

Competition Law in Asia: The Interplay of Power Dynamics in the Digital Market

Ankit Srivastava*

Dharmashastra National Law University, India

Aditi Richa Tiwary

Dharmashastra National Law University, India

ABSTRACT: The digital economy and multi-faceted markets have significantly contributed to the efficacy of most transactions governing modern humankind. Digital platforms have become an irreplaceable cross-border asset that has acclimatized with technological advancements. However, there is obscurity in the methods of accommodation of digital economy in competition laws of most jurisdictions globally. Consequently, there are ascertainable issues in competition laws of such jurisdictions. Such issues remain unaddressed due to the absence of evaluation parameters of digital platforms in the conventional market system and culminate into an Implicit and undetected abuse of dominance. This study used the doctrinal method by highlighting the distinctness of contemporary digital markets and their consequential issues. This study explicated the issues in the competition that need to be independently addressed, considering the intricacies of digital platforms. The presence of non-price factors, multi-faceted markets, and data-driven networks being the primary source of such novel issues have been particularly explicated. The established premise was substantiated by way of case studies of major events involving factors such as predation, deep discounting, and data privacy. Elucidation of the competition system in most jurisdictions in Asia and the accommodation of digital platforms in the same was also sufficiently enunciated to present a holistic insight to the established premise. Finally, the authors suggested ways to sufficiently address the issues arising from the distinctness of digital platforms, thereby giving rise to a dynamic and all-inclusive competition.

KEYWORDS: Digital Markets, Competition Law, Data Privacy.



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* Corresponding author's e-mail: ankitsrivastava824@gmail.com

I. INTRODUCTION

In this 21st century, techniques, tools, and methodologies, digitization mark its distinct presence. Given the inevitable digital economy, the global markets are prone to the same downsides. These downsides impose some substantial threats to the prevailing competition in the markets. This threat stems from the peculiar nature of digital markets that are not readily accommodated in conventional market systems operating for decades in most jurisdictions. Contemporarily, the ability of competition laws to accommodate and address the changes brought about by the digital economy is the source of the efficacy of competition laws of any jurisdiction. The authors sketched a detailed analysis of the impact of the digitized economy on the competition in markets. The study trickled to the specifications of accommodation of digital economy in the competition laws of major jurisdictions in Asia.

Works such as that of L. Khan and Lois Cabral explicated the evolution of the global perception on competition law issues in the digital economy, which the past decade has witnessed.¹ Mandrescu discussed the impact of digitized platform markets on the competition laws of the European Union, majorly focusing on the modifications needed in the legislation to tackle the situation more effectively.² Mohindroo also explicated that the digital economy impacted competition laws in the light of web search, social platforms, and e-commerce platforms.³ The reports of international organizations, such as the United Nations and the major journal articles

¹ Lina M Khan, “Amazon’s Antitrust Paradox” (2017) 126:3 Yale Law J. See also Luis Cabral, “Dynamic Price Competition with Network Effects” (2017) Eur Compet Law Rev.

² D Mandrescu, “Applying EU Competition Law to Online Platforms: The Road Ahead” (2017) 38:9 Eur Compet Law Rev.

³ Mohindroo Aryan & Mohindroo Rajat, “Digital Economy & Competition Law: A Conundrum” (2018) 3 Indian Compet Law Rev, online: <<http://www.iclr.in/assets/pdf/2.pdf>>.

focusing on the digital economy and competition, highlighted some distortions to the digital economy's competition.⁴

While there has been a considerable degree of deliberation to the threats that the digital economy brings in, there has not been comprehensive and wholesome research marked by the efficacy of remedies that the modern jurisdictions have availed as a cure to such threats. The present research explains the concerns raised because of the inception of the digital economy and points at the novel issues that the digital economy has Introduced In the modern world. Further, the holistic nature of the present research is marked by the explication of the major concerns to the modern-day competition that the digital economy has brought and the remedies with which the major Asian jurisdictions have addressed such concerns.

This study aimed to highlight the efficiency of an apt accommodation of digitized and data-driven economy in modern markets, thereby underlining the prevalent system of such accommodation in Asia. The research was premised on the peculiarity of the digital economy in association with competition law and the quest for concrete solutions to address the same. As the issues stemming from the digital economy are not research would contribute to crystallizing the apt method to address such concerns.

This study consists of four parts of the main discussion. The first part discusses the digital market that shifts the conventional market system. The second part identifies the latent threats to competition in the global market. The third part analyzes the Indian digital market with the following challenges and solutions. The fourth part examines competition law and digital economy in other major Asian jurisdictions by taking into account Japan, Singapore, and Indonesia.

⁴ United Nations Conference on Trade and Development, "Competition issues in the digital economy, Intergovernmental Group of Experts on Competition Law and Policy Eighteenth session Geneva," (2019).

II. METHODS

The authors used the doctrinal research method to revolve around the quest for a pan-Asian perspective to carry out the established digital accommodation premise. The doctrinal method was chosen for this work because it involved an insight into the challenges posed by the digitized economy to the competition globally. There was an explanation of the *modus operandi* employed by various Asian jurisdictions to resolve such issues. Such a premise demanded studying the concepts, systems, and specific remedies against a data analysis.

III. DIGITAL MARKET: AN EXPLICIT DEPARTURE FROM THE CONVENTIONAL MARKET SYSTEM

The digital marketplace underlines the existence of extreme distinctness as compared to the conventional market system. The root cause of such distinctness stems from the multi-sided nature of digital markets, the absence of monetary considerations, the data-driven network effect, and the ever-expanding nature of digital markets. These attributes often make it difficult for the competition enforcement authorities and other adjudicators to account for definite parameters that can be employed to test the threat to the competition, which any firm may be potent enough to impose. Resultantly, abuse of dominance implicitly takes place, undetected by the adjudicatory and enforcement authorities.

A. Absence of Monetary Considerations and Presence of Non-Price Factors

One of the starkly differentiating features of the digital economy is the presence of non-price factors. The presence of non-price factors means that the parameters employed to adjudicate a market's effectiveness are independent of price consideration since many firms offer their services for free. Therefore, the determining factor becomes the quality of services offered, which, yet again, is devoid of objective assessments. It marks the short drift of digital markets from the conventional market arrangement. Further, due to rapid fluctuations in prices and personalized pricing, which

might at any time become zero pricing, concrete analyses parameters are absent.⁵

The present-day competition does not consider the probable adverse impact that the digitally-driven firms may have on consumers.⁶ Such non-price factors, far from benefitting customers, effectively add to their detriment because of other problems such as abuse of data privacy, predation, and illegal export of data by mergers. These factors are essential to address, as they effectively add to the adjudicatory parameters of effectiveness of any competition system. As an efficient step to counter the consequences of non-digital factors, Germany, in 2017, revised its competition laws by introducing in its list of markets all those firms that tend to offer goods or services on zero price considerations.⁷ By doing so, the jurisdiction added "non-price factors" to its list of parameters to ascertain the firm's efficacy and the potential threats it may cause to the ongoing competitive environment. With regard to Facebook, Germany's Federal Cartel Office declared that it would include Facebook as a private social network market,⁸ by taking a step further towards accommodation of digital factors in the current market system. The Cartel Office also noted the insufficient to have a 'critical mass' of users or technical, financial, and personal expertise to enter adjacent markets and be as successful as the original market.⁹ A service cannot expect to have the same reach when providing a different type of service due to direct solid network effects.¹⁰ The case outrightly emphasized the need to revisit the conventional market structure to accommodate the digital economy's changes.

⁵ United Nations Conference on Trade and Development, "Competition issues in the digital economy, Intergovernmental Group of Experts on Competition Law and Policy Eighteenth session Geneva," (2019).

⁶ Khan, *supra* note 1.

⁷ Federal Law Gazette I, 2013, Act against Restraints of Competition. The law was updated in 2017, where there is the incorporation of a dynamic list of firms that offer services for non-price considerations.

⁸ *Ibid.*

⁹ Federal Cartel Office, Germany, 2019a, Facebook, exploitative business terms according to section 19(1) GWB [German Competition Act].

¹⁰ Federal Cartel Office, Germany, 2019a, Facebook, exploitative business terms according to section 19(1) GWB [German Competition Act].

B. Data-Driven Network Externalities

The term ‘network externalities’ defines the value added to the product with every substantial amount rising in its consumer base. The digital economy thrives on network externalities. Network externalities depend on two-fold considerations, first, their network of consumers. Second, the availability of complementary products. For example, all Google Play-store applications thrive first on the number of consumers who download these applications and Android users. It becomes increasingly probable for android applications to augment their user base. Complementary products or services have a significant influence on network externalities.¹¹ As a rather catchy example of this, 75 percent of online customers in the United States shop at Amazon most of the time.¹²

A direct effect of network externalities lies in the fact that once a substantially stable network is established. It had a double-edged role in augmenting the service's efficacy or product concerned incisively. The first is the trend that the foundational network sets to attract potential users. The second is the advantage of data that this network avails to the firm. This data is usually in the form of feedback that the firm might use to incisively and objectively determine users' demand and augment its services accordingly. While this is a significantly impactful weapon in the hands of the protagonist firm, it has tremendous potential of causing a threat to the competition due to the creation of entry barriers. The data, which firms have, belongs to them to exclude other potential entries in the market. The lack of availability of this data has an evident probability of transforming into an entry barrier. For example, to collect data, Google gives its Android operating system free of cost to mobile telephone manufacturers to collect user data.¹³ As per its official statistics, Google has acquired 225 business

¹¹ Luis Cabral, “Dynamic Price Competition with Network Effects” (2011) 78:1 Rev Econ Stud. at 78.

¹² Courtney Reagan & Jodi Gralnick, “More than 75 percent of US online consumers shop on Amazon most of the time”, *CNBC* (December 2017), online: <<https://www.cnbc.com/2017/12/19/more-than-75-percent-of-us-online-consumers-shop-on-amazon-most-of-the-time.html>>.

¹³ Nicholas Carlson, "Chart of the Day: Why Google Gives Away One Of Its Most Valuable Assets Away For Free," *Bus Insid India* (December 2013), online:

entities since its founding in 1998, and the value of these acquisitions exceeds USD 17 billion,¹⁴ which creates competition for startups right from their initial step in the market.¹⁵

In addition to the online traffic that startups may encounter, these network giants such as Google and Amazon pose a specific threat to the competition due to data access, which these network giants have in abundance. Therefore, network externalities yet again fall outside the adjudicatory ambit availed by conventional market systems. They amplify the need for data-driven markets to be adjudicated upon by making specific provisions within the existing competition.

C. The Ever-Expanding Attribute

One of the most widely ascribed attributes of the digital markets is multi-sided operation. Markets have been conventionally understood to mean either single-sided markets. They are markets that involve only one set of consumers. A conventional firm offers its services in exchange for monetary consideration and generates value from the amount paid by customers or double-sided markets. Also, markets generate value from two sets of customers, and a magazine generating value from its customers. On the other hand, it includes advertisements. However, digital markets have revolutionized this notion of markets by bringing in multi-sided markets that operate with various customers and generate value from the interaction of one set of customers and the other. All the modern-day digital platforms like Google, Facebook, and WhatsApp are multi-sided and heavily dependent on the value generated from these interactions amongst the varying sets of consumers.

These multi-sided markets are ever-expanding and contribute to the obscurity associated with the digital platforms in terms of competition. The

<<https://www.businessinsider.in/chart-of-the-day-why-google-gives-away-one-of-its-most-valuable-assets-away-for-free/articleshow/28158460.cms>>.

¹⁴ Microacquire, "Google Acquisitions," online: <<https://acquiredby.co/google-acquisitions/>>.

¹⁵ Cabral, *supra* note 11 at 83-111.

interaction and transaction of these multi-sided markets are not static and keep changing as these platforms are updated. For example, PayTM, initially, a transaction-enabling platform, was updated to accommodate e-commerce and e-retail Pay TM Mall under the same firm name.¹⁶

As another example, in the Facebook and WhatsApp merger, the European Commission acknowledged that Facebook was effectively engaged with three kinds of markets: social networking services, online advertising services, and consumer communication services.¹⁷ The Commission divided the market into three distinct markets to determine competition threats to all those narrower markets. While it explains the obstructions indirectly determining the potent threat to the markets, another case of the European Commission explains how a few sides of the multi-sided markets may remain untouched in some cases. It is accomplished by the adjudicating authorities while determining the capacity of a firm to distort the ongoing competition. In the case of the Google and DoubleClick merger, the European Commission analyzed whether merging these two platforms' data-driven assets might cause a risk of a dominant position of the merger.¹⁸ The European Commission found that there was no threat to the competition, which this merger posed. It is significant to mention that the movie market widely criticized this judgment. Streaming and navigation service platforms contended that the decision did not consider that both the entities involved in the merger had a substantial role in movie streaming and web navigation. Such markets could be affected negatively post the approval of the merger by the European Commission. The case sufficiently explains the dynamic enigma

¹⁶ Supraja Srinivasan, "Paytm launches separate smartphone app, website for e-marketplace business," *Econ Times* (February 2017), online: <<https://economictimes.indiatimes.com/small-biz/startups/paytm-launches-separate-smartphone-app-website-for-e-marketplace-business/articleshow/57367650.cms>>.

¹⁷ Facebook/ WhatsApp, Case No. Comp/M.7217 (Oct. 3, 2014) (European Commission), online: <http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf>.

¹⁸ Google/DoubleClick, Case No. Comp/M.4731 (Mar. 11, 2008) (European Commission), online: <http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf>.

associated with the digital platforms and their impact on competition owing to their multi-sided operation.

The existence of multi-sided markets explains yet another departure of digital markets from the conventional markets, thereby obstructing a direct determination of the threat to the competition which such multi-sided platforms may cause. Therefore, markets' unmatched nature marks a stark departure from the conventional market system, needing introductions of methods of perception and parameters of adjudication of such dynamic, novel, and ever-expanding markets.

IV. IDENTIFYING THE LATENT THREATS TO COMPETITION IN THE GLOBAL MARKET

Factors such as the absence of monetary considerations, data-driven network externalities, and the ever-expanding attribute of digital markets are the principal sources of the threats to the competition that the digitally-driven markets encounter. These issues are meticulously comprehended in association with the distinctness of digital markets to discern the existing distortions to the competition that the digital age inevitably brings in. Following is a broadly categorized account of the issues that can be ascribed as implicit or latent threats to competition.

A. Lack of Bargaining Power Owing to Standard Forms of Contract

The digital economy exists on virtual tools, the most common of which are the standard contract forms. Standard forms of contracts, also known as "take it or leave it" contracts, are typically the ones to which the consumers fall prey. These contracts, also known as adhesion contracts¹⁹ involve terms that cannot be negotiated. Such non-negotiability stems from the fact that standard forms of contract are so designed that it is impossible to choose a particular set of conditions or clauses while seeking any change in the

¹⁹ Julie A. Reich, "French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective" (2005) *Tulsa J.Comp.& Int'l L.* at 357. Also see *Collins v Farmers Ins Co of Or*, 822 P 2d 1146, 1160 n 20 (1991).

others. These contracts demand an acceptance of the entire conditions. This is why such contracts propel the dominance of the drafter of the contract over the other party. The non-drafters of the contract, in a majority of cases, are consumers. The standard form of contract is an easy tool to enable cartels. Given that data availability occupies an asset's equivalent in a digitally-driven economy, user data input in digital platforms is a widely employed tool to cause an unwelcome advantage.

E-commerce platforms, an inevitable gift of the digital economy, serve as the most efficient and efficacious tools to propagate bargaining power inequality in standard contracts. The E-commerce apps, as an example, require users to enter a variety of information such as feedback, provide access to a gallery, user-location, or agreeing to a set of terms that is not directly related to the transaction, but the input of which would prove to be an asset to the firm. Cookies are also explicit examples of the same. It is highly probable for a user to witness a statement "we use cookies" in any E-commerce platform. The work of cookies is to collect the information relating to the surfing of data by the users and then supply such information to the main server.²⁰ In most cases, the web platform does not function unless the user accepts cookies in the platform.

Firstly, this causes two-fold harm: the consumer has to input the required data, without which the e-commerce platform does not advance to the next stage of a transaction. Secondly, the new entrants are forced to have similar one-sided and unilateral conditions to upkeep their data assets at par with the established firms. Therefore, e-commerce platforms and their consequential propagation of standard forms of contract lead to a distortion of competition through unilateral and non-negotiable conditions.

Two doctrines operate in order to avail a remedy to the unilateral terms of contracts. These two are the doctrine of unconscionability and the doctrine of abusive clauses. While the doctrine of unconscionability operates in common law jurisdictions (such as the UK), the doctrine of abusive clauses

²⁰ Gokce Attorney Partnership, "Turkey: Are Cookies A Threat For Our Privacy?", *Mondaq* (March 2019), online: <<https://www.mondaq.com/turkey/privacy-protection/784926/are-cookies-a-threat-for-our-privacy>>.

is applicable in civil law jurisdictions (such as Columbia).²¹ Both the doctrines nullify those clauses that deny the bargaining power to the consumers. However, both concepts have their shortcomings.

The doctrine of unconscionability demands an exceedingly high threshold for the determination of unequal bargaining power. The requisite parameter is that the impugned clause should shock the conscience of the court.²² Further, there should be procedural and substantive inequality reflected by contracts' clauses to avail this doctrine.²³ Thus, the purpose of this doctrine is to prohibit the incorporation and enforcement of extremely one-sided contracts and not to curb the inequality in bargaining power merely.²⁴ Therefore, even after the presence of this doctrine, the inequality in bargaining power remains unaddressed. Such inequality is addressed only when there is an extremity of inequality to such an extent that it shocks the court's conscience.²⁵ The modern-day standard forms of contract cannot be expected to unreasonably shock the court's conscience because the inequality in bargaining is created subtly and implicitly via e-commerce platforms. Therefore, the doctrine of unconscionability does not effectively solve the issue of inequality in bargaining power.

Considering the civil law jurisdictions such as Columbia, American states like Louisiana, the doctrine of abusive terms is applied. The doctrine of abusive terms brings the same import as unconscionability. It nullifies those terms in a contract that reflects a lack of bargaining power in either of the parties. The inability of the doctrine of abusive power to address the issue of inequality of bargaining stems from the fact that it involves relatively subjective grounds to establish abusive terms. The Colombian Supreme Court of Justice, in addition to several arbitral decisions, has identified

²¹ Camilo A Rodriguez-Yong, "The Doctrines Of Unconscionability And Abusive Clauses: a Common Point Between Civil And Common Law Legal Traditions" (2011) 1 Oxf Univ Comp Law Forum.

²² *Adams v John Deere Co* 774 P 2d 355, 357 (Kan Ct App 1989).

²³ *Fensterstock v Educ Fin Partners* 611 F 3d 124, 134-136 (2d Cir 2009); *Edwards v Hovensa LLC* 497 F 3d 355, 362 (3d Cir 2007).

²⁴ Rodriguez-Yong, *supra* note 21.

²⁵ *Ibid.*

situations where the doctrine of abuse of right may arise.²⁶ These include situations where there are exercises of a right to harming someone and a right that deviates from its economic or social finality. Further, From the US law perspective, states like Louisiana have also recognized the doctrine of rights abuse. It applies when a right is exercised with the exclusive purpose of 'harming another or with the predominant motive to cause harm' and for a purpose that differs from the one it was granted. It includes a serious or legitimate interest that deserves to be judicially protected does not exist, or the use of the right violates moral rules, good faith, or elementary fairness.²⁷

As is evident from the above judicial interpretations, the subjectivity associated with the terms good faith, predominant motive of harm, serious or legitimate interest, in the doctrine of abusive terms makes it difficult to address the issues arising from standard forms of contracts emerging from the digital market. Therefore, while unconscionability is ineffective due to the high determination threshold, the doctrine of abusive terms is meaningless. It considers the excessive subjectivity associated, thereby reassuring inequality in standard forms of contracts in the digital economy.

B. Predation

Predatory pricing is yet another common phenomenon that is observed mainly in the digital economy. Predatory pricing involves reducing prices to such an extent, and the other competitors are forced to do so by reducing their prices. Otherwise, it includes quitting the market in the absence of the ability of such reduction. The competition in the market is distorted by such low pricing. Given that the digital economy is primarily run on non-price factors and involves multi-sided markets, the conventional systems of detecting predatory pricing fail when it comes to the digital economy. For example, when Microsoft offered its web browser Internet Explorer, its

²⁶ *Expediente 3972*, Corte Suprema de Justicia [Supreme Court of Justice], 19 Oct 1994, MP: CE Jaramillo Schloss (Colom). Also see *Consortio Business Ltda v Bellsouth Colombia SA* Arbitral Award (Camara de Comercio de Bogota 2004).

²⁷ *Coleman v Sch Bd of Richland Parish*, 418 F 3d 511, 524 (5th Cir 2005).

most significant competitor Netscape was forced to offer similar user interface improvements to its web browser. Then, there began competition amongst the two companies to capture the market.²⁸ Moreover, through the complementary windows operating system, Microsoft established itself as a default browser on PCs. However, it was not game over. It was from roughly 2006 onward that new competition in the browser market took off. By 2008, Mozilla Firefox and Chrome had been eating into IE's market share in the desktop browser market, as had been doing by Apple's Safari.²⁹ By 2016, Microsoft stopped improving and marketing Internet Explorer versions 7 through 10 on its operating systems.³⁰ It also announced that it would now work on simulating the chromium project, the underpinning technology of Google Chrome.³¹

Due to its multi-dimensional and multi-faceted nature, Chrome, in addition to its non-price factors, continues to be the undeniably dominant firm in web browsing, owing to a global share of more than 64.15%.³² Presently, neither Microsoft nor Mozilla has been able to defeat Chrome right from its inception. Presently, anyone can access all the web browsers for free. However, Chrome continues to be the most widely used web browser. It presented to its users an improved version of existing web-browsers early on and has incessantly improved by collecting relevant data and employing network externalities to the fullest. Any competition enforcement agency has not stalled this practice to date. It accounts for the limited adjudicatory parameters that are practically inapplicable in this digital age.

²⁸ Ryan Bourne, "Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism" (2019) 872 *Cato Inst Policy Anal*, online: <<https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism>>.

²⁹ Gregg Keizer, "Browser metrics: IE slide continues, Firefox users update", *PC World IDG* (October 2008), online: <https://www.pcworld.idg.com.au/article/262516/browser_metrics_ie_slide_continues_firefox_users_update/>.

³⁰ Klint Finley, "The Sorry Legacy of Internet Explorer", *Wired* (2016), online: <<https://www.wired.com/2016/01/the-sorry-legacy-of-microsoft-internet-explorer/>>.

³¹ Bourne, *supra* note 28.

³² Statcounter, "Browser Market Share Worldwide" (March 2021), online <<https://gs.statcounter.com/browser-market-share>>.

C. Threats to Data Privacy

Since data remains an asset in the digital economy, the race to procure data often underlines privacy breaches' existence in an implicit and unreported manner. The digital economy has opened doors of access to private data with such ease that it has become arduous to keep track of user privacy's ongoing infringements. While the other problems associated with the digital economy do not have a solution because of the conventional markets' limited adjudicatory parameters, data privacy infringement is different. The problem persists not because of the absence of yardsticks to gauge the data infringement but because the ever-expanding nature of digital markets and the significance of data as a precious asset for firms make consumers easy prey to the firm's need for data.

As a recent example, the United States Federal Commission ordered the tech giant Facebook in July 2019 to pay USD 5 billion for intruding billions of its users' private data.³³ The Commission also ordered Facebook to restructure its policy and recalibrate the present systems to prevent infringement or unnecessary intrusion into consumers' private data. Further, the Commission separately sued Cambridge Analytica and its former Chief Executive Officer and App Developer for being instrumental in harvesting the personal information of Facebook users.³⁴ Facebook had sold the obtained data to Cambridge Analytica, which was the reason for holding both the firms accountable.³⁵ Further, in February 2021, the same Commission ordered the online meeting platform Zoom to restructure its privacy settings and provide comprehensive security programs to prevent

³³ Federal Trade Commission, "FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook", *Press Releases* (July 2019), online: <<https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>>.

³⁴ Federal Trade Commission, "FTC Sues Cambridge Analytica, Settles with Former CEO and App Developer", *Press Releases* (July 2019), online: <<https://www.ftc.gov/news-events/press-releases/2019/07/ftc-sues-cambridge-analytica-settles-former-ceo-app-developer>>.

³⁵ BBC News, "Facebook to pay record \$5bn to settle privacy concerns", (July 2019), online: <<https://www.bbc.com/news/business-49099364>>.

consumer data threats.³⁶ As yet another example of consumer privacy infringement, the US Federal Trade Commission issued orders to revamp the privacy protection arrangements to the health protection application "Flo Health." This brand took control of user's sensitive fertility data and shared such data with third parties.³⁷ The US is an apt example to depict the threats to consumer data relating to health, as there are major health-protecting apps in the US that share data with health insurance companies.³⁸

One may find numerous cases that deal with the theft of user's data for the cause of supplying it to or sharing it with third parties to generate profit directly or to improve one's interface. Consumers' human behavior cannot be reasonably expected to cause them to question every little happening on the digital data platform they are dependent on carrying out their work.³⁹ In such cases, it becomes critical for the firms to take charge of their activities and for the consumer protection and competition enforcement authorities to check for the privacy settings aptly so that there is no infringement of data. In the cases mentioned earlier on data privacy infringed, a detailed account of such infringements is accessible. However, there is a high probability of many more similar cases on the digital platforms that remain unnoticed, hence unaddressed. Therefore, for the cause of consumer protection, there is a strong need to create a system of rectification of privacy concerns in web platforms, rather than the mere existence of data protection bills.

³⁶ Federal Trade Commission, "FTC Gives Final Approval to Settlement with Zoom over Allegations the Company Misled Consumers about Its Data Security Practices," (February 2021), online: <<https://www.ftc.gov/news-events/press-releases/2021/02/ftc-gives-final-approval-settlement-zoom-over-allegations-company>>.

³⁷ Lesley Fair, "Health app broke its privacy promises by disclosing intimate details about users," *Fed Trade Comm* (January 2021), online: <<https://www.ftc.gov/news-events/blogs/business-blog/2021/01/health-app-broke-its-privacy-promises-disclosing-intimate>>.

³⁸ Sam Thielman, "Your private medical data is for sale – and it's driving a business worth billions," *The Guardian* (January 2017), online: <<https://www.theguardian.com/technology/2017/jan/10/medical-data-multibillion-dollar-business-report-warns>>.

³⁹ Alessandro Acquisti, Laura Brandimarte & George Loewenstein, "Privacy and human behavior in the age of information" (2015) 347:6221 *Science* at 509–515.

V. INDIAN DIGITAL MARKET: CHALLENGES AND SOLUTIONS

Like the major jurisdictions worldwide, India has its share of uncertainties associated with identifying digital age competition discrepancies. In this context, India is on its way to availing a cure for the problem, as reflected by the Competition Commission of India's significant reports and some of the Indian courts' recent judgments. However, just like most jurisdictions, Indian has not yet legislatively reflected the change in the yardsticks to judge the modern, digitally-driven market.

Considering the inequality in the bargaining power arising from the standard form of contracts in E-commerce platforms, Paytm, which is India's product, in addition to the existence of Amazon and Flipkart, occupies the Indian market widely. The Indian Commerce Ministry is all set further to support the existing system of India's e-commerce.⁴⁰ The inequality in bargaining power, which E-commerce in association with standard forms of contract brings along, remains an unaddressed concern in India. The 103rd and 199th Reports of India's Law Commission had based their recommendations on unconscionability principles and its need to be expressly recognized within the Indian legislative domain.⁴¹

The reports above of the Law Commission recognize the fact of prevailing inequality in bargaining power propagated by standard forms of contracts,⁴² as is clear from the following paragraph:

"A standard-form contract is prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms. Also termed contract of adhesion contract;

⁴⁰ BW Online Bureau, "The Government Will Extend All Support To E-Commerce And Retail Industry Through Various Policies: Commerce Ministry," *BW Bus World* (October 2020), online: <<http://www.businessworld.in/article/The-government-will-extend-all-support-to-e-commerce-and-retail-industry-through-various-policies-Commerce-Ministry/28-10-2020-336772/>>.

⁴¹ *Unfair Terms of Contracts*, by Law Commission of India, 103 (1984). See also: *Unfair (Procedural and Substantive Terms in Contract)*, by Law Commission of India, 199 (2006).

⁴² *Ibid.*

take it or leave it contract. Some sets of trade and professional forms are extremely one-sided, grossly favoring one interest group against others, and are commonly referred to as adhesion contracts. From weakness in bargaining position, ignorance or indifference, unfavored parties are willing to enter transactions controlled by these lopsided legal documents.”⁴³

The Commission recommended an unconscionable term in a standard form of contract to be treated as a void term. However, not many explained the e-commerce platforms and their propagation of the lopsided nature of standard forms of contract. Further, the impact of standard forms of contract on competition has not been described in the report.

As regards predating, in India, the case of Jio is noteworthy. In 2016, Reliance Jio entered the Indian market, and right from its inception date, it offered services free of cost. Such services were inclusive of voice calls, video chat, text, net surfing, and downloads. Post such an offer, Jio witnessed a massive network and all the associated benefits. Post such colossal drift of masses to Jio's offer, Bharati Airtel filed a case against Reliance Jio in the Competition Commission of India in 2017.⁴⁴ The Commission applied its conventional parameters to rule that since Jio was occupying a share of merely around 7 percent, it could not have been considered a threat to competition.⁴⁵ It is noteworthy that right after the Commission's decision came, Jio gradually increased its prices. The present case is sufficient to establish predating. However, owing to the Commission's limited parameters, considering the conventional market system, this predation could not be identified aptly in 2016. To avail a cure to this, India's Competition Commission has published a thorough and detailed report on the market study of the telecom sector in India.⁴⁶ The report identifies all the digital market nuances, such as non-price factors, multi-faceted and

⁴³ Law Commission of India, *supra* note 41. Also see Harxus B Steinberg, “Lawyers and Their Work. By Quintin Johnstone and Dan Hopson” (1968) 17:2 *Cathol Univ Law Rev.* at 329-30.

⁴⁴ *Bharati Airtel Ltd. v. Reliance Industries Ltd.* (2017), online: <<https://www.cci.gov.in/sites/default/files/3%20of%202017.pdf>>.

⁴⁵ *Ibid.*

⁴⁶ *Study on the Telecom Sector in India*, by Competition Commission of India (2021).

ever-expanding markets.⁴⁷ This report is expected to be a source of the drift towards accommodating the digital age in the Indian market system to resolve issues such as predating.

One can trace a significant evolution in the Indian competition and adjudicatory bodies over the past half-decade regarding privacy concerns. In the year 2017, when a case against WhatsApp's anti-competitive and user-privacy infringement policies was filed in the Competition Commission of India,⁴⁸ the Commission identified the relevant market as the market for instant messaging services using consumer communication apps through smartphones, which was not the case. WhatsApp had a lot to offer, such as user data in location sharing, name, media sharing, downloads, and sharing of website links. As a result of considerable import given to the conventional systems of fixing a limited market, the Commission held WhatsApp free from such allegations. The Commission reflected an extremely narrow and conservative approach towards the modern, digitally-driven market by such an action.

However, as a response to an SLP, the Supreme Court in 2021 directed Facebook and WhatsApp to file their replies regarding merits' data infringement allegations. In the words of the court:

"You may be a two or three trillion (dollar) company. However, people value their privacy. It is our duty, and we have to protect people's privacy."⁴⁹

India is in the process of passing its Personal Data Protection Bill 2019,⁵⁰ which would address the issues of consumer data privacy by digital platforms in a concrete manner. It aims to impute liability on data fiduciaries and intermediaries for data processing without consent. Moreover, the Competition Commission of India has ordered an

⁴⁷ Yash Mehta, "India: CCI's Market Study On The Telecom Sector – An Overview," (February 2021), online: <<https://www.mondaq.com/india/antitrust-eu-competition-1037960/ccis-market-study-on-the-telecom-sector-an-overview>>.

⁴⁸ *Shri Vinod Kumar Gupta v WhatApp Inc*, 2017 Competition Commission of India.

⁴⁹ *Karmanya Singh Sareen v. Union of India*, (2020) SLP (C) 804/2017.

⁵⁰ Vijay Pal Dalmia, "India: Personal Data Protection Bill, 2019", *Mondaq* (2021), online: <<https://www.mondaq.com/india/data-protection/1024292/personal-data-protection-bill-2019>>.

investigation into the privacy policy of WhatsApp and Facebook recently, with an intent to curb any privacy infringement activity intended to steal data from consumers.⁵¹ Therefore, given the progress of the Indian system to recognition, assimilation, and accommodation of the novelty, nuances, and intricacies associated with the digital economy, one can witness a fair reflection of an evolutionary mindset progressing towards the much-required change.

VI. COMPETITION AND DIGITAL ECONOMY IN OTHER MAJOR ASIAN JURISDICTIONS

The issue of accommodation of the digital economy in the competitive market is not peculiar solely to India. It is a global concern because of the universality of digitization, especially in the 21st century. Given the Asian continent, the following jurisdictions have reflected the accommodation of the digital economy in the most manifest manner.

A. Japan

The Japanese competition law is one of the most progressive jurisdictions where the digital economy's accommodation can be perceived most expressly. In regard to academic and practical aspects, Japanese competition reflects aptness in protecting consumers from dominant market positions, bringing in transparency on digital platforms, and maintaining healthy competition. The Japanese government's efforts are significant in response to the lack of remedy to address the digital economy's change in conventional market systems.

The conventional law governing competition in Japan is the Anti-Monopoly Act (Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), preventing cartel formation, formation of monopolies, and all the anti-competitive practices. However, the Japanese government acted promptly due to the market system's sudden drift to a digitalized version. The Japan Fair Trade

⁵¹ *Case against Whatsapp LLP*, 2021.

Commission passed the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information.⁵² The guidelines were released in 2019 and deal with the substantive conceptual clarifications of the Japanese competition by enhancing digitalization and explicating the effort to prevent superior position misuse by the dominant players. The factors of abusive clauses in contracts and unconscionability have also been considered and sufficiently addressed by the Japanese Fair Trade Commission. These guidelines have also considered factors such as infringement of data privacy by digital platforms. Such an action explicates a holistic accommodation of the digital economy in the conventional markets.⁵³ The guidelines also provide for the burden of proof to rest on the seller or service provider. In case there is any violation found.⁵⁴ The blend of impartiality, protection of consumers, and a productive mindset towards a digitalized economy mark the Japanese Guidelines' peculiarity.

As a reflection of another attempt to address the novel issues of the digital economy, the Japanese Ministry of Economy, Trade, and Industry passed the Act on Improving the Transparency and Fairness of Digital Platforms, which came out in February 2021.⁵⁵ The Act's objectives revolve around improving transparency and reducing uncertainty and arbitrariness in trading in digital platforms.⁵⁶ It simultaneously prohibits the innately prevalent exercise of non-disclosure of terms in digital platforms.⁵⁷ The

⁵² Japan Fair Trade Commission, "Release of the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc." (2019), online: <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html>.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Ministry of Economy, Trade, and Industry, "Cabinet Decisions Made on Two Cabinet Orders for the Act on Improving Transparency and Fairness of Digital Platforms," *Minist Econ Trade Ind* (January 2021), online: <https://www.meti.go.jp/english/press/2021/0126_003.html>.

⁵⁶ Jeffrey J Amato & Tomonori Maezawa, "Japanese Legislature Passes Act To Regulate Big Tech Platforms," (January 2021), online: <<https://www.mondaq.com/antitrust-eu-competition-/1024456/japanese-legislature-passes-act-to-regulate-big-tech-platforms?type=mondaqai&score=64>>.

⁵⁷ *Ibid.*

Ministry has also given its assent to a series of regulations backing the Act to materialize it aptly.⁵⁸ The Act aims to streamline the trading in digitalized platforms, swiftly reducing unnoticed offenses by implicit ways.

It is noteworthy that the exercise of study groups strengthens the competence and acumen of the legislature in Japan,⁵⁹ where considerably detailed study, research, and analysis of circumstantial factors are considered.⁶⁰ This study helps point out and explicate the prevalent concerns with any matter, after which a substantial deliberation takes place to find solutions for the problems. The Japan Fair Trade Commission's study circle on the impact of digitalization in competition is working to ensure that the effect of the ongoing policies is considerably taken into account, gauging the need for new regulations to address the citizenry's needs. These academic and research-oriented exercises enable logical and factual justifications of every action taken by the government and help justify further action with any concern. The academic deliberation and prompt response to any implicit concern mark the peculiarity of Japanese jurisdiction. The aptness of Japanese jurisdiction is reflected by the Japanese response to the change brought about by the digital economy.

B. Singapore

Singapore's jurisdiction is another fact that has shown considerable evolution and accommodation of the digital economy in its conventional system. The Competition and Consumer Commission of Singapore is the body that regulates and prevents threats to competition in Singapore. It is noteworthy that the Competition Act and The Consumer Protection (Fair Trading Act) both apply to the cases, and the Commission is empowered to give a combined interpretation to the provisions of both Acts while

⁵⁸ *Ibid.*

⁵⁹ Japan Fair Trade Commission, "The Study Group on Competition Policy in Digital Markets," *Jpn Fair Trade Comm* (2020), online: <<https://www.jftc.go.jp/en/p/ressreleases/yearly-2020/July/200729.html>>.

⁶⁰ *Ibid.*

considering any matter before it.⁶¹ This explicates the consumer-oriented approach to which the Competition Commission of Singapore adheres.

Further, in February 2017, the digital economy and its association with competition were recognized in Singapore when Committee on Future Economy highlighted the impact that technology was capable of causing to the ongoing competition.⁶² The report submitted by the Committee directed that the nation should focus on building a robust system to attract investments, where a process to streamline the digital economy was initiated.⁶³ Thereafter, the Digital Industry Singapore was a step forth by the Singapore government. The Digital Industry would exist as an interface between the companies and government to better understand the tech-driven company's needs.⁶⁴ In order to harmonize the aspects of the development of the state and maintenance of accountability by the tech-driven companies, the Digital Industries maintained clear and explicit agreements so that the consumer's interests are not affected.⁶⁵ Any act of digitally-driven companies creates no entry barrier.

In September 2020, the Consumer and Competition Commission of Singapore had explicated its Market study, in which the Commission pointed out the significant issues arising in the competition laws of Singapore.⁶⁶ The Commission found a need to amend the laws regarding dominant positions to include data as an asset in the Section 47 Prohibition Guidelines (relating to dominant abuse).⁶⁷ The definition of markets was

⁶¹ Lee PP Rachel & Leow R Ping, "Competition and Consumer Commission of Singapore", *Glob Compet Rev* (2019), online: <<https://www.lexology.com/library/detail.aspx>>.

⁶² *Ibid.*

⁶³ Royston Sim, "Committee on the Future Economy outlines 7 strategies to take Singapore forward", *Straits Times* (February 2017), online: <<https://www.straitstimes.com/singapore/committee-on-the-future-economy-outlines-7-strategies-to-take-singapore-forward>>.

⁶⁴ CNA, "New office for digital industry aims to help create 10,000 tech jobs in Singapore", *CNA* (2019), online: <<https://www.channelnewsasia.com/news/singapore/disg-digital-industry-singapore-office-could-yield-11662936>>.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Andrew McCallum, "Singapore Competition and Consumer Commission Issues Final Market Study on E-commerce Platforms," *Assoc Corp Couns* (October 2020),

also suitably amended.⁶⁸ Further, the Commission found that the rules regarding mergers would have to be amended to prohibit those mergers where data could be manipulated.⁶⁹ Resultantly, the Commission intended for changes in the Guidelines on Mergers Procedures,⁷⁰ so that a merger between companies is prevented in cases where there is a threat of a dominant position in the digital markets.⁷¹

Therefore, Singapore's Consumer and Competition Commission has already accommodated the changing trend in the competition that the digitally-driven markets have brought. Further, the state has created an apt balance between development and consumer welfare. The Consumer and Competition Commission and Digital Industry have created a conducive environment for an apt digitally-driven competition.

C. Indonesia

In the recent past, competition law in Indonesia has confronted substantial issues relating to the digital economy, such as lack of bargaining power and data privacy infringement. However, the state has been successful in addressing a variety of those concerns. The existing e-commerce activities in Indonesia are aimed at development but are consumer-oriented at the same time.⁷² The KPPU (Competition Commission of Indonesia) ensures that e-commerce activities provide for consumer protectionism. These protections include national payment gateways, accreditation of e-commerce platforms, and payment mechanism policies.⁷³

Further, the KPPU has its own sets of reports that aim to accommodate the digital economy in the Competition Law of Indonesia.⁷⁴ These reports

online: <<https://www.acc.com/resource-library/singapore-competition-and-consumer-commission-issues-final-market-study-e-commerce>>.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Vience M Rumata & Ashwin S Sastrosubroto, "The Paradox of Indonesian Digital Economy Development" in *E-Bus High Educ Intell Appl* (IntechOpen, 2020).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

aim at identifying the major issues being confronted by the Indonesian competition with a digital economy and suggest solutions to the same while comparing the Indonesian system with major international jurisdictions. However, there is no explicit legislative enactment aiming to accommodate the digitalized economy in the Indonesian competition. The Reports of the Competition Commission of Indonesia demonstrate sufficient concern for issues arising out of multi-faceted markets digitalized economy.

Further, the issues of data privacy arising out of the multi-faceted and digitally driven platforms are explicitly addressed by the Electronic Information Law, Government Regulation on the Implementation of Electronic Systems and Transactions and Communication and Informatics Regulation about the Protection of Personal Data in Electronic Systems.⁷⁵ These regulations prevent the threat to user data that the digital platforms inevitably impose due to their tendency to accumulate data because of the sole reason that the digitally-driven economy propagates data as an asset. In order to prevent the consumers from the illegitimate use of their data by firms, these regulations are significant.⁷⁶ The Indonesian government is also in its way of a Nation-wide Digital Road Map by making significant provisions to attract foreign investment in the digital economy while maintaining consumers' trust by ensuring consumer protectionism, transparency, and accountability.⁷⁷

As reflected from the afore-explained system of competition law in Indonesia,⁷⁸ the state is on its way to assimilate the digitized transformation in the conventional system, where consumer protectionism and data security have already found their way. The competition law of the nation

⁷⁵ Denny Rahmansyah, "Indonesia: Data Protection And Cybersecurity In Indonesia: Enforcement And Litigation," (2019), online: <<https://www.mondaq.com/data-protection/874882/data-protection-and-cybersecurity-in-indonesia-enforcement-and-litigation>>.

⁷⁶ *Ibid.*

⁷⁷ Kearney, "Unleashing Indonesia's digital potential", *Kearney*, online: <<https://www.middle-east.kearney.com/digital-transformation/article/?/a/unleashing-indonesia-s-digital-potential>>>.

⁷⁸ *Ibid.*

and other supporting regulations make the state a promising host for both consumers and investors in the years to come.

VII. CONCLUSION

The current digital economy and competition are intricately connected to such an extent that can no more be comprehended or applied in the other's seclusion. Due to the peculiar attributes of the digitalized economy, such as multi-faceted markets, non-price factors, ever-expanding nature, and the significance of data as an asset, there are challenges such as predation, lack of bargaining power, and threats to data privacy. They inevitably creep in along with the advancement brought by the digitalized economy.

In order to confront these challenges, prior recognition and acknowledgment of the change are required. As evident from the extensive Asian perspective, there is a manifest recognition of such changes. While it is true that a majority of jurisdictions may find it apt to resolve the issue via any means other than legislation, the significant factor remains a certainty. Jurisdictions should devise ways to qualify 'data' as a factor for market dominance, as the data in a digitized economy is an essential determinant of dominance. The data should be qualified as a parameter of asset to adjudicate the dominance of any firm in the market. Also, the data must be considered equivalent to price in defining the relevant product market, in which the price of goods and services are taken as a tool. Jurisdictions should consider defining the relevant market in the dominance cases in multi-sided markets by accommodating the digitally-driven economy and unexpected changes. Network effects should be considered to discerning the degree of threat that a firm may pose to the existing competition. Jurisdictions should draft procedurally consistent legislation to address such dynamic changes, where there is the minimal scope of ambiguity. While the available remedies to the concern are inevitable, to the extent that there is a quick remedy availed to the breach of any digital economy issue, the system is apt to address the challenges. Thus, most Asian jurisdictions are on their journey to achieve this promptitude in remedy and address the concerns.

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