International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

A Cross-Jurisdictional Analysis of Competition Law: Perspectives from The Eu, Us, And India.

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ABSTRACT

Competition law governs markets by forestalling monopolistic behavior, encouraging fair competition, and safeguarding consumer interests. With growing digital markets, there has been increased concern regarding Big Tech dominance, data monopolies, and anti-competitive takeovers. This paper contrasts competition law regimes in the EU, US, and India based on their legal systems, enforcement mechanisms, and methods for regulating digital platforms.

Major legislative frameworks are the Sherman Act (1890), Clayton Act (1914), and FTC Act (1914) in the US; Articles 101 and 102 of the TFEU in the EU; and India's Competition Act (2002). The EU adopts a strict interventionist approach, the US is market efficiency-oriented, and India combines both but has enforcement issues in the digital economy.

The research also delves into India's draft Digital Competition Act (DCA), bringing measures to prevent anti-competitive behaviours proactively. Highlighting international cooperation, more challenging merger control, AI-based enforcement, and global regulatory cooperation, the paper urges a competitive and equitable digital economy.

Keywords: Competition Law, Antitrust, Digital Markets, Big Tech Regulation, EU Competition Law, US Antitrust Law, Indian Competition Law, Market Dominance, Regulatory Frameworks, Ex-Ante Regulation.

INTRODUCTION

The law of competition protects fair market conduct by avoiding monopolization, dominance abuse, and anti-competitive agreements. Its relevance increased in the digital age, where Big Tech has extensive market power. Various jurisdictions have competition regulations grounded in historical, economic, and policy reasons.

This paper contrasts competition law in the EU, US, and India—three large economies with different paradigms. The EU has rigorous interventionist policies emphasizing consumer protection, the US has a market-oriented approach emphasizing efficiency and innovation, and India has a hybrid model with liberalization coupled with regulatory intervention. The paper examines legal regimes, enforcement tools, and digital market issues, especially concerning Big Tech.

As fears of data monopolization and predatory pricing increase, policymakers are looking at proactive (ex-ante) regulation in addition to conventional enforcement. India's draft Digital Competition Act (DCA) is a case in point. This paper analyzes changing competition laws in these countries, assessing their efficacy and proposing reforms for a more equitable digital economy.

COMPARATIVE ANALYSIS OF GLOBAL REGULATORY APPROVALS

Competition laws are enacted to protect consumer interests by promoting fair competition among businesses and preventing the abuse of market power. Competition authorities intervene and launch investigations upon detecting potential cases of anti-competitive behaviour, with the ultimate objective of interfering when required. This chapter comprehensively examines competition policy and its ramifications for Big Tech, focusing on two prominent competition law jurisdictions: the US and the EU. The United States and the European Union competition laws are compared in this chapter, as the US competition law is one of the oldest competition laws, and the EU competition law is similar to India's competition law. Competition authorities, sometimes known as antitrust regulators, are actively involved in the United States and the European Union against the Big Tech Companies. However, significant differences exist in their viewpoints towards competition, specifically with the growth of prominent technology corporations, generally referred to as Big Tech. This chapter helps us to understand the judicial approach toward the big tech companies to regulate these companies in the Indian digital Market.

1. UNITED STATES COMPETITION LAW

Within the United States, two federal entities possess concurrent authority over matters pertaining to market competition. Within the United States, two primary entities possess distinct and designated responsibilities. The initial regulating entity is the Department of Justice (DOJ), which possesses the jurisdiction to scrutinize and enforce sanctions on actions that hinder competition inside the market[1].from the structuralist paradigm and argues that antitrust authorities should primarily focus on regulating the prices of goods. The Chicago School claims that the best way to evaluate antitrust issues is by using price theory as the main framework.

