

Facebook-Jio Deal: Big Data, Competition and Privacy

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[Competition Law](#), [Information Technology](#)

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Facebook recently signed an all cash deal worth ₹ 43,574 crores to acquire a 9.99 percent stake in Jio Platforms, a subsidiary of Reliance Industries Limited's (RIL). It is the largest foreign direct investment (FDI) in the technology sector in India thus far. The deal brings together Jio, India's biggest telecom and internet service provider with over 370 million users, with Facebook which has over 250 million users in India, and WhatsApp with over 400 million Indian users. Concurrently, Jio Platforms, Reliance Retail and WhatsApp have also entered into partnership to accelerate JioMart and support small businesses through WhatsApp.

The deal raises several competition and privacy concerns. The large user base of these companies has individually already been a cause of concern since it allows them to profit from network effects, making the entry of new

players virtually impossible and driving out existing competition. The deal significantly expands this user base and amplifies its resultant network effects. Network effects refer to the advantages of a large user base of consumers and sellers, allowing corporates exclusive access to countless data sources and providing them unparalleled business opportunities. These companies are backed by investors with deep pockets willing to bear sustained losses for predatory growth in winner-takes-all markets. India's 2019 draft e-Commerce Policy noted that network effects must be looked at while analyzing mergers and acquisitions.

In 2017, a nine-judge bench of the Supreme Court of India unanimously held that the right to privacy was a fundamental right and considered it integral to freedoms guaranteed across Part III of the Constitution. Despite this, the draft e-Commerce Policy characterises data as a public good or a national asset. The last Economic Survey regarded privacy as an elite preference that must not be imposed on the poor. Similarly, the UNCTAD's Digital Economy Report 2019 promises a future wherein the greatest value for developing countries can be mined from "the monetization of large-scale digital data".

These narratives around the seductive potential of data for competitive commerce enable BigTech's race to the bottom to extract as much data from individuals as possible for optimal use of market opportunities. This can be problematised by appreciating the impact of corporate power over society, reorienting competition law towards its foundational justifications and concretising the following recommendations and observations.

Attempt to Monopolise

In late 2018, the Government constituted a Competition Law Review Committee (CLRC) to review and suggest changes to the Competition Act.

In its final report submitted in 2019, the CLRC discussed the possibility of a provision to penalise the mere attempt to monopolise in the relevant market where a particular product or service is sold.

However, players other than dominant firms may also be able to cause significant anticompetitive effects based on their unilateral conduct. This is illustrated by Jio's entry into and rapid capture of the telecom market by offering services initially for free and subsequently for negligible prices. In 2015, when Jio was formally launched, India had ten private sector wireless providers, which has reduced to three now. Jio's predatory pricing caused competitors to cut tariffs and, by March 2018, the telecom operators were in "severe financial distress" with a cumulative debt of ₹ 7.7 lakh crore and revenue under ₹ 2.5 lakh crore. Experts have cautioned against firms' ability to engage in predatory conduct even prior to achieving substantial market power, which is reflected in amendments to competition law in the US, Germany and Japan. However, before making any concrete recommendation regarding this, the CLRC suggested a detailed study of digital markets in India.

CCI's Market Study on e-Commerce

The Competition Commission of India (CCI) recently published a market study on e-commerce in India. The study, which is pertinent for the FB-Jio deal, highlights the many competition concerns raised by the operation of e-commerce platforms in India. According to the study, numerous e-commerce players in India compromise platform neutrality by according preferential treatment in marketing and selling products by their own subsidiaries, related parties or others. There is a lack of transparency regarding search rankings and user reviews. This leads to e-commerce platforms determining market outcomes such as sales, prices and consumer traffic as opposed to the competitive merits of the products. This

is because of platforms' exclusive access to massive transaction data and ability to control search rankings. JioMart has already gone live over WhatsApp and allows users to place orders dispatched to local kirana (grocery) stores. This is crucial since RIL plans to sell its own private labels through these kirana stores under brand names such as Best Farms, Good Life, etc.

The study also revealed the unfair and discriminatory contractual terms for different entities and how that evidences small businesses' lack of countervailing power against and dependency on e-commerce platforms. Even if there are no significant switching costs between platforms, there is a lack of substitutes available. This is because all major platforms have similar practices. Further, sellers consider it essential to have visibility over all large platforms to survive in the market and cannot afford confining themselves to the offline segment or selective platforms or both. This allows platforms to engage in exclusive contracts with sellers, mandatorily bundle the platforms' delivery services with their listing services and compel sellers to fund the platforms' deep discounts over their products. There is no information regarding what constitutes the basis of platforms' discounting practices. These discounts cannot be matched by the sellers offline on their own and drive consumer traffic to online platforms, making consumers and sellers dependent upon them via artificial price distortions.

The study also revealed that platforms engage in 'data masking', i.e., refusing to share vital customer information with market participants on the pretext of privacy while mining customer data themselves to launch their own products. It concluded with certain recommendations for self-regulation despite BigTech's deliberate failure to self-regulate globally. Recently, a [Wall Street Journal report](#) alleged that Amazon used data regarding third party sellers to launch its own competing products. As a result, U.S. Congress members have called on Amazon's CEO, Jeff Bezos, to

testify before the Judiciary Committee of the House of Representatives, as part of an ongoing antitrust probe.

Suggestions

The CLRC report highlights Indian competition law's growing cognizance to the relationship between market power and control over data. It noted that the definition of 'price' under section 2(o) of the Competition Act, 2002 is broad enough to include non-monetary considerations such as personal data and preferences revealed to digital market players. It also noted that section 3(4)(c) is broad enough to cover refusal to deal encompassing restrictions on selling and buying through exclusive arrangements. Further, section 19(4)(b), referring to 'resources of the enterprise', used to assess the dominance of firms, was interpreted as wide enough to include control over data. Section 19(4) was also regarded as being inclusive enough to consider 'network effects' as a relevant factor for the determination of a firm's dominance. The CLRC also suggested the introduction of necessary thresholds to ensure that digital transactions involving asset light businesses causing an appreciable adverse effect on competition do not evade competition assessment.

These interpretations of the existing Act are crucial to the competition analysis of this deal, which is yet to receive the CCI's approval. Some of the competition concerns raised can also be mitigated by amending the Competition Act to penalise any potential attempt to monopolise the relevant market. Finally, competition law regulates state enabled markets. Its inherently political content needs to be acknowledged to ensure that technicalities and overreliance on self-correcting markets do not compromise the democratic justifications for its existence in the first place.

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