DATA PROTECTION AS A CRITICAL FUNDAMNETAL LAW AND BIG DATA IMPLICATIONS ON COMPETITION LAW

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INTRODUCTION

Collection and use of personal data fall under the area of data protection laws, so it is relevant to consider to a question by competition authorities that whether the 'use of 'Big Data' can impact the competition in markets. The meaning of Big Data is large volumes of a variety of data[2]. And when such data sets are processed by computer software, it becomes of a great commercial value. The following research paper will focus on emerging need of a unified authority that can have jurisdiction on matters of Big Data and Privacy, also focusing on the competition assessment between data, consumer protection and antitrust enforcements as they are a mutually co extensive triangle which will overlap if the age of Big Data is not sustained.

It is to be known that collection or accumulation of what kind of data under competition law is subject to scrutiny? So answer to that is, to see in what type of market a company operates or which kind of data it collects and what data sets does the company processes and does it has the ability to do so!.

In order to determine whether a market conduct is in accordance of competition law it is necessary to know and define that particular market and then its effects on competition, which is done by checking that whether such products and services are sustainable for others including other companies in market and consumers. Hence when Big Data is used by companies or business for commercial gain and other purposes the goal of competition law[3] is to prevent such activities which creates adverse effects on competition in India. With the emergence of global economy the hot topic of Big Data has reached to 'big analytics' voluminous data leaving implications on competition policies.

Looking at the relation between Big Data and competition law it can into existence right after the announcement of Google's acquisition of Double click in 2002. The main concerns in this case where when all the data of Double Click came into the hands of Google, since than there can be seen rapid growth of interactions between data protection and competition law.Framer of competition law/policies and enthusiasts has time and again formulated that Big Data has four popular V's popularly known as volume of data, the velocity at which data is collected, variety of information and value of the data, together they help in examination of 'Big Data' for example with the help of specialized algorithms which may be further used to hide some patterns or to extract some data to seek knowledge of market trends. Hence it can be said that though data i.e.

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[2] Large volumes of variety of data, collected at high velocity.
[3]Competition Act, 2002.

Big Data has become an asset to business but protection of data also becomes an important issue for consideration of market competition in an economy. Based on the rapid growth in the digital

economy there have been few cases which are subjected to scrutiny by European Commission[4] Google/double click and Facebook/ WhatsApp[5] which will be discussed in this paper ahead.

So as per the line of research up till know it can be clearly seen that competition law policies needs to be framed in regard to the Big Data as data in hands of companies or business becomes a critical instrument effecting the market competition and conduct of companies, also when computerize algorithm are used to process the data for fixing the prize of any product, services or for any merger & acquisition deal; as in the realm of Big Data a company come into a dominant position.

So moving forward we will study why competitive significance of data is necessary?

The data which is likely to access and processed through computer software is likely to be competitive or significantly competitive because merely having access to data and being able to exploit it for commercial purpose is not exploitation or misuse of data. So the competition authorities should differentiate between data based on whether the company in question is a data controller or merely a processor of the data[6].

DATA CONTROLLER/ DATA PROCESSOR

Whether a company is a data controller or data processor is decided by its specified purpose and consent of the user's, for ex. Microsoft is data controller for its consumers as the terms of the services provide within the leaps of data protection and privacy laws, each user's data can be graphed with data from other users for analysis for improvement in its software and services[7].Whereas data processors differ from data controllers as such companies have limited powers to access or use data. Example for the same company when one company contracts to entrusts data to any other company only for the purpose of processing data. 'Machine learning' and 'Artificial intelligence' are also some of the modes which are used by companies to access data. So formulators on competition law shall before framing any policy minutely look into the purpose for which the data is being used. There are always challenges in digital economy and

[4]The commission.
[5]Take over prize- 3.1billion dollars, 19 billion dollars.
[6]See, e.g. Directive 95/46/EC [1995] OJ L 281. The EU's existing data protection regime is set out in the Directive. Per Art. 2(d), "'Controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data … ". Per Art.2(e), "'Processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller." To address the difficulties arising under the Directive, the EU has created a new data protection regime – the GDPR. The GDPR entered into force on 24 May 2016. However, enforcement of the GDPR will not begin until 25 May 2018.
[7] Consumer Cloud services include Outlook.com, Office 365 Personal, Student and Home, OneNote, OneDrive, Bing, Groove, Movies & TV, etc. Microsoft runs these applications in the cloud. The user logs into the service with her or his user credentials. The user retains full ownership of the data.

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challenges associated with it, and accordingly big data may sometimes be a big deal and sometimes not.

Also data is classified as Product, Input, and Non- Commercial asset.

Let us know look at some cases of data products cases: (horizontal and vertical mergers)

In the case of Thomas/ Reuters in this case the EC imposed remedies after determining that both the companies were leading companies in providing financial data and had went on for mergers for providing such financial data to a trader, imposing remedies on the companies EC said they are the only providers of such kind of financial data and there are entry barriers for other companies, hence other companies will not be able to provide any sustainable data for the same, the case is known to be that of a horizontal mergers[8].EC also said that mergers between direct product competitors are of major risk, as there are limited available substitutes. Google's acquisition of ITA was also in question as ITA was a critical input supplier (suppliesairline schedule data base to travel intermediaries), the Department of Justice reviewed the same as the algorithm to process and access airfare data for its customers used by the ITA were not owned by it directly, however ITA had the power to aggregate, reconfigure and used the cached data and was able to provide unique data results to its users. The DOJ profoundly said that in cases of data products they focused on competitive effects and barriers to entry and in this case analysis was dependent heavily upon the data[9].

If we look today at the Indian Scenario e- commerce websites, online shopping and payment apps has made people in country digital savvy though not skeptical about privacy, also the growth and surge of M&A activities, exposed to market has become threat and hence a matter to be looked by competition law authorities. The anti- competitive concerns involving self-learning price algorithms, profit earning algorithms used for mergers creates potential anti-competitive threat and the use of big data concerned and questionable and is subject to anti- trust scrutiny[10].

BIG DATA MARKET COLLISSION

At present in India there is no clear map or guide of whether there would be collecting or processing of Big Data in competition market or not? But from various reports and studies it can be gauged that there is a quickening need of the same. The DOJ in 2015 used a cartel fixing pricing method for the goods sold on Amazon that basically enabled sellers to fix price after knowing consumer preferences. Though after looking at the prosecution of DOJ, CCI has noticed pricing algorithms results in collision and are of high enforcement priority. Also it shall be

[8]Commission, Mergers: Commission Clears Acquisition of Reuters Subject to Conditions, also see Complaint, U.S. v. Thomson Corp. and Reuters Group, No. 1:08-cv-262 (D.D.C., 19 February 2008).
[9]Google v. ITA, Competitive Impact Statement, U.S. v. Google Inc. and ITA Software, Inc., No. 1:11-cv-688 (D.D.C., 8 April 2011).
[10]Studies on the potential competition concerns arising from the use of big data have been conducted by the OECD may 2016.

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noticed, having acknowledged the data driven innovations Big Data do not comes without cost.In the case of merger review CCI in Bayer/ Monsanto stated that combined entity could use its expertise and big data stifle to influence competition, so appropriate remedies for imposing in such deals is required. Hence regulation of big data through competition law enforcement has become an important objective.

EVIDENCING DATA SUSTAINABLITY

Google/ Double Click, Facebook/ WhatsApp and Microsoft/ LinkedIn these are few of the mergers which have been subject to scrutiny by EC and have been passed unconditionally by with some directions, based on the criteria of effective and significant competition in market. The data protection concerns can be seen is non-price competition to the extents consumers thins it fit for providing quality in services offered and if look in detail into ***Microsoft/ LinkedIn*** transaction which showed that the merged entity would not create competition for Customer relationship management (CRM) software solutions as the commission found out that the data or data subset of LinkedIn is not unique. So such data (input) by LinkedIn was not in contravention of the provision of Machine learning in CRM. In this case it shall be also noted that the two sources of CRM data are: In-house customer data uploaded to CRM (used for the purpose of accounts, services tickets and alike) and complementary third party data, also such data is available to every relevant provider so such availability of Customer Relationship Management data will not be affected by this merger, thought the EC stressed about LinkedIn being one of the source for the availability of third party data depending upon the type of industry, so it will not create any threat for market competition for provider of Machine learning in CRM.

Ahead is the analysis of ***Facebook/ WhatsApp*** the question was whether Facebook was creating a dominant position in the market for social networks as it had terms of service on the gathering of user data or whether such merger of two companies' data sets leads to adverse effects on competition. The founding that came out by EC was that social networking platforms and other platforms are generally having difficult time in preventing their data from competitors and also a situation may exist where a firm may own or control a data set, uses the data set as an input condition being the data is necessary for competition and other reasonable substitutes are available (which is very rare), the commission further became reluctant to consider data privacy issues in competition law and stated that any matters related to privacy concerns does not comes under EU competition law rules but within EU data protection laws also the US FTC and EC decline to include privacy related matter into competition law and said such matter should rather be solved under privacy laws[11]. So as per this case considering the potential of Facebook to create new customers is proportional to expansion of its data base, it was not considered to be 'abuse of dominance, by Facebook for using the data on whatsApp after their acquisition hence much focus should be given upon how the consumers can take advantages of 'multi homing' and

[11]Vinod Kumar Gupta v WhatsAppInc, 2017 SCC OnLine CCI 32, Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover, 18 May 2017.

its effects in the digital culture and the choice should be in the hands of the consumer to go with other providers if they are dissatisfied.

Similarly looking at India, the Competition commission of India rejected the allegations of abuse of dominance against Ola, clearing the regime of Indian Competition law on its functionality on data protection. It said in favor of "Consumer Welfare" and reiterated that such a presumption would be advantageous for consumers meaning the any regulator will not interrupt if the harm is limited to market competition and not the consumers and also such conduct would not amount to anti- competitive conduct[12]. In case of Re Bharti Airtel Limited case the practice undertaken by Reliance Jio (pricing strategies to create its own network) as an entrant was not anti-competitive as the relevant market already consisted of other big incumbents[13].Since there are several competitions related problems linked with 'Big Data' for the algorithm can engage in direct collusion, further the digital economy based on artificial intelligence and machine learning is creating disproportionate returns on networks and its effects , causing lucrative deals only to potential players as witnessed in case when *Facebook acquired Whatsap*. Therefore, it concludes in failure of Sec 4 of Competition Act, 2002 which prohibits the 'abuse of dominance' position in markets but do not penalize it; meaning companies can indulge in anti-competitive practices till the such practices becomes dominant. Accordingly for an innovation driven economy the competition authorities should necessitate on regular intervention so the market is assured of legal thresholds and along with the antitrust actions, as from the very famous example from the anti- trust actions against Microsoft by US authorities opened space for Google to Facebook to reach to a position, what they are today. Hence actually India's competition regime must move towards legal restrictions or holds on anti-competitive conduct rather than abuse of dominance.

DATA PROTECTION INTRESTS IN MERGERS: A REVIEW

The substantive provisions for combinations (mergers and acquisitions) are contained in sec 5 and 6 of Competition Act, 2002; but the question is whether this provision also talks about deals containing data as the basis of merger and acquisitions, as generally it is seen that access to data sets in competitive market have always been of great value and mergers or merger control which are data driven begs the most attention and pose a significant competition law concern including Big Data. Such transactions are seen as dangerous because it increases the value of the transactions as the companies can see potential in such transactions as the flow of data gives them an edge to create a hold in market i.e. customers there by increasing the takeover or merger price. The best example can be takeover prices of Google/ DoubleClick, Facebook/ what sap and Microsoft/ LinkedIn as the takeover prices were high. Though there are no any guidelines or law on big data in terms of merger control by EU or in India till date. Sec 5 and 6 also talks only the thresholds for combinations in and across the borders. So Looking at the cases mentioned above a position is not clear to weigh the merger or acquisition of big data. But such deals also draw on

[12]Fast Track Call Cab Pvt. Ltd, Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd.
[13]Re: Bharti Airtel Limited and Reliance Industries Limited & Reliance JioInfocomm Limited.

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attention towards making a law or an amendment so that a player or party does not creates any undue competitive edge in the market. As competition authorities in every country wants to get a hold on deals involving big data in my opinion a uniform set of guidelines should prevail nationally and Internationally and all the state laws should be made subject to such standard universal guidelines.

BALANCING BIG DATA AND PRIVACY

The recent admission by Facebook of 87 million people out of which 5 lakh users were Indians, the data was shared with Cambridge Analytica, having no clue of what such large amount of data was doing with the latter and since then it came into light that why such personal information is being used for unknown intentions? This incident was sent across the globe alarming the need for protection of citizen's data. The result of same can be seen India's data protection Bill, 2018 that laid down data protection law. Soon after, SC upheld the right to privacy of individual in the famous judgment of *Puttuswamy and Anr. V. Union of India*, after this judgment central government has put in place stringent regime for data protection taking into consideration interests of individual and state.There after a committee was constituted in November 2017 headed by Justice B.N. Srikrishna Committee to study problems relating to data protection in India, drafting a comprehensive data protection Bill, same was submitted on 27th July 2018, containing recommendations of committee and Personal Data Protection Bill.

Looking at the promises made by Justice B.N. Sri Krishna Committee, ensuring to protect individual privacy along with the flourishing the digital economy. The committee had claimed that in doing that the path would be different from US, European Union, China finely tuning to stable digitalized era and data protection for Individuals of the country. The main challenge in the whole thing was to design framework for both Artificial Intelligence and Big Data together. I my opinion the committee had failed to make useful suggestions on the use of BIG DATA, despite of mentioning its benefits. Also when personal data of the consumers is collected by the companies it is used at a later stage i.e. the data that gets collected becomes evident for use by Big Data applications at a later stage, but the committee has just stated that imposing limitations on collection of data at such an early stage would be impossible, since the committee got to do such an important observation but in turn did not provide any solution for the same, leading to imbalance between the data collection and imposing limitations on data collection process. Also there are many concerns which have been articulated in the bill but no solutions are provided for the same. An important pinch in the law contained in the draft bill is that of 'definition of harm' in particular as it is defined in a manner which will not result in any evaluative or beneficial decision (as it says denial or withdrawal of services) causing ill effects on using artificial intelligence via machine learning. For example: the primary use of machine learning is to collect valuable data and insights which human intelligence can do or collect, helping banks to offer loans and financial help to rural people and such use of harm definition would deny services to

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someone while offering to someone else. Till so far such things are not happening we are safe with the results but beyond such results financial markets are at stake.

The bill being criticized of giving enormous powers to state to control individual's data, considering provisions where government is empowered to access data when it feels the situation is critical. The data protection law in India is the relationship between users, government entities and companies with whom the users will entrust their data- said by Chairwomen of Mozilla followed by that we can afford to have loopholes in the bill like data localization requirements and exceptions clauses for using data by government or government authorities, data localisation being bad for business and users security. Also a number of specialists such as Rama Vedashree, CEO of Data Security Council of India have said data localization provision to be regressive. Lastly the bill exempts government agencies from taking concern coming to delivery of services, mandating data collection in such cases. And this is alarming as government services are offered in same market as that of private players.In its present form, the draft legislation is going to upset three powerful lobbies: the intelligence community which has tripped earlier attempts to enact a privacy law will oppose this draft because it curbs their ability to conduct surveillance until authorized by law; the Silicon Valley lobby will oppose the new draft bill because of the data localization requirements and finally, the bureaucracy, which will now have to rework their record keeping practices failing which department heads will be liable for offences[14].

CONCLUSION

The recommendation of the committee for one law (for data protection) is against the federal spirit of the constitution[15],For example, only parliament has been given the power to enact laws regarding tax income (excluding agricultural income) while only state legislatures have the power to tax agricultural income. Of course, this delineation of power is not always that clear cut. Quite often there is litigation on whether parliament or state legislatures have crossed the boundaries of their powers. In these cases, India's constitutional courts try to ascertain the 'pith and substance' of the disputed legislation to determine whether the essence of the legislation falls under List I, II or III. As it is mentioned earlier, the issue of government records and the data contained within them has been a contentious issue. When parliament was debating the Public Records Act, 1993, some MPs made a demand that parliament extend the law even to state governments and not confine it to only records of the Central government.In the decade that followed, several state legislatures enacted Right to Information-style laws on the assumption that only the state legislature could regulate the manner in which state government records could be accessed.

[14]Prashant T Reddy, assistant professor at NALSAR, Hyderabad, 31.07.18.

[15]According to art. 246 only parliament can legislate on those entries contained in List I of schedule VII of the constitution, while only state legislatures can legislate on entries contained in list II and both together can legislate on items contained in entry III.

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As noted and known the Personal Data Protection Bill, 2018 grants power to Competition Committee of India to keep check and balance on activities of mergers consisting data protection along with it storing and collecting of data keeping in hands thresholds given under Competition Act, 2002. CCI in its recent order held that any breach of Information Technology Act, 2000 did not fall within the ambit of Competition Act, 2002 the main concern is that till what extent CCI will take consideration from EU's framework on privacy laws and relevant data protection laws. So either there should be a unified authority for stopping to overlap the mutually co extensive triangle between data, consumer and anti- trust enforcement, considering the fact that the government should not delve within its authority extra ordinary powers to collect or process data.

However, the provision that will hurt businesses is the need to maintain a copy of all personal data collected on a server or data center located in India. This has been introduced to deal with problems with data requests faced by investigative agencies, when they require data hosted outside India. However, the proper response to this problem is to work with other countries on reforming the mutual legal assistance treaties. Requiring all businesses to store data within India, without any reform of surveillance governance, will pose even bigger privacy issues in the future[16]. The CCI has stated that, notwithstanding the benefits of data driven innovation, big data would be subject to scrutiny for possible anti-competitive conduct.

Hence it comes for tech companies to should trade and dread carefully, be it accessing data sets or licensing for the same. Merger frontier is at embryo stage in Indian Law, however the commission has started looking at companies based on their ability to access or process data or private data; there it seems likely that we are moving towards privacy and data protection laws.

[16] Amber Sinha, center for Internet for society, Data Privacy Bills and Its Loopholes, 28.07.18.

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