According to the principles of this theoretical framework, the presence of market dominance by one company or a small group of companies does not necessarily harm the consumer. Chicago schools are recognized for their focus on efficiency and utilizing economies of scale, which may benefit consumers. The competition law in question bears similarity to India's legislation, which specifies that the mere presence of a monopoly is not inherently harmful. However, exploiting or misusing such a dominant market position is deemed objectionable. Additionally, it is important to acknowledge the belief in the market's ability to self-regulate. Supporters of the Chicago School contend that market results, such as firm size, industry structure, and concentration levels, reflect the interaction between market forces and the technical requirements of production.[2] The claim is being made that market dominance is naturally temporary and, thus, antitrust enforcement is rarely needed. In this context, it is evident that US Antitrust does not actively pursue digital platforms due to its business strategies that focus on providing inexpensive rates to customers, attracting a wider audience, and meeting the expectations of the other side of the market. The big tech platform companies provide their services to end consumers free of charge.[3]The global digital market is undergoing substantial growth.

The latest developments have changed the situation since both authorities have commenced investigations into Big Tech companies. Although the EU Commission has issued recent verdicts against significant technology companies, much opposition originates from the United States. The United States has built a

[1] Singha, N. N. (2023). Dominant Position and Its Abuse: A Comparative Analysis of Competition Law in India, and the US. Issue 2 Indian JL & Legal Rsch., 5, 1.
[2] Shapiro, C. (2021). Antitrust: What went wrong and how to fix it. Antitrust, 35(3), 33-45.
[3] Lianos, I. (2019). Competition law for the digital era: A complex systems' perspective. Available at SSRN 3492730.

regulatory framework for competition law by collecting federal statutes. The Sherman Antitrust Act of 1890 prohibits agreements, collaborations, or plans that unfairly limit trade, as well as the act of monopolizing, attempting to monopolize, or conspiring to monopolize any part of interstate or foreign commerce.[4] The Sherman Act enforcement is conducted by the Department of Justice (DOJ) and private entities. Those found in violation may face criminal fines and civil damages as potential consequences. The Clayton Antitrust Act of 1914 is a legislative enactment that prohibits mergers and acquisitions that could substantially reduce competition or create a monopoly.[5] The Clayton Act covers anti-competitive conduct such as price discrimination, exclusive dealing, and tying. It is enforced by the Department of Justice (DOJ), the Federal Trade Commission (FTC), and private parties. Non-compliance can result in injunctive remedies or civil damages.

Created in 1914, the FTC enforces the FTC Act to avoid unfair competition and deceptive trade practices. Cease-and-desist orders, injunctions, or money penalties can be the consequences of a violation. As an additional protection, there exist separate competition laws in individual states, which are enforced by state attorneys general and private litigants. Violations can result in criminal sanctions, civil liability, or court orders to stop illegal behavior. The regulatory framework controlling competition law in the United States is complex and primarily focused on litigation.[6]The ambiguity of competition law statutes requires the establishment of legal principles through judicial interpretation and precedent. Enforcement agencies and courts utilise a range of criteria and economic analysis methods to examine and evaluate the competitive consequences of different types of activity and transactions. The competition law framework in the United States includes provisions for private enforcement, which might possibly strengthen the deterrent and compensatory effects of the legislation. However, this strategy also has the inherent risk of creating an atmosphere favourable to unnecessary or trivial legal action.

2. EUROPEAN UNION COMPETITION LAW

The European Commission oversees the regulation of competition issues in Europe. The EU competition legislation has a distinctively interventionist strategy, particularly when it comes to regulating Big Tech, in contrast to the approach taken by the United States.[7] Over the past few years, various legal proceedings have been directed against Big Tech, most notably Google, resulting in regulatory measures such as the General Data Protection Regulation (GDPR). The European Commission continues to be worried about Big Tech's dominance and the inadequacy of current competition laws in countering their market power.

EU competition investigations are based on Articles 101–109 of the Treaty on the Functioning of the European Union (TFEU) and the EU Merger Regulation. This report considers the regime, with emphasis on Articles 102 and 103 of the TFEU and the problem of applying such regulations to Big Tech. Article 101 TFEU forbids any cooperation between competitors, which leads to limits on competition.[8] The restriction encompasses both vertical and horizontal relationships, as well as relationships with parties that operate outside the market where the forbidden behaviour takes place but nonetheless contribute to the violation. This is analogous to Section 3 of the Competition Act of 2002. The application of Article 101

