
BIG DATA & COMPETITION LAW

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ABSTRACT

The history of big data can be tracked from the 1990s. The digital economy's drastic growth gave birth to a new kind of business model based on the collection & analysis of big data. The rapid growth of the internet played a pivotal role in the development of big data.¹ Nowadays, big corporate houses use big data to develop their businesses. Big data has the potential to put companies in monopolistic positions. Big data is defined as large, diverse sets of information that evolve at very drastic rates. Primarily, big data is based on the four 'V' of the big data, i.e., volume, velocity, variety & veracity. The first V highlights the volume of information, the second V highlights the velocity in which the big data is created & analyzed, the third V highlights the variety of different areas of data & the last V veracity signifies the correctness of the big data.² The corporate entities can access the big data from the comments of different social networking sites, voluntarily given information from electronic applications, details given on the purchase of products, check-ins done electronically, etc. The company like Facebook and Youtube uses big data to create revenue by showing ads only to the targeted consumers while using their platforms. Big data has changed the competitive system and opened new markets by changing the existing ones. This evolution has also created lots of issues for the competition authorities.

¹ Apoorva Thakral, "The Role of Competition Law in Big Data", *Indian Journal of Corporate Law and Policy*, Aug. 25, 2021, available at <<https://ijclp.com/the-role-of-competition-law-in-big-data/>> (last visited on Apr. 25, 2022).

² Unknown, "The Four V's of Big Data- What is Big Data", *Analytics Insight*, Dec. 10, 2021, available at <<https://www.analyticsinsight.net/the-four-vs-of-big-data-what-is-big-data/#:~:text=Big%20data%20is%20now%20generally,velocity%2C%20variety%2C%20and%20veracity>> (last visited on Apr. 25, 2022).

“There were 5 Exabyte of information created between the dawns of civilization through 2003, but that much information is now created every two days.”³ – Eric Schmidt

Introduction

During the 2016 discussion, the Organisation for Economic Co-operation and Development (OECD) explored the expected implications of big data on competition authorities and tried to analyze the appropriateness of the competition law to tackle the challenges of big data.⁴ Many reports highlighted that by 2025 there would be 175 Zettabytes of big data available globally, and this will be an invitation for the big corporate houses to exploit the data in their favor. Companies provide services for free in the electronics world because we are the primary product.⁵ We are the primary product means our data is the primary product. In this, the company stores information on a large scale. As per the recent market trends, these data provide a competitive advantage to the company over the other opponent's companies who operate in the absence of big data.

Further, big data also play an essential role in the telecommunication sector worldwide. In India, the mobile data traffic increased almost eight times in the year 2020 to 30.6 Exabytes from 2015.⁶ The telecommunication service providers have an abundance of data from the customer's database. This big data includes each & every detail of the consumer, including their messaging style, calling pattern, internet access, etc. These data can be used to determine the behavior of the user.

This project deals with the question of how big data is relevant to competition law. Under this, the legal provisions & judicial discourse of India & other foreign jurisdictions are covered. This work will emphasize how big data creates a large barrier for other companies to enter the market.

Legal Scenario of Big data in Indian Competition Law

The Competition Act of India was introduced in 2002 to prohibit anti-competitive agreements,

³ Statement by Eric Schmidt, Former Executive Chairman at Google.

⁴ “Big data: Bringing competition policy to the digital era”, Organisation for Economic Co-operation Development (OECD), 2016, available at <<https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>> (last visited on Apr. 26, 2022).

⁵ *Ibid.*

⁶ Guy Daniels, “Cisco expects global mobile data traffic to reach 30.6 Exabytes per month”, *Telecom TV*, Feb. 4, 2016, available at <<https://www.telecomtv.com/content/mobile/cisco-expects-global-mobile-data-traffic-to-reach-30-6-exabytes-per-month-13243/>> (last visited on Apr. 25, 2022).

prevent monopolies, enhance competition, prohibit the abuse of dominance, etc. Despite so much interdependence on the internet, there are no specific provisions for the regulation of big data in the competition act. The judicial discourse on big data was started in 2012 when the Competition Commission of India heard the case of *Matrimony.Com Ltd. v. Google LLC*⁷.

In this case, Matrimony.com alleged Google LLC of abusing its dominant position in the sector of online search advertising. Matrimony alleged that Google's results search was biased, and the company uses its vertical search sites by blending its vertical results into the original results. In simple language, the claim highlighted that Google, by changing the algorithm, controlled the natural search result. It was alleged further that Google abused its dominant position.⁸ The market, in this case, was the 'online general search advertising market in India.' In defense, Google stated that they could not abuse the position because, as per section 4 of the Competition Act, there must be sales and purchases of goods, and without this, section 4 essentials are not fulfilled.⁹ The Commission said that despite Google providing the services free of cost, there is another process of generating revenue: an advertisement, which makes it a two-sided market. The information stored from every user on every search contributed to data collection, which led to the targeted advertisement, i.e., a way to generate revenues.¹⁰

Another landmark case was the cartelization of a few airlines. The Competition Commission of India penalized Rs 258 Crores on three airlines (Jet Airways, Spice Jet & Indigo). As per CCI, they were charging fixed fuel surcharges at a uniform price for Cargo transport. Interestingly, they collectively increase the charges even without any rise in fuel prices on a specific day.¹¹ The Commission stressed that these airlines violated section 3 of the Competition Act, 2002.

Further, in *Vinod Kumar Gupta v. Whatsapp Inc.*¹², the Competition Commission of India answered on the legality of using big data in light of Competition law. The WhatsApp new

⁷ Competition Commission of India, Case Nos. 07 and 30 of 2012, <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>.

⁸ Pratyush Bhattacharjee, "Association of big data and Competition Law : an analysis with respect to India and Europe in the telecommunication sector", *Ipleaders*, Sept. 15, 2021, available at <<https://blog.ipleaders.in/association-big-data-competition-law-analysis-respect-india-europe-telecommunication-sector/#:~:text=Big%20data%20was%20first%20recognized,market%20through%20search%20bias%20and>> (last visited on Apr. 30, 2022).

⁹ *Ibid.*

¹⁰ CCI, *Supra* note 7.

¹¹ Sparsh Agrawal, "Impact of Big Data on Competition Law", *Ipleaders*, Jul. 4, 2020, available at <<https://blog.ipleaders.in/impact-big-data-competition-law/>> (last visited on Apr. 30, 2022).

¹² 2017 SCC Online CCI 32.

privacy policy was the primary reason behind the case. The new policy forced the member to link their accounts with Facebook, which automatically gives Facebook permission to access all the data on WhatsApp.¹³ In this case, Commission said that the cases regarding breach of privacy & data security don't come under the jurisdictions of the Competition Commission of India. Further, they highlighted that any contravention of Information Technology law doesn't come under the purview of Competition law.¹⁴ After this, in 2019, the government introduced 'The Personal Data Protection Bill' to safeguard the personal data & set up uniform guidelines for the intermediaries & fiduciaries to maintain transparency & accountability in their operation.¹⁵

This approach of the Competition Commission was criticized. Still, even the Commission was helpless because the Commission works under the provisions of Competition law, and Competition law doesn't have any provisions on big data and artificial intelligence.

The apex court of India also highlighted the same issue. The Supreme Court in *Rajasthan Cylinders and Containers Limited v. Union of India*¹⁶, signifies the responsibility of the Competition Commission to maintain transparency, accountability & healthy competition in the Indian market. This required evolution of laws, and the issue of data security & privacy must need to be incorporated under the present competition law regime. Without adequate changes, the Competition Commission of India doesn't deal with the recent trend of cases that include their elements.¹⁷

Furthermore, there are also cases on the issue of data and dominant position in India. The first one was the *Ashish Ahuja v. Snapdeal & Ors.*¹⁸ In this, the Commission rejected the contention of Snapdeal & others that both online & offline are two different relevant market in India for section 4 of the Competition Act, 2002. As the Commission said, they are a single relevant market, and the only difference is with the distribution system. The same principle was

¹³ Aaqib Javeed, "Big Data and Emerging Competition Concerns", *SSRN*, Jul. 14, 2021, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3884350> (last visited on Apr. 30, 2022).

¹⁴ *Ibid.*

¹⁵ Gulshan Rai, "India: Personal Data Protection Bill, 2019- Key Highlights of Reports of Joint Parliament Committee (JPC)", *Mondaq*, Feb. 16, 2022, available at < <https://www.mondaq.com/india/privacy-protection/1161678/personal-data-protection-bill-2019--key-highlights-of-reports-of-joint-parliament-committee-jpc>> (last visited on Apr. 30, 2022).

¹⁶ Divya Harchandani, "India: Parallel Pricing by Itself Cannot Be Construed as Collusive Bidding: Supreme Court", *Mondaq*, Dec. 04, 2018, available at < <https://www.mondaq.com/india/antitrust-eu-competition-/759874/parallel-pricing-by-itself-cannot-be-construed-as-collusive-bidding-supreme-court>> (last visited on Apr. 29, 2022).

¹⁷ Pratyush, *Supra* note 7.

¹⁸ *Ashish Ahuja v. Snapdeal and Ors*, Case No. 17 of 2014, Competition Commission of India.

followed in the *Deepak Verma case*¹⁹, *Infotech Private Limited case*²⁰ & *Real Estates Brokers Association of India case*²¹. Then in 2018, the famous *In Re: Samir Agrawal (Uber India)* case was entertained by the competition commission of India. In this, the complainant raised the cab aggregator's model issue.²² The Commission, in this case, acknowledges the role of big data and how a large set of information like demand-supply (surge), traffic conditions, and customers' personal information decides the cost of the services. As per the different data, the algorithms fixed the price for each trip.

Indian judicial discourse on big data & competition are not adequate to tackle the issues of big data in competition. Prima facie, these cases doesn't come under the purview of competition law as per the existing regime.

Big Data Effects on the Competition Law

Collection & analysis of big data is not illegal, but if the information is exploited, it affects the fair & healthy competition of the market. Let's discuss how big data affects healthy competition.

- Potential for the abuse of Dominance- Companies with dominant positions with rich data can use these data exploitatively. For example, the insurance companies enjoying the dominant position increase their premium by analyzing the big data that individual in this area follows fewer traffic rules or traffic police in this area fines a lot.²³
- The merger between two companies having big data is common in the telecommunication sector, where the merger of two companies also merges their data. These mergers make the new companies rich in big data, which has the potential to exploit healthy competition if not regulated.
- Rise of Anti-Competitive Agreements- Companies with big data often indulge in anti-competitive agreements distorting the healthy competition of the markets. The same situation arises in the airline case where Jet Airways, Indigo & Spice Jet formed cartel-

¹⁹ Deepak Verma v. Clues Network Pvt. Ltd. and Ors. Case No. 34 of 2016, Competition Commission of India.

²⁰ Jasper Infotech Pvt. Ltd. v. Kaff Appliances (India) Pvt. Ltd. Case No. 61 of 2014, Competition Commission of India.

²¹ Confederation of Real Estate Brokers' Association of India v. Magicbricks Case No. 23 of 2016, Competition Commission of India.

²² Sparsh, *Supra* note 11.

²³ CAM Competition Team, "Big Data: Emerging Concerns under Competition Law", *Cyril Amarchand Mangaldas*, May 10, 2018, available at < <https://competition.cyrilamarchandblogs.com/2018/05/big-data-emerging-concerns-competition-law/>> (last visited on Apr. 30, 2022).

like structures in increasing the fuel surcharges collectively by using their algorithm. Here, they distorted the healthy competition by using the company's big data.²⁴

- Entry barriers for the new entrants- Many companies with big data create barriers in the market that don't allow new companies to enter. For example, the food delivery apps like Zomato & Swiggy have lots of data regarding consumer food preferences, taste, eating habits, timings of the order, etc. This helps the companies create barriers for the new entrants.²⁵

International Scenario on Big Data

Indian competition laws are not evolved to combat the issue of exploitation of big data. Interestingly, many other countries started framing their laws to tackle the different aspects of big data. This part will include the legal scenario of the European Union, United States of America & United Kingdom. A comparative study is required to determine the changes that can be incorporated into Indian laws to tackle the issues of big data. The comparative study is also crucial to look at the options that might otherwise be overlooked.

European Union

In the European Union, 'The Treaty of Functioning of the European Union' (TEFU) plays a pivotal role in regulating big data. The art. 16 of the TEFU emphasized that every individual personal data must be protected. Under this, the European Parliament & Council is obligated to frame laws to protect personal data. This protection is not only from the private entities but also from the Union institutions, bodies, offices, agencies & member states.²⁶ Further, art. 7 of the treaty stressed uniformity in its policies & practice, which is the obligation of the Commission.²⁷ The judicial discourse in European Union is very rich. In one of the cases of *Chemie BV v. Commission of the European Communities*²⁸, it was held that the companies have an unfair advantage if they have access to sensitive information and considered this a contravention of the competition law. The company AKZO Chemie BV penalized ECU

²⁴ Campbell Whyte, "Competition Law's Challenges in Regulating Big Data", *KSLR Commercial & Financial Blog*, Sept. 11, 2020, available at < <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/09/11/competition-laws-challenges-in-regulating-big-data-campbell-whyte/>> (last visited on Apr. 30, 2022).

²⁵ CAM, *Supra* note 23.

²⁶ The Treaty of Functioning of the European Union, 2009, art. 16.

²⁷ The Treaty of Functioning of the European Union, 2009, art. 07.

²⁸ *AKZO Chemie BV v. Commission of the European Communities*, European Court Reports 1991 I-03359, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61986CJ0062>.

10,000,000 for abusing the dominant position. The company also used predatory pricing to eliminate the other companies from the market.²⁹

Further, the European Commission decided another landmark case of the Microsoft/LinkedIn merger. It was held that the personal data privacy concerns come under the ambit of data protection laws and are considered as a non-price competition factor for considering different issues in the assessments for the merger control.³⁰ In this case, the merger was approved by European Commission. Another case was triggered because of the acquisition of Whatsapp by Facebook.³¹ The Competition Commission of India also dealt with a similar kind of case. The Commission highlighted that data protection doesn't come under the purview of competition law. In this, the Commission fined USD 132.26 million not to disclose the clause of matching between the accounts of users of Whatsapp and Facebook.³² The fine was on Facebook for not disclosing the automated matching issue. Interestingly, in this, Facebook misled everyone by hiding information about automated matching during the acquisition deal of Whatsapp in 2014.³³

Another landmark case of the European Commission was the acquisition of Shazam, a music streaming service by Apple. In this case, Commission highlighted the quality & uniqueness of the data. Before this, no judgments were passed in any commission or court on the quality of big data and how big data is crucial for healthy competition in the market. Initially, it was alleged that Apple would collect & analyze the data of Shazam after the acquisition. Still, in reality, the acquisition will lead to sharing those data from the database only, which the user of Shazam agreed to share.³⁴ Others can also access the same services, which means the data has no significant importance & negligible potential to distort the healthy competition of the market.³⁵ Lastly, the Google & Double click merger was also crucial. The case comes under scrutiny because of the allegations that Google can track & analyze the user behavior better

²⁹ Sparsh, *Supra* note 11.

³⁰ "EU Commission's Microsoft/ LinkedIn Decision – watershed for competition and data", *Baristows*, Mar. 31, 2017, available at < <https://www.bristows.com/news/eu-commissions-microsoft-linkedin-decision-watershed-for-competition-and-data/>> (last visited on Apr. 30, 2022).

³¹ *Ibid.*

³² Sparsh, *Supra* note 11.

³³ Enrique Medina, "Facebook fined for misleading information over Whatsapp merger", *Telefonica*, May 26, 2017, available at < <https://www.telefonica.com/en/communication-room/blog/facebook-fined-for-misleading-information-over-whatsapp-merger/>> (last visited on Apr. 30, 2022).

³⁴ "Commission unconditionally clears Apple's acquisition of Shazam", *Ashurst*, Oct. 17, 2018, available at < <https://www.ashurst.com/en/news-and-insights/legal-updates/commission-unconditionally-clears-apples-acquisition-of-shazam/>> (last visited on Apr. 30, 2022).

