Commission has also sued Facebook for illegally preserving its monopoly and acquiring Instagram and WhatsApp. The Trade Commission fined Facebook \$5 billion for the Cambridge Analytica scandal. The Canadian Competition Bureau fined Facebook \$6.5 million for violating its privacy promises by sharing user data with third-party developers. Facebook has a long history of antitrust investigations.¹⁶ "GAFA"—the "giants of the internet"—are Amazon, Apple, Facebook, and Google. A bipartisan group of US House of Representatives legislators introduced five antitrust proposals to limit GAFA's competitive power on June 11, 2021. Large corporations can attract new customers and promote their own products and services under the laws. Digital giants may need to reorganise if these measures become law. The Subcommittee on Antitrust, Commercial, and Administrative Law of the House Judiciary Committee proposed these ideas during a sixteen-month investigation into the companies.¹⁷ In January 2019, Germany's competition watchdog, the Federal Cartel Office, found Facebook's terms of service oppressive and illegal. The Federal Cartel Office issued a historic ruling against the social media giant. It also restricted contentious terms that allowed Facebook to share data with WhatsApp, Instagram, and third-party apps. The watchdog has occasionally been unable to punish Big Tech for anti-competitive practices due to regulations. The Competition and Consumer Commission (CCI) has challenged tech giants over monopolistic practices, but

¹⁶ Bar and Bench, Competition Act and Insolvency & Bankruptcy Code: Applying the Failing Firm Defence for Green Channel Approval of Cases, February 23, 2020, available at <https://www.barandbench.com/columns/competition-act-and-insolvency-bankruptcy-code-applying-the-failing-firm-defence-for-green-channel-approval-of-cases> (Last Visited on December 17, 2020).

¹⁷ Greg Sterling, Congressional report blasts Google, Apple, Amazon and Facebook as monopolistic 'gatekeepers' of the digital economy, October 7, 2020, available at <https://searchengineland.com/congressional-report-blasts-google-apple-amazon-and-facebook-as-monopolistic-gatekeepers-of-the-digital-economy-341628#:~:text=Google%20is%20a%20system%20of%20'interlocking%20monopolies'&text=The%20report%20finds%20Google%20has,others%20dependent%20on%20its%20ecosystem> (Last visited on December 17, 2020).

industry stakeholders believe the CCI needs more precise and effective laws. To empower the CCI, the government is reforming competition laws. The Competition Commission of India, the Supreme Court of India, and the High Court of Delhi have filed appeals against WhatsApp's revised terms of service and privacy policy on the grounds that they inhibit competition. The Indian government has warned WhatsApp to revert to its recently updated privacy policy. WhatsApp, however, insists that their upgrade complies with Indian law and will implement it.¹⁸

RECENT STEPS TAKEN BY CCI

The CCI ordered a thorough investigation into Google in October of this year due to the company's purported dominance in the smart television and news aggregation markets. This occurred one year after Google was penalized by the CCI more than INR 2,200 Cr for misusing its hegemony in the Android device market and in relation to its Play Store policies. The most recent accusations concern Google's hegemony in the news aggregation market. The watchdog commissioned a probe into the tech giant's alleged dominance in October last year after receiving complaints from industry bodies News Broadcasters and Digital Association (NBDA), Indian Newspaper Society (INS) and Digital News Publishers Association (DNPA). The broadcasters and news publishers allege that their members are forced to provide their news content to Google to rank higher on Google search pages, adding that the tech major freerides on the content of publishers without giving them adequate compensation.

The imposition of a Rs. 13367 crore penalty on Google for abusing its dominant position in the Android market was upheld by the National Company Law Appellate Tribunal (NCLAT). The complaint against NCLAT specifically concerned the pre-installation of some Google-sponsored apps on the operating system that the user was unable to remove. It amounted to discrimination against other players who were providing comparable apps.

However, the CCI chairperson's remarks were made a few months after rumours circulated that the CCI was studying the findings of the investigation into Apple's app billing practices. In

¹⁸ Shivam Tripathi, Introduction of Competition (Amendment) Bill, 2020: A step towards revamping Indian market, May 6, 2020, available at <https://www.sconline.com/blog/post/2020/05/06/introduction-of-competition-amendment-bill-2020-a-step-towards-revamping-indian-market/> (Last visited on December 17, 2020).

December 2021, the watchdog opened an initial investigation into the business practices of the Tim Cook-led company following complaints from various businesses and trade associations.¹⁹

CONCLUSION

In today's digital economy, these decisions will affect data protection and competitiveness regardless of the outcome. GAFAs, once industry leaders, are now monopolists that stifle competition. Their feeble explanations, which include the possibility that they will fail and that other disruptive companies are competing for them, are insufficient to explain how they came to represent \$5 trillion in the US economy. Policymakers at the national level and competition regulators, such as the FTC in the US, the EC in Europe, and the CCI in India, are growing increasingly conscious of the ways in which Big Tech companies like Amazon impact competition. Legislative or regulatory action to dismantle these digital behemoths into smaller businesses or control their business practices may result from this. The global debate on the more effective use of competition law as the key tool for addressing super platforms, with abuse of dominance against exclusionary conduct, has already been sparked by the ongoing evolution of AI with machine learning capabilities of super platforms like Facebook and WhatsApp. The enforcement of this law initially concerns whether to order super platforms to make their data accessible to their competitors. All regulatory authorities and policymakers must work together to implement a new economic model that accounts for the power of these internet behemoths and removes their monopoly's barriers to competition. Despite these major improvements, the system still needs to be fixed. Despite the 2022 amendments, the Competition Act of 2002 (the "Competition Act") is insufficient to address the issues. It does not enable CCI to view data-driven enterprises differently, even if they have a non-traditional impact on the market and customers. Thus, while the above actions are a start toward fixing the act and ending these anticompetitive business practices, they are not enough. Data must be protected and a healthy digital market fostered immediately. Ultimately, the consumer must weather the two storms of abuse of dominance by online giants and the protectionist tendencies of domestic nations. For this, it is important for consumers to be empowered by increased awareness and transparent business practices to arrive at a reasoned decision.

¹⁹Livemint, <https://www.livemint.com/companies/google-apple-under-probe-for-alleged-unfair-business-practices-cci-chief-11696941655984.html>