[4] Sawyer, L. P. (2019). US antitrust law and policy in historical perspective. In Oxford Research Encyclopedia of American History.
[5] Srivastava, C. DEVELOPMENT OF US ANTI-TRUST LAWS.
[6] Shapiro, C. (2021). Antitrust: What went wrong and how to fix it. Antitrust, 35(3), 33-45.
[7] Løgager, P. (2023). Digital Market Acts and the Future of European Union's Digital Sovereignty Policy: An Assessment of Structural Power, and Policy Implications for the Future.
[8] van der Zee, E. (2020). Quantifying benefits of sustainability agreements under Article 101 TFEU. World Competition, 43(2).

necessitates the presence of coordination, which can take the shape of an agreement, decision, or concerted practices. Once coordination has been identified, the qualification process involves determining whether the coordination has the intention or impact of limiting competition. Without any reasons or exceptions, forbidden behaviour is punished based on its severity. The utilisation of this procedure, although extensively employed by the Commission in several situations, encounters certain challenges when applied to the business model of big tech platforms. Article 102 of the law forbids the exploitation of a position of power that results in the limitation of competition and it bears resemblance to Section 4 of the Competition Act, 2002 in India.[9] Abuse can be classified into two distinct types: exclusionary behaviour and exploitative abuses of dominance. In order to ascertain dominance, it is imperative to delineate the pertinent market and assess the company's market power to ascertain its dominance within that specific market. Article 102 of the Treaty on the Functioning of the European Union (TFEU) covers the forbidden actions of tying and predatory pricing. Tying refers to a scenario in which a seller conditions the sale of a product, known as the "tying" product, on the buyer's agreement to purchase another product, known as the "tied" product.[10]

An instance of this can be seen in the Google Android case. However, this method is employed in various ways across web platforms, making it challenging to identify. In a market where both the tying and tied products are provided without charge, it becomes challenging to establish evidence of anti-competitive behavior. Predatory pricing, which involves setting prices below cost to eliminate competition, is frequently employed by big tech companies. Detecting this practice can be challenging due to the free access provided to most big tech platforms. The expenses incurred in offering free services are typically recovered from the opposite side of the platform. The conventional test deems a price below the average variable cost (AVC) as predatory.[11] However, this test is unsuitable for online platforms owned by Big Tech. This is because the pricing structure of the entire platform needs to be taken into account, not just the aspect that offers suspiciously low prices. If we were to apply the conventional test in this case, all platforms that provide free services to consumers would also be considered predatory. Big tech platforms have various methods to engage in predatory pricing.

Their dynamic and discriminatory pricing system provides them multiple options, such as customizing prices or altering their pricing structure once they have acquired a sufficient audience and secured enough consumers to deter new competitors.[12] The EU Merger Regulation forbids mergers and acquisitions that have the potential to diminish competition and guarantees that enterprises do not gain a level of market dominance that could enable them to impact consumers by increasing prices detrimentally. Specific turnover standards must be met to be exempt from regulation, ensuring that modest mergers are not subject to regulatory oversight. This is a challenge in the digital economy as Big Tech business strategies result in minimal profits despite the company's significant worth and market capitalization. A prime example is WhatsApp, which was purchased by Facebook (now known as Meta). It is crucial to regulate the mergers of dominant Big Tech corporations with innovative firms in order to prevent any potential harm to competition. The practice of Big Tech companies frequently acquiring creative tech startups with less

[9] Kapri, C. (2021). Competition Law and Economics: Competition Law (Indian & EU) and the Application of Price Theory. Supremo Amicus, 27, 97.
[10] Hanley, D. A. (2022). Per Se Illegality of Exclusive Deals and Tyings as Fair Competition. Berkeley Tech. LJ, 37, 1057.
[11] Cheng, H. F. G. (2020). An economic perspective on the inherent plausibility and frequency of predatory pricing: the case for more aggressive regulation. European Competition Journal, 16(2-3), 343-367.
[12] Martínez Pastrana, S. (2023). PRICE DISCRIMINATION AND BIG DATA: HIGHEST PRICES EVERY TIME WE CLICK? (Master's thesis).

