

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 2 | Issue 2

2020

© 2020 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Legal Science and Innovation**, kindly email your Manuscript at editor.ijlsi@gmail.com.

Anti-Competitive Conducts by Tech Titans

SUMIT KUMAR¹

ABSTRACT

Rise of tech-titans provided enormous power and influence to them in the digital economy, which leads to various anti-competitive conduct. By 2019, tech-titans become the biggest global companies and all of them were alleged with various anti-competitive conducts. Digital economy and tech-titans created new complexity for Competition regulators as old rules and principles of competition law has to be applied to this new economy. Author focuses on various complexity of competition law in the digital economy such as- big data, network effects, zero price product, etc., which has unidentified effects and is also hard to trace. These new challenges instigated study of the digital economy and some measures are developed to apply competition law principles. Author tries to apply some of the principles on the tech-titans in order to identify and analyse various anti-competitive conducts.

Keywords- Tech Titans, Tech companies, Digital Economy, and Competition Law.

I. INTRODUCTION

The World as we know is continuously changing and one of the fundamental drivers in recent time is digital transformation or digital revolution. Digital revolution leads to formation of new and enormous economy which is widely known by the name of Digital Economy. The Digital economy refers to a wide range of economic activities that use digital networking and communication infrastructure technology as key factor for production. Sometimes this economy is also called as the Internet Economy, New Economy, Tech Economy or Web Economy. In today's society this digital revolution is the same as what the industrial revolution was in the late 1800s and early 1900s. Industrial revolution had industrialized the world economy and this time the digital revolution is digitalising the world economy.

Digital Economy per se is not about tech businesses or companies but it is more about users engaging in this economy. In recent times, the number of internet users has increased all over the world at an astounding rate with the dot-com boom. The number of internet users has bounced from almost 361 million in 2000 to gargantuan 4,422 million in 2019 which

¹ Author is a student at Chanakya National Law University, Patna, India.

indicates an astonishing growth rate of 1,125%.² By 2019, almost 57.3% of the world population is part of this economy.

This increase in enormous internet users creates opportunity for new businesses who developed their model around this digital economy. Some of these businesses emerged as colossal companies operating in different product markets and proclaiming themselves as leaders of this economy. Due to their enormous size and large market share, these companies are also known by the name of “tech-titans”.

According to study by Visual Capitalist tech-titans have settled themselves as largest companies by market capitalisation. In the year 2004 after the dotcom bubble burst, only two tech companies were in the list of top 10 companies by market capitalisation. But in 2019, 7 out of top 10 companies are tech companies.³ Further what is remarkable is the fact that today all the top 5 companies by market capitalisation are tech-titans.⁴ These tech-titans have seized power in the entirely new market i.e., Google in search engines, Facebook in Social Networking services, Amazon in e-commerce, Microsoft in operating system, etc. In most of the cases these companies have generated the new markets all by themselves by using innovative technology and identifying human wants. Increase in both internet users and tech-companies lead to expansion of the digital economy as whole.

Tech-titans are responsible for many technological breakthroughs and massive wealth creation, but they have also received many condemnation related to harmful content, privacy practices, alleged political bias and the anti-competitive conducts.⁵ Government and regulatory bodies all over the world failed to pick up with the fast pace expansion of digital economy and that’s why tech-titans grew in an economy which is unregulated for the most part. One of the key areas where rules and regulation for digital economy was missing is in the field of competition law. Further more daunting is the fact that governments and regulators could not understand the working and scope of digital economy, this is pellucid from *United States vs. Microsoft Corporation*,⁶ which is first major anti-competitive case against any tech-titan in the USA, where Department of Justice (‘DoJ’) had a hard time in

² Top 20 Countries with the highest number of Internet Users, Internet World Stats (June. 30, 2019), <https://www.internetworldstats.com/top20.htm>.

³ Jeff Desjardin, A Visual History of the Largest Companies by Market Cap (1999-Today), Visual Capitalist (June 21, 2019), <https://www.visualcapitalist.com/a-visual-history-of-the-largest-companies-by-market-cap-1999-today/>.

⁴ Andrea Murphy, Hank Tucker, Marley Coyne & Halah Touryalai, GLOBAL 2000 The World's Largest Public Companies, *Forbes* (May 13, 2020, 6.00 A.M.), <https://www.forbes.com/global2000/list/#tab:overall>.