³⁵ *Ibid.*

after merging with Double Click. Though, in this, the Commission has approved the merger because of the potential of the competitor potential to exert adequate competitive pressure.³⁶

Apart from this, there is also one lacuna in the European Union's functioning concerning the jurisdiction of big data associated with competition law. This conflict is because of the establishment of the 'European Data Protection Board' (European Body) that works for uniform & mutual application of the 'General Data Protection Regulation' (GDPR). This contradicts the power of the European Commission to make decisions on the issue of data privacy laws.³⁷

United States of America

In the United States of America, the Federal Trade Commission (FTC) & Department of Justice (DoJ) play a significant role in the investigations & regulations of the big data in the US Jurisdictions.³⁸ One of the famous cases was the *David Topkins Case*³⁹, in which the Topkins drafted the computer code. The computer code was based on the company's algorithm that contributes to setting the price. The price-setting was done in accordance with the price-fixing agreement. In this case, it was established that Topkins with other companies conspired & fixed the payment of posters in a collusive manner. The prices fixed were for the online market, and the prices were non-competitive.⁴⁰

United Kingdom

The authority that regulates healthy competition in the United Kingdom is Competition & Market Authority (CMA). Like the Competition Commission of India, they also didn't interfere with the issue of big data. They stressed the challenges of investigating unlawful combinations, which include algorithm complexity. Including algorithms in the competition also makes it tough to analyze & review the anti-competitive practice. But, the authority in one of these orders stressed the threat associated with big data that affects the healthy competition of the

³⁶ Pratyush, *Supra* note 8.

³⁷ Sparsh Agrawal, "Impact of Big Data on Competition Law", *Ipleaders*, Jul. 4, 2020, available at < <https://blog.ipleaders.in/impact-big-data-competition-law/>> (last visited on Apr. 30, 2022).

³⁷ 2017 SCC Online CCI 32.

³⁸ Ikigai Law, "India: Big Data & Merger Control- Takeaways from the American Experience", *Mondaq*, Jan. 18, 2021, available at < <https://www.mondaq.com/india/antitrust-eu-competition-/1026024/big-data-merger-control-takeaways-from-the-american-experience>> (last visited on Apr. 30, 2022).

³⁹ Jonathan Stempel, "U.S. announces first antitrust e-commerce prosecution", *Reuters*, Apr. 07, 2015, available at < <https://www.reuters.com/article/us-usa-antitrust-e-commerce-plea-idUSKBN0MX1GZZ20150406>> (last visited on Apr. 30, 2022).

⁴⁰ *Ibid.*

market. The authorities further stressed how big data enhance market penetration in different arrangements.⁴¹

Conclusion

Interestingly, the competition law of India doesn't have any specific provisions on Big Data but the Hon'ble Apex Court in 2017 in *K.S. Puttaswamy case*⁴² already declared the 'right of privacy as a constitutional right. The absence of protection in competition law for big data is a concern in the Indian market. Right now, everything is available by pressing some buttons. The algorithm decided by the big corporate houses is deciding our choices & interest. The rapid growth in electronic transactions developed the digital assets of the company. Here, the customer believes that they enjoy the services for free, but they are the product in reality. The collection & analysis of big data are not illegal or wrong per se, but these data must not create distortion in the healthy competition in their relevant market.

In many cases, big data also create entry barriers for new entrants. Almost every organization, entity, bodies, agency, etc., use data for market penetration. The data help them save their resources from wastage which was very common in past practices. The use of big data increased the role of regulatory authorities in India. The literacy level of India is very low, and Indian users are rapidly sharing their personal data online with different applications. Awareness about online usage, what to do, what not to do, what to share, what is confidential personal information, what is optional & what is mandatory, etc. There are many questions that Indian users are not aware of. Because of this, they are sharing the information vehemently. Though, Indian competition law is also not static but developing at a prolonged rate. India must need incorporate changes and learn from European Union. India must understand how the European Union prioritized an individual's personal data and obliged the government to make laws to safeguard the personal data.

Further, the use of big data is extensively regulated in European Union, like the fine on the automated data sharing of Facebook & Whatsapp was penalized in European Union. In India, the primary requirement is changes in Competition law because the competition law will empower the competition commission of India to regulate the aspect of big data in competition. But there are other sides to the argument. If we frame strict regulations for big data, the

⁴¹ Sparsh, Supra note 11.

⁴² *K.S. Puttaswamy and Anr. V. Union of India* (2017) 10 SCC 1.

multinational company will hesitate to invest & merge with Indian companies because of intensive regulations. Even in this globalized world, regulating data means regulating the innovation of the entities. Big data has lots of advantages that are crucial for developing big corporate houses and country economies in general. But still, the regulation of big data is crucial to maintain healthy competition in the Indian market.