income can result in mergers that are able to evade scrutiny at times.[13] The General Data Protection Regulation was ratified on 15 December 2015 and became effective on 25 May 2018. The previous Data Protection Directive, in effect since 1995, was deemed inadequate by the EU in addressing the challenges posed by the emerging digital economy. The General Data Protection Regulation is applicable to all companies, regardless of their location, that handle personal data of individuals residing in the European Union (EU).[14] Under the General Data Protection Regulation,the definition of data has been broadened to include information obtained through cookies, location tracking, and other means of identification. As a result, consumers are now required to provide explicit authorization for the use of their personal data before accessing a website.[15]

Furthermore, users now can transfer their data to another provider and have the right to receive and delete their personal data from the data controller. The introduction of these two new alternatives is a significant advancement that has the potential to simplify the process of platform switching for customers and enable new competitors to challenge established players effectively. If a person desires to utilise a different social networking platform, they have the option to transition to it while retaining all the data that was previously stored on Facebook, such as photo feeds and other content. The penalty for online platforms that do not seek explicit consent from users can be as high as €20 million or 4% of their sales.[16]

CRITICAL COMPARISON OF THE COMPETITION LAW OF EU, US AND INDIA

A robust competition law framework is essential for economic development, guaranteeing market equilibrium and avert monopolistic dominance. It promotes equitable competition, reduces prices, improves quality, and stimulates innovation while safeguarding small firms from unjust entry obstacles. While competition does not have a definition that applies everywhere, institutions such as the U.K. Competition Commission, U.S. Department of Justice, EU regulators, and the OECD offer subtle insights. Competition policy emphasizes consumer well-being and efficiency through influencing business conduct and market structure. It has been described by the OECD as government policies supporting competition and hindering anti-competitive activities. In India, the Raghavan Committee highlights the imperative for a National Competition Policy to align with economic reforms.

Based on economic theory, competition law suppresses monopolistic tendencies and promotes economic stability. The EU has both national and community-level competition laws, whereas the U.S. possesses traditional antitrust legislation, such as the Sherman Act (1890), Clayton Act (1914), and FTC Act (1914). With the growth of digital markets, regulators across the globe are evolving enforcement measures to tackle challenges raised by Big Tech and maintain fair competition in changing economies.

PROPOSED LEGISLATIVE REFORMS FOR THE DIGITAL MARKET

The Competition Commission of India (CCI) struggles to regulate digital markets effectively under the current *Competition Act*, which follows an ex-post approach—intervening only after anti-competitive

[13] Rizzo, A. M. (2021). Digital mergers: Evidence from the venture capital industry suggests that antitrust intervention might be needed. Journal of European Competition Law & Practice, 12(1), 4-13.

[14] Klar, M. (2020). Binding effects of the European general data protection regulation (gdpr) on US companies. Hastings Sci. & Tech. LJ, 11, 101.

[15] Hoofnagle, C. J., Van Der Sloot, B., & Borgesius, F. Z. (2019). The European Union general data protection regulation: what it is and what it means. Information & Communications Technology Law, 28(1), 65-98.

[16] Fletcher, A., Crawford, G. S., Crémer, J., Dinielli, D., Heidhues, P., Luca, M., ... & Sinkinson, M. (2023). Consumer protection for online markets and large digital platforms. Yale J. on Reg., 40, 875.

conduct occurs. This reactive model is often too slow for fast-moving digital markets, where harm can be irreversible.

The 53rd Parliamentary Report recommended a separate ex-ante competition law to preempt anti-competitive behavior. In response, the Committee on Digital Competition Law (CDCL), formed in February 2023, released its report on March 12, 2024, advocating for a *Digital Competition Act (DCA)*. This proposed law would empower the CCI to regulate large digital enterprises with significant market influence proactively. Additionally, the CCI has set up a Digital Markets Unit to monitor and address antitrust concerns in the tech sector.

SUMMARY OF THE REPORT[17]

The Committee on Digital Competition Law was constituted to evaluate the need for an ex-ante competition framework for digital markets in India. In its report, the Committee also published a draft Bill to give effect to its recommendations. The report was released on March 12, 2024.

Key observations and recommendations of the Committee include:

- **Need for ex-ante regulation of digital competition:** The Committee noted that the current ex-post framework (intervening after an event occurs) under the Competition Act, 2002, does not facilitate timely redressal of anti-competitive conduct by digital enterprