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COMPETITIVE DYNAMICS IN DIGITAL MARKETS: CUSTOMIZING REGULATORY FRAMEWORKS FOR INDIA'S UNIQUE LANDSCAPE

HARTEJ SINGH KOCHHER

Ph.D. RESEARCH SCHOLAR, Gd Goenka University, Sohna, Haryana

I. Introduction

Global technology firms, sometimes known as Big Tech[1], have amassed extraordinary influence and market power in today's quickly changing digital economy[2]. Their hegemony has sparked worries about possible anti-competitive behaviour and the effect on smaller market competitors[3]. As a result, regulatory oversight has increased in countries all over the world, including India. This article analyses the problems with Big Tech, considers the necessity for regulation, looks at the gaps in Indian competition legislation, and makes recommendations for strategies to regulate Big Tech companies.

II. Issues with Big Tech

Amazon, Google, Facebook, and Apple have risen at an exponential rate in recent years, garnering significant market dominance[4]. While their ideas and technology breakthroughs have greatly benefited consumers[5], worries have arisen about their ability to hinder competition and hurt smaller market competitors[6].

Some of the major difficulties with Big Tech are as follows[7]:

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[1]Kean Birch & Kelly Bronson (2022) Big Tech, Science as Culture, 31:1, 1-14, DOI: 10.1080/09505431.2022.2036118 – available at https://www.tandfonline.com/doi/full/10.1080/09505431.2022.2036118
The term 'Big Tech' refers to the transnational firms Apple, Amazon, Microsoft, Alphabet/Google, and Facebook/Meta in the United States. It can also be used to refer to a number of other technological companies situated in the United States (such as Uber and Netflix) and internationally (such as Alibaba and Tencent). In India, it can be used to refer to companies such as Reliance Jio and Flipkart also along with the transnational firms already mentioned.

[2]Making "Big Tech" a Force for Good. (2021, December 1). Making "Big Tech" a Force for Good. https://www.greaterpacificcapital.com/thought-leadership/making-big-tech-a-force-for-good
Birch, K., & Cochrane, D. T. (2021). Big Tech: Four Emerging Forms of Digital Rentiership. Science as Culture, 31(1), 44–58. https://doi.org/10.1080/09505431.2021.1932794

[3]Kerai, A. (2022, August 15). Big Tech is Taking Out Small Business | Business.org. Business.org. https://www.business.org/business/big-tech-small-business/

[4]Can Big Tech Be Disrupted? (2022, January 1). Harvard Business Review. https://hbr.org/2022/01/can-big-tech-be-disrupted

[5]Supra 2

[6]Supra 3

[7]On December 22, 2022, the Standing Committee on Finance published its findings on 'Anti-Competitive Practices by Big Tech Companies'. This Report examines ten key anti-competitive practises by Big Tech firms and provides the Committee's views and suggestions on each problem. According to the report, monopolistic practises will restrict fair competition, limit customer choice, and limit the emergence of new entities as the Indian digital ecosystem expands in the absence of regulation. Available at - https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf

1. Rapid Market Power Accumulation[8]: Concerns have been made regarding diminished competition and limited customer choice as a result of Big Tech companies' ability to swiftly grow their market share and dominate multiple sectors. Because of their huge resources, economies of scale, and network effects, they may outrun competitors and create obstacles to entry.

2. Anti-Competitive Behaviour[9]: Big Tech businesses have been accused of engaging in anti-competitive behaviour that undermines fair competition. Predatory pricing, in which corporations purposefully offer items or services below cost in order to force competitors out of the market, and exclusionary behaviour, such as putting unreasonable terms or conditions on business partners or limiting interoperability with competing platforms, are examples of these practises. Furthermore, several Big Tech firms have been accused of abusing their market dominance in order to obtain an unfair edge in neighbouring or complementary areas.

3. Data Monopoly[10]: Because Big Tech controls enormous quantities of user data, there are worries about privacy, data security, and the possibility for monopolistic control over essential digital infrastructure. Big Tech firms can improve their goods and services, optimise their advertising tactics, and acquire important insights into customer behaviour by collecting, storing, and analysing user data. This data advantage, when combined with restricted data portability and interoperability, can erect considerable obstacles for potential competitors and stifle innovation.

III. Why Regulate Big Tech?

The expanding market strength and influence of Big Tech firms has demanded governmental involvement to guarantee a fair and competitive marketplace.

Several factors highlight the necessity for regulation [11,12]:

1. Protecting Competition: Regulation helps to prevent Big Tech corporations from abusing their market dominance by fostering healthy competition and banning anti-competitive practices that hurt consumers and smaller businesses. Regulators can provide a fair playing field for new entrants and smaller rivals by putting prohibitions on anti-competitive behaviour.

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[8] Urvashi Aneja and Angelina Chamuah, A Balancing Act: The Promise and Peril of Big Tech in India (Tandem Research, 2020) <https://tandem-research.org/assets/Tandem-Research-Big_Tech_report.pdf>
[9] Silvia Alves Felix, "Big Tech Companies' Unprecedented Success and the Abuse of Dominance in the EU and the US: A Comparative Analysis" (2022) 12 Southampton Student L Rev 137.
[10] Santesteban, C., & Longpre, S. (2020). How Big Data Confers Market Power to Big Tech: Leveraging the Perspective of Data Science. The Antitrust Bulletin, 65(3), 459-485. https://doi.org/10.1177/0003603X20934212
[11] Moore, Martin, and Damian Tambini (eds), Regulating Big Tech: Policy Responses to Digital Dominance (New York, 2021; online edn, Oxford Academic, 21 Oct. 2021), https://doi.org/10.1093/oso/9780197616093.001.0001,
[12] Regulating Big Tech | The Financial Express. (2022, September 16). Regulating Big Tech | the Financial Express. https://www.financialexpress.com/opinion/regulating-big-tech/2668648/
Also, The value and challenges of regulating Big Tech. (2020, December 16). The Value and Challenges of Regulating Big Tech | Harvard Kennedy School. https://www.hks.harvard.edu/faculty-research/policy-topics/business-regulation/value-and-challenges-regulating-big-tech

2. Safeguarding Innovation: Regulation may build an atmosphere favourable to innovation by tackling concerns such as data monopolies and anti-competitive behaviour, promoting new entrants and ensuring that creative ideas have a chance to develop. When Big Tech firms dominate a large piece of the market and limit competition, it can impede innovation and discourage entrepreneurship.

3. Consumer Protection: Regulation may be extremely helpful in safeguarding the rights of consumers, maintaining the privacy of their data, and resolving issues with the disparity in power between large tech corporations and ordinary users. Transparent policies and enforcement procedures may enhance data usage transparency, prevent the exploitation of personal information, and provide people the ability to decide how they want to engage with the internet

IV. Lacunae in Indian Competition Law

India, like many other countries, is wrestling with the difficulties brought by Big Tech and the need to adequately govern digital marketplaces. While India's Competition Act of 2002 establishes a framework for tackling anti-competitive practises, it leaves several gaps in terms of regulating Big Tech. Some of the major flaws are as follows:

1. Ex-ante Regulation: Ex-post enforcement is the primary emphasis of India's current competition legislation, which targets anti-competitive practises after they have happened. However, due to the unique characteristics of digital markets, ex-ante regulation is required to address any harm to competition in advance. Ex-ante regulation is proactive steps done before to the occurrence of anti-competitive practises, with the goal of preventing market distortions and promoting fair competition. Ex-ante regulation allows authorities to proactively monitor and handle competition concerns.

2. Lack of Proper Classificatory Definitions: Ineffective regulation is hampered by a lack of precise definitions and limitations for defining big tech companies or gatekeepers. Gatekeepers are platforms in digital marketplaces that have extensive control over access to certain markets or user data, impacting competition. It becomes difficult to identify and control gatekeepers effectively without precise and objective definitions. Because of this, both enterprises and regulators may face uneven enforcement and confusion. To tackle this difficulty, it is critical to develop clear criteria for identifying and defining gatekeepers in the digital arena, such as market share thresholds, revenue thresholds, user base, and influence on competition. This is also important for ex ante regulation as entities which can impact competition in the digital space need to be identified for regulation.

3. Data Monopolies: India's competition legislation does not expressly address concerns about data monopolies and Big Tech firms' potential exploitation of customer data. Given the growing importance of data in the digital economy, addressing these data-related challenges requires a comprehensive legal framework. Mechanisms to enable data portability,

interoperability, and user control over personal information can be included. Furthermore, stronger enforcement of data protection laws can assist preserve customer privacy and prevent Big Tech businesses from misusing data.

4. Enforcement Difficulties: Enforcing competition legislation in the digital realm presents particular obstacles. Traditional enforcement tactics may not be enough to confront the intricacies of digital marketplaces, in which corporations frequently operate across states and engage in complicated business practises. For successful enforcement, specialised knowledge and competence in digital marketplaces are required. Strengthening regulatory agencies' institutional capabilities and encouraging coordination among competition regulators, sectoral regulators, and data protection authorities can improve enforcement efforts and solve these difficulties more effectively.

V. The Way Forward: Suggestions for a Balanced Approach

The following recommendations can help policymakers and regulators in India[13]:

1. Implementation of Ex-Ante Regulation: Recognising the unique nature of digital marketplaces, India should contemplate ex-ante regulation. Rather than relying exclusively on reactive enforcement once anti-competitive practises have happened, this would entail establishing proactive steps to avert possible harm to competition. Ex-ante regulation may include measures like as required reporting requirements, transparency standards, and pre-approval systems for Big Tech mergers and acquisitions. This technique would allow regulators to analyse any anti-competitive consequences early on and implement necessary mitigation actions.