⁵ Ryan Tracy, Tech Giants Draw Fire in Congress, *Wall St. J.* (July 16, 2019), <https://www.wsj.com/articles/congress-puts-big-tech-in-crosshairs-11563311754>.

⁶ *United States v. Microsoft Corporation*, 232 F. Supp.2d 144 (D.D.C. 2002).

understanding the working of the digital economy and creating arguments against Microsoft.

Tech-titans have intentionally or unintentionally used this void of regulation to aggressively gain market share and sometimes even used anti-competitive conduct to become leading player. These titans are accused of indulging in various anti-competitive practices like predatory pricing, product bundling, buying out potential competitors, favouring their own services, etc.

For the purpose of understanding anti-competitive practices by tech-titans, focus is on big tech-companies i.e., Alphabet, Facebook and Amazon. Further countries which are chosen for this study are those who have significant presence of tech-titans in their economy and have identified the convoluted issue of anti-competitive conduct in the digital economy i.e., USA, European Union ('EU') and India. It is also important to note that in today's global digitalised economy, business practices and decisions in one geographical market also affects the other geographical market. That's why decisions made by companies in USA also affect its conduct in India. This paper focuses on grey areas in digital economy which governments and regulatory bodies have hard time to identify and comprehend. And most importantly, it analyses remedy or counterattack measures proposed or developed by regulators or analysts against anti-competitive conducts by tech-titans.

II. MARKET ANALYSIS

All the major economic domains i.e., USA, EU and India have their own anti-trust laws to regulate and promote competition. Anti-trust laws provide commitment to the promotion of economic competition, which includes businesses to cut costs, improve productivity, and innovation.⁷ The Sherman and Clayton Act in USA, The Treaty on the Functioning of the European Union ('TFEU') in EU and the Competition Act in India respectively restrict market players to indulge in anti-competitive activities. Although these legislations are different from each other on various points, the basic idea remains the same i.e., to barricade anti-competitive conduct. In all these legislations, anti-competitive conduct is explained in relation with the relevant market. Analysing a relevant market is the initial essential component for proving anti-competitive conduct. Broader market definition makes it hard to prove anti-competitive act and vice-versa as broader market definition implies market power is hard to prove.

Relevant Market Definition

Relevant market consists of the product at issue in a given case and all other products which

⁷ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018).

are reasonably interchangeable. Defining relevant market in the digital economy has created new challenges for the competition regulators, because of-

1) **Multi-sided Platform-** Tech-titans have multi or dual sided market which complicates matters for competition regulators to identify the relevant market. In multi-sided market of these titans, an online platform enables sale of different products from one side to different groups at other side, while recognising that the demand from one group of customer depends on the demand from the other group. For assessing the multi or two-sided nature of the market, it is crucial to identify and characterise the indirect network effects.⁸ Market definition for two-sided platforms always depends on both sides if the externalities flow in both directions, regardless of whether the platform is transaction or non-transaction. Two-sided platforms compete on both sides of the market at the same time. They set low prices on one side to draw away customers on that side from other platforms. By doing so, they also draw customers on the other side away from other platforms due to the externalities. Both sides of one platform thus compete with both sides of other platforms, and thus relevant markets should include both sides of platforms if externality flows in both directions.⁹ So, this anomaly creates contention whether the relevant market for tech-titans includes only one side or both sides of the platform. And this can be answered only by analysing the externalities in each case.

2) **Online and Offline Wall-** Some services can be provided through both online and offline mode, like- retail sales can be done through websites or brick and mortar store. So, question arises whether relevant market will be only one mode or combination of both modes.

3) **Services at zero pricing-** In digital economy, services provided by tech-titans are often at zero price, or at least it seems to customers that services are free, like- online search or social networking. Many services provided in this economy are actually paid by the customers through their information or data. In a market without charge or price, it is not possible to apply the small but significant and non-transitory increase in price ('SSNIP') test as there is no way to analyze an increase in price of zero price product because such an increase would result in a price that remains zero. The SSNIP test as traditionally administered to identify relevant markets is inoperable in zero-price technology markets.¹⁰

⁸ Lapo Filistrucchi, Market Definition in Multi-Sided Markets, DAF/COMP/WD(2017)27/FINAL (Jan. 12, 2018) [https://one.oecd.org/document/DAF/COMP/WD\(2017\)27/FINAL/en/pdf_](https://one.oecd.org/document/DAF/COMP/WD(2017)27/FINAL/en/pdf_)

⁹ Gunnar Niels, Transaction versus Non-Transaction Platforms: A False Dichotomy in Two-Sided Market Definition (June 30, 2019), <https://ssrn.com/abstract=3438913> or <http://dx.doi.org/10.2139/ssrn.3438913>.

¹⁰ David S. Evans, The Antitrust Economics of Free, 7 *Competition Policy International* 71, 72 (2011).

That's why SSNIP test should be modified for the zero priced product, one way of doing this is through giving emphasis on quality of service rather than price. While using any service, consumers will necessarily take the quality of a product into consideration. Tech-titans source of pride is its reliability, i.e., an accumulation of small pleasure: the servers rarely crash, few login or password problems, and protection of one's profile. Tech titans accustomed its users to a certain level of quality. If they suddenly suffered a small but significant non-transitory decrease in the quality ('SSNDQ') then the question is whether the users will switch to the other platforms.¹¹

4) **Changing relevant market-** Firms engaged through digital economy often expand their business which changes their relevant market. Increasing the operation in this economy is easy as firms can use network effects to support the new operation. When Amazon started its operation, it was only engaged in the retail business of books but within few years it started selling different kinds of product. Titans are also indulged in different markets at same time by a single product, like- Facebook operates in social networking, instant messaging, video calling and video sharing market.

The anomaly of defining relevant markets was identified in the DoubleClick and Google acquisition case, the relevant market is defined as single market of "online intermediation" and other two-sided markets like- movie-streaming platforms and navigation markets were ignored. As a result, the acquisition of DoubleClick strengthened Google's position on the multi-platform online advertising market as it can obtain data of users and improve its targeted advertising on other platforms.¹²

Dominant Position/ Monopoly Power

After defining the relevant market for the product, competition regulators have to look into power of the firm in the relevant market. Different countries have different ways of defining this power. USA state the market power through monopolization, whereas EU explains market power as dominant position. India's approach is very similar to the EU as Indian Competition Law is based on TFEU.

Factors while considering monopolization/dominant position are-

1. Market Share;

¹¹ Aleksandra Gebicka & Andreas Heinemann, *Social Media & Competition Law*, *World Competition* 37, no. 2, 149-172 (2014).

¹² Nicolai Van Gorp & Dr. Olga Batura, *Challenges for a Competition Policy in a Digitalised Economy*, IP/A/ECON/2014-12 (2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf.

2. Barriers to entry and expansion;
3. Market structure and Performance;
4. Demand and Supply Substitution.

Monopoly power in USA is generally referred to as the power to control prices and exclude competition. Unlike the EU Law on abuse of dominance, which has elaborate guidelines on the assessment of relevant markets and the enforcement priorities in applying Article 102 of TFEU to abusive conduct by dominant undertakings, the USA Law does not have such elaborate guidelines as such. The USA Law on monopolisation has to be interpreted from the decisions of the courts. However, an analysis of these decisions would reveal that more or less the approach in dealing with monopolisation cases in US is quite similar to the EU Law on prohibiting abuse of dominant position, except some philosophical differences.¹³

Market share is the primary factor to decide the market power of a firm. EU and USA law requires different amounts of market share to probe the monopolization or dominant position.

Table 1- Market Share in relation with market power (Rough Estimate)¹⁴

Market Share	Monopolization (USA)	Dominant Position (EU and India)
Less than 40%	-	No dominance
Less than 50%	No Monopoly	-
50% - 70%	More investigation done while considering other factors	Rebuttable presumption of dominance
More than 70%	Prima facie Monopoly power	Clear dominance

Threshold for dominance in Europe is lower than the threshold for “monopoly power” in the United States. In Europe, market shares in the area of 40 per cent may be troublesome, while in the United States, actual monopolisation is not often found until market share reaches at

¹³ Vijay Kumar Singh, Competition Law: Dominant Position and Its Abuse: Abuse of Dominant Position in US and EU (September 2014), <https://ssrn.com/abstract=2973772> or <http://dx.doi.org/10.2139/ssrn.2973772>.

¹⁴ Vijay Kumar Singh, Competition Law: Dominant Position and Its Abuse: Abuse of Dominant Position in US and EU (September 2014), Available at SSRN: <https://ssrn.com/abstract=2973772> or <http://dx.doi.org/10.2139/ssrn.2973772>.

least 60 per cent, if not more.¹⁵ Overall, proving anti-competitive conduct in USA is much harder than it is in EU or India as proving monopolization in the relevant market is much arduous than proving the dominant position.

Further, fluid nature of the digital economy makes it even harder to prove the dominance in the relevant market. Network effect creates synergy for products, one product which did not seem to compete in the relevant market at first, now start competing in the relevant market. And data collected from one market can also be used to compete in the other market, thus even amount and nature of data collected can also imply dominance.

Now coming specifically to some of the tech Titans, and analyse how all the above issues also create hindrance in defining their relevant market.

Google as Search Engine Platform

Google search engine is a platform, which connects people who seek content from websites with the advertisers. Internet users do not pay any charge whereas advertisers pay to place their ads. Google advertising business heavily depends on the externality at other side of the platform i.e., users of google search engine. Internet users do not pay any monetary charge for availing Google services, but they pay by providing their usage data. Google uses this data to improve their search results and targeted advertising which results in increasing its revenue. Google does not compete on price, but there are other parameters of competition between general search services. These include the relevance of results, the speed with which results are provided, the attractiveness of the user interface and the depth of indexing of the web.¹⁶ Thus, both sides of the platform are part of the relevant market i.e., Online search and advertisement.

Table 2- Market Share of Google¹⁷

Year	2020	2019	2018	2017	2016	2015
India	84.14%	-	-	-	-	-
Global Search Market of	87.35%	89.95%	87.35%	89.06%	88.36%	88.1%

¹⁵ Roundtables on Abuse of Dominance and Monopolisation, OCDE/GD, 131 (1996) <http://www.oecd.org/competition/abuse/2379408.pdf>.

¹⁶ Case C- 9/07, Google v. Commission, 2018, EUR Lex (Jan. 12, 2018) https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

¹⁷ J. Clement, Worldwide desktop market share of leading search engines from January 2010 to April 2020, Statista (May, 2020), <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/v>.

Google						
--------	--	--	--	--	--	--

The stated relevant market has strong entry barrier, as proper algorithms have to be formed for a search engine which is a very complex process. For developing efficient search algorithm, a large amount of data and search queries are required which cannot be easily acquired. Google through its large market share acquired a large amount of data which has been used for improving its search algorithm. These powers clearly donate Google dominance in Online Search and advertisement market.

Amazon as E-commerce Platform

Amazon is an electronic commerce platform, which connects people who seek to purchase certain goods with the sellers. Purchaser does not pay any charge to Amazon except the delivery charge in some circumstances whereas sellers pay fee to the Amazon for every sell and sellers can also advertise their product on the Amazon by paying the charge. Business at the purchaser's side depends on the externality at sellers' side i.e., number and quality of sellers. Whereas business at the seller's side depends on the externality at purchasers' side i.e., number and quality of purchasers. By acting as platform, Amazon also charges both sellers and purchasers by collecting their data. Amazon uses this data to improve its algorithm, to foresee demands or trends, and to analyse the products.

In the USA and Europe, Amazon also acts as both a platform and seller. Thus, Amazon competes with other platforms and it also competes with other sellers on its own platform. Overall Amazon as a platform acts as a Brick and mortar mall where sellers and purchasers can meet each other, main difference lies in the involvement of digital medium. So, the main question which arise while defining the relevant market for e-commerce is whether brick and motor retail stores and e-commerce is part of the same relevant market or not. If both modes are treated as two relevant markets, then it will be much easier to prove the dominance of Amazon. But if it is defined as a single relevant market i.e., retail business, then it is almost impossible to prove the dominance as Amazon share in retail market is insignificant.

Table 3- Amazon Market Share in E-Commerce¹⁸

E-commerce market share	Amazon	Flipkart(Owned	by
--------------------------------	---------------	-----------------------	-----------

¹⁸ J. Clement, Projected retail market share of Amazon in the United States in 2016 and 2020, Statista (Jan 14, 2020), <https://www.statista.com/statistics/709515/amazon-retail-market-share-usa/#statisticContainer>; Tough 2020 awaits Amazon, Flipkart as Reliance firms up plans, The Sentinel (Dec 30, 2019), <https://www.sentinelassam.com/business/tough-2020-awaits-amazon-flipkart-as-reliance-firms-up-plans/?infinitemscroll=1>.

in		WalMart)
India	30%	60%
USA	50%	-

The other main question is whether to define the relevant market in relation to the good in question or as a whole retail sector i.e., Amazon platform can be defined as product markets consisting of electronics market, skin care, kitchen & dining, fashion etc or it can be defined as a business of online retail market. If one single market is defined for all the products then it is very cumbersome to prove the dominance, whereas if different relevant market is defined for the different products then it is easy to prove the dominance of Amazon. For example- In USA, during the first quarter of 2018 Amazon held an over 90 per cent share in five different product markets on its platform.¹⁹

It is normally presumed that e-commerce has very low entry barrier as anyone having a computer can sell their goods online. But enormous infrastructure which is developed by Amazon is ignored, it increases efficiency of Amazon by many folds. If any company wants to seriously compete as e-commerce player then they have to make heavy investment which act as a vigorous entry barrier.

Facebook as Social Networking Platform

Facebook is a social networking platform, which connects people from all over the world. Users do not pay any charge for availing the services but entities who want to advertise on the platform have to pay the relevant fee. Number of users on the social networking platform acts as a stimulus for new and existing users. Further, Facebook advertising business also heavily depends on the externality at other side of the platform i.e., users of Facebook. Users do not pay any monetary charge for availing Facebook services, but they pay by providing their data. Facebook uses this data to improve their targeted advertising which in turn attracts advertisers. On one side, Facebook competes with other social networking platforms for user involvement and on other side it competes with other platforms for advertisers. Facebook does not compete on price, but there are other parameters of competition between social networking platforms like- number and involvement of users, features of platform, amount of data, etc. Other than social networking platforms, Facebook platform also acts as instant

¹⁹ Amy Gesenhues, Amazon owns more than 90% market share across 5 different product categories, MarketingLand (May 31, 2018, 2:30 pm), <https://marketingland.com/amazon-owns-more-than-90-market-share-across-5-different-product-categories-report-241135>.

messaging, video and voice call, picture and video sharing platform.

There are two ways of defining relevant markets for Facebook. Either the whole user market will be defined as a social media of various kinds, including Twitter, Google+, etc which is an official competitor for Facebook and offers many of the same sharing and other features. Another option would be to view Facebook as its own market, because people who already use it will not switch because all their contacts and data are on Facebook, even though they may dislike some features. Consequently, they are locked in users. However, in either of these markets Facebook would be considered to have a dominant position.²⁰

Table 4- Market Share of Social Networking Platforms on April, 2020²¹

Facebook	Twitter	Pinterest	Instagram	YouTube	Tumblr
60.15	15.84%	10.46%	8.73%	4.2%	0.36%

Source- <https://gs.statcounter.com/social-media-stats>

Social networking has very high entry barrier as it would be extremely difficult for a newcomer to bring already locked-in old users and attract new ones. Network effect and big data provides enormous competitive advantage to Facebook.

III. ANTI-COMPETITIVE CONDUCT

Tech-titans are accused of indulging in various kinds of anti-competitive activities. Most prominent ones are discussed below-

1. Predatory Pricing

Predatory pricing behaviour is a two-step strategy. During the first step, a firm charges a price below the cost in the short run so as to drive other firms out of the market. In the second step, the firm charges higher price in long run in an effort to recoup the losses.²² Competition law examines predatory pricing for its possible anti-competitive effect.

Tech titans deal with various products in different markets and can transfer their loss in one market to another market i.e., recoupment of expenses or losses through different markets. Recoupment is one of the ingredients to identify the predatory pricing and tech-titans can hide it easily through their business model. In Browser War case,²³ Microsoft's losses in the

²⁰ Aleksandra Gebicka & Andreas Heinemann, Social Media & Competition Law, World Competition 37, no.2 149–172 (2014), http://awa2015-concurrences.nursit.com/IMG/pdf/4_social_media.pdf.

²¹ SOCIAL MEDIA STATS WORLDWIDE, STATCOUNTER, <HTTPS://GS.STATCOUNTER.COM/SOCIAL-MEDIA-STATS>.

²² Paul L. Joskow and Alvin K. Klevorick, A Framework for Analyzing Predatory Pricing Policy, The Yale Law Journal, Vol. 89, No. 2, 219 (Dec., 1979).

²³ United States v. Microsoft Corporation, 253 F.3d 34 (DCC 2001).

browser market were recouped in the market for operating systems.²⁴ This shows how a firm may engage in predatory pricing in one market in order to sustain a profitable monopoly in another market. If courts focus exclusively on the market in which the price predation occurred, they may fail to detect the recoupment.

Amazon sold its Kindle (e-book reader) and e-books at much below cost price between 2007 and 2009 resulting in capture of 90 percent of the e-book market in the USA.²⁵ No action was taken by the USA Federal Trade Commission ('FTC') instead when Apple got into deal with the six big publishers to sell their books at list prices forcing Amazon to abandon its below cost pricing of e-books, the US DoJ acted against Apple for colluding with the big publishers for raising prices of e-book.²⁶ Amazon's policy was treated as loss leading rather than predatory pricing. Amazon was selling both e-book reader and e-books at heavy discount to capture the market for both. Such price manipulation is easier on online market places as price differentiation based on different components of the market can be used to recoup losses, without recoupment taking place for the same product.²⁷ Another Contention is that when a customer enters an ecosystem of these platforms, then they are bound to use it for long time, like- once a person purchases a kindle, then he/she will purchase e-books from amazon only which will help to raise the revenue in long run. That's why it is hard to identify the manner in which losses are recouped in the digital economy.

There is also a possibility that Amazon may engage in predatory pricing to eliminate rivals.²⁸ These allegations involve Amazon's 2010 acquisition of Quidsi in USA, the parent company of the online baby-products retailer Diapers.com and its other online-retail subsidiaries. According to some commentators, Amazon aggressively cut its prices for baby products and offered various benefits to customers after Quidsi rejected its offer to purchase the company. When Amazon's below-cost prices started hampering Quidsi growth and future prospects, the company ultimately accepted Amazon's subsequent acquisition offer. And after the Quidsi acquisition, Amazon allegedly raised its prices for baby products and withdrew various offers.²⁹

In India, Confederation of all India Traders ("CAIT") alleged that e-commerce platforms like- Amazon and Flipkart are engaging in predatory pricing and providing excessive

²⁴ Predatory Pricing and Recoupment, Columbia Law Review, Vol. 113, No. 7, 1695-1771 (Nov, 2013).

²⁵ United States vs. Apple Inc., 952 F. Supp. 2d, 649 (S.D.N.Y 2013).

²⁶ Lina Khan, Amazon's Anti-trust Paradox, Yale Law Journal, Vol. 126, 757 (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911742.

²⁷ Atul Kaushik, Competition Law and Digital Economy: Identifying Emerging Challenges, CWS/WP/200/52.

²⁸ Wilson C. Freeman & Jay B. Sykes, Antitrust and Big Tech, CRS Report R45910 (Sep. 11, 2019).

²⁹ Lina Khan, Amazon's Anti-trust Paradox, Yale Law Journal, Vol. 126, 756-68 (2017).

discounts.³⁰ But in India situation is little unique as law prohibits foreign e-commerce platform players to engage in retail business i.e., B2C business.³¹ This law creates a division between platform business and retail business on the platform. So, Amazon cannot act as a retailer on its e-commerce platform and that's why it cannot affect the price of any product. This approach can be applied on various platform based online businesses to promote competition in multi-sided market.

2. Influencing one product market by using power in other product market

Tech-titan have presence in various digital markets and they usually have monopoly or dominant position in a certain market, like- Google in Search engine and Mobile OS, Microsoft in Computer OS, etc. They are capable of using this leverage to influence other product markets. It can be done through -

1. Favoring their own services; or
2. Exclusive dealing; or
3. Entering new product market by using dominance in other product market; or
4. Tie-in Product.

Vertical discrimination is one of the common anti-competitive practice in online platform-based market. Vertical discrimination means favouring own services by having bias towards vertical competitors. This problem occurs mainly due to dual role of one entity as operator of platform and a player on the platform, and thus it gives motivation to the platform-based company to have bias towards vertical competitors. Google's case is quite unique on this matter as US FTC and EC came to different conclusions while deciding whether Google is discriminating against vertical rivals by favouring their own services.³² FTC declined to pursue lawsuit challenging alleging vertical discrimination after Google committed to make certain changes to its business practices.³³ FTC chose to protect Google's incentive to innovate which serves consumers. On the other hand, EC fined Google 2.4 billion euros for antitrust violations for Google search's preferential treatment of the company's comparison-shopping service Google Shopping.³⁴ Comparison of consumer welfare and innovation with

³⁰ Ministry of Commerce & Industry, Predatory Pricing by e-COMMERCE Companies (Dec. 13, 2019) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1596379>.

³¹ Ministry of Commerce & Industry, Review of the policy on FDI in e-commerce (Dec. 26, 2018) https://dipp.gov.in/sites/default/files/pn2_2018.pdf.

³² Richard Gilbert, U.S. Federal Trade Commission Investigation of Google Search (November 9, 2017), <https://ssrn.com/abstract=2984013> or <http://dx.doi.org/10.2139/ssrn.2984013>.

³³ Wilson C. Freeman & Jay B. Sykes, Antitrust and Big Tech, CRS Report R45910, 26 (Sep. 11, 2019).

³⁴ Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service, EUROPEAN COMM'N (June 27, 2017),

anti-competitive conducts is the major contention for the regulators as same act leads to both the result.

Analysts also alleged that Amazon exploits its dual role by implementing policies that favours its own product over competing products offered by other sellers.³⁵ According to ProPublica investigation, Amazon has designed its Marketplace ranking algorithm, which determines the order in which products appear in such a way that it favours its own products.³⁶

Similarly, vertical bias can lead companies to bring new products which compete with vertical competitors by using data collected through their platform. Big data often acts as an input into other product or service markets, rather than a product of its own. A company having the big data in one market can use that data to enter and dominate other product markets.³⁷ Certain merchants have complained that Amazon has revoked their ability to use its Marketplace after deciding to move into the relevant markets with its own private-label products or products it distributes on behalf of other companies.³⁸ Amazon used the data about these products through its platform and used it for business forecasting. The big data act as a utility which gives them enormous advantage over other competitors.

Tech-Titans can also tie-in their less valued product with its dominant product to increase the sale of less valued product. It can help the less valued product to become dominant in its own market. EC came to the conclusion that Alphabet which is a dominant player in mobile OS market through Android is indulged in act of tying its Google search and browser apps with Google Play store which is in breach of TFEU.³⁹ This provided unfair advantage to Google in web search and mobile browser market. Search and browser app are essential apps on mobile devices and its pre-installation create a status quo bias among users.⁴⁰

Digital market has a high entry barrier and dominant firms can maintain their dominance by further elevating the barrier. Tech-titans can cut demand for their potential competitors by entering into subscription agreements with customers. Once a user has taken subscription for

https://europa.eu/rapid/press-release_IP-17-1784_en.htm.

³⁵ Lina Khan, Amazon's Anti-trust Paradox, *Yale Law Journal*, Vol. 126, 988-89 (2017).

³⁶ Julia Angwin & Surya Mattu, Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't, *ProPublica* (Sept. 20, 2016), <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt>.

³⁷ Daniel L. Rubinfeld & Michael S. Gal, Access Barriers to Big Data, 59 *ARIZ. L. REV.* 339, 375-377 (2017) Available at- <https://arizonalawreview.org/pdf/59-2/59arizrev339.pdf>.

³⁸ Jason Del Ray, An Amazon Revolt Could Be Brewing as the Tech Giant Exerts More Control Over Brands, *VOX* (Nov. 29, 2018), <https://www.vox.com/2018/11/29/18023132/amazon-brand-policy-changes-marketplace-control-one-vendor>.

³⁹ Case- 402/08, *Google v. Commission*, 2018 EUR-Lex (Nov. 28, 2019).

⁴⁰ Antitrust: Commission fines Google €4.34 billion for abuse of dominance regarding Android devices, European Commission (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

getting attractive benefits from any platform, then it is very rare for them to shift to another platform. Prominent example of this is Amazon Prime service. For getting full benefit of Amazon platform, users have to purchase Prime subscription. And once a user becomes a prime user then it is rare for them to purchase goods from other e-commerce platforms. Similarly, prime subscribers can use other platforms like- Amazon Video, Amazon Music, etc. If a person has prime subscription for any of the platforms then he is more likely to use other platforms of Amazon.

3. Buying out potential future Competitors

Competition regulators have to look into the merger and acquisition which damages competition in the market. Tech-titans have a lot of financial and influential power in the market which they can use to acquire other firms.⁴¹

Tech-titans have big pockets and can take over another entity very easily. Suddenly, Small Companies realised that they have to compete with tech-titans and then they just get bought out by them. These acquisition aim to maintain the dominant position in the market. Facebook acquisition of Instagram and WhatsApp resulted in Facebook owning three of the top four and four of the top eight social media platforms.⁴² Facebook also acquired Onavo Mobile Ltd., a mobile analytics company that may have allowed Facebook to identify emerging social media platforms and purchase them before they became competitive threats.⁴³ Through this all the potential competitors become part of Facebook.

Further, tech-titans can also use anti-competitive practice to dry revenue and diminish market capitalization of competitors and finally acquire the competitor at lower price. It is already mentioned earlier that how tech titans like-Amazon can use predatory pricing to take over their competitors.

For mergers and acquisition, there is certain threshold above which the company must report and take approval from the regulator. So, acquisition or merger of small entity or start-up is not checked by the regulator as it is presumed that it will not harm the competition. But digital economy is erratic and even the small innovative start-up has some capability of becoming a major competitor in future. Tech-titans try to identify small businesses and start-ups who have potential to enhance the competition and then acquire them. Academics have

⁴¹ Olivia Solon, As tech companies get richer, is it 'game over' for startups?, *The Guardian* (Oct. 20, 2017) <https://www.theguardian.com/technology/2017/oct/20/tech-startups-facebook-amazon-google-apple>.

⁴² Wilson C. Freeman & Jay B. Sykes, *Antitrust and Big Tech*, CRS Report R45910, 33 (Sep. 11, 2019).

⁴³ Brent Kendall, John D. McKinnon & Deepa Seetharaman, *FTC Antitrust Probe of Facebook Scrutinizes Its Acquisitions*, *WALL ST. J.* (Aug. 1, 2019), <https://www.wsj.com/articles/ftc-antitrust-probe-of-facebook-scrutinizes-its-acquisitions-11564683965?mod=e2tw>.

also suggested that because promising technology start-ups often fall below the minimum-size thresholds, legislators should consider lowering or eliminating those thresholds for deals involving dominant technology companies.⁴⁴

IV. CONCLUSION

Emergence of digital economy and especially tech titans in it, started creating new challenges for the competition regulators all over the world. Old rules and practices cannot be directly applied on this economy, this vagueness created a vacuum for the regulation of tech-titans. Therefore, tech-titans emerged and developed in the market which is unregulated by the competition regulator. But with time regulators developed principles and regulations to cope up with the developing digital economy.

Problem started with the very definition of relevant market in the digital economy. But regulators and experts have come with some solutions for these problems. First major issue is irrelevancy of SSNIP test in the digital economy due to zero pricing. For this purpose, SSNIP is substituted with its modified version i.e., SSNDQ which gives emphasis on the quality rather than price. Relevant markets for the tech-titans should be decided by analysing the substitution of the product due to decrease or obsoleting of the quality in the product.

These titans often act as both the platform and the player on the platform, which gives reasons for having bias against its vertical competitors. For reducing this issue, an entity should not act as both platform and user at one side of the platform, this will diminish the chances of discriminating the users by the platform owning entity. Or if an entity is acting as both platform and user at one side, then platform entity should share all the data or information which platform is using for promoting its business from user side with all its competitors at user side. Using this analogy, Amazon should not be a seller on its platform. Otherwise, it should provide all the data or information to the sellers which it is using for expanding its business at sellers' side.

Tech-titans are also accused of acquisition of start-up and businesses which have potential of becoming future competitors. To avoid such acquisitions, competition regulators should reduce the threshold for getting approval of tech companies' acquisition by the titans. And such acquisition should be analysed by keeping digital economy and its effect in the mind.

A very common defence for the accusation of various anti-competitive conduct by tech-titans is the proposition that such activity will cause consumer welfare. Regulators should

⁴⁴ Report, Comm. for the study of Digital platforms, Market Structure and Antitrust Subcomm., University of Chicago Booth School of Business, 78 (May 15, 2019).

distinguish the concept of anti-competitive and consumer welfare practices and draw a line between them. Sometimes an act seems to cause consumer welfare in short run but in turn causes damage to the competition which damage the consumer welfare in the long run.

Another important aspect while analysing global digital economy is the difference between laws of the countries. By above study, it is concluded that competition law in Europe and India is much stricter in comparison with USA because EU and India rely on the principle of dominant position whereas USA relies on monopolization. Proving monopolization is more cumbersome than proving the dominant position. That's why USA should relax its law related to monopolization and go for dominant position.