2. Clear and Objective Definitions: To guarantee effective regulation, clear and objective criteria for designating gatekeepers or defining big tech companies must be established. These criteria may include market share, revenue levels, user base, and competitive effect. The regulatory framework may be implemented consistently by giving clear and explicit definitions, reducing misunderstanding and uncertainty. Clear definitions would help firms understand their duties and will allow regulators to more effectively identify and control gatekeepers.

3. Addressing Data Monopolies: Given the increasing importance of data in the digital economy, it is critical to design policies that particularly address data monopoly issues. Mechanisms to enable data portability, interoperability, and user control over personal information can be included. It is critical to develop standards that allow consumers to seamlessly transfer data from one platform to another while also ensuring interoperability

[13] This section has been inspired from various sources, mainly the Digital Markets Act of the European Union. Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1. Also, Section 19A of the German Competition Act.

between various digital services. This would promote competition and prevent data concentration in the hands of a few strong players.

Furthermore, rules should prioritise user privacy protection and set strong data protection requirements. This might include requirements for gaining informed permission from users for data collection and usage, guaranteeing openness in data practises, putting in place strong security measures to protect user data, and enabling methods for users to exercise their rights over their personal information. Stricter enforcement of data protection regulations, including hefty fines for infractions, can serve as a deterrent and hold Big Tech corporations accountable for misusing user data.

4. Collaborative Approach: Regulating Big Tech necessitates collaboration among multiple stakeholders, including legislators, regulators, industry experts, and consumer advocacy groups. Consultations and exchanges with different stakeholders can aid in gathering varied viewpoints, identifying possible issues, and ensuring that the regulatory system is effective and balanced. Engaging with industry participants may assist regulators in better understanding the complexities of digital marketplaces and technical improvements, while incorporating consumer advocacy organisations can guarantee that consumers' interests are effectively safeguarded. Transparency, accountability, and confidence in the regulatory process will also benefit from a collaborative approach.

5. International collaboration: Because Big Tech regulation crosses national borders, international collaboration is vital. India can benefit from the experiences and best practises of other countries facing comparable difficulties. Collaboration with global colleagues, exchanging ideas, and coordinating regulatory activities can result in a more harmonised approach to global Big Tech regulation. International collaboration can also aid in the resolution of cross-border difficulties such as data flows, jurisdictional disputes, and regulatory norm harmonisation. Platforms such as the G20, The Organization for Economic Cooperation and Development (OECD), and international competition law conferences can serve as platforms for country talks and collaboration.

VI. Conclusion

Big Tech regulation is a multidimensional and difficult endeavour that necessitates careful consideration of the unique characteristics of digital marketplaces. As the Indian government and the Competition Commission of India (CCI) seek to solve the issues posed by Big Tech, it is critical to take a balanced strategy that assures a competitive marketplace while also encouraging innovation and growth.

Ex-ante regulation is a critical component of effective regulation. This proactive strategy enables regulators to foresee and solve possible concerns before they become visible, preventing anti-competitive behaviour and market distortions. To identify and regulate businesses with considerable market power, clear definitions for gatekeepers, which are major stakeholders in the digital ecosystem, must be defined. This will allow for the use of tailored counter-competitive measures.

Another essential component is addressing data monopolies. Big Tech businesses frequently gather massive volumes of user data, giving them a competitive edge and making it difficult for future competitors to enter the market. Regulators must create regulations that promote data portability while still protecting user privacy. They may create competition, limit data concentration, and support the formation of creative businesses by doing so.

Collaboration is essential for successful digital regulation. Government agencies, industry stakeholders, and academics should collaborate to create policies that strike the appropriate balance between regulation and innovation. Extensive consultations and soliciting information from many views will aid in the development of comprehensive and inclusive regulatory frameworks. Furthermore, because digital marketplaces transcend national boundaries, international collaboration is critical. Collaboration with overseas peers can assist India in aligning its rules with worldwide best practises and addressing the issues faced by multinational Big Tech businesses.

Because the digital ecosystem is always changing, regulatory frameworks must be nimble and responsive. To adapt evolving technology, business strategies, and consumer behaviours, flexibility is essential.

By striking the right balance between regulation and fostering a competitive and innovative environment, India can cultivate a vibrant digital market that benefits consumers, nurtures homegrown businesses in sectors such as Ed-tech, Health-tech, and Agri-tech, and supports overall economic growth. It is critical to handle Big Tech regulation with care, taking into account its specific issues, and engaging in constructive discourse among all parties. Through joint efforts and a forward-thinking strategy, India can effectively traverse the difficulties of regulating Big Tech and secure a sustainable and inclusive digital future for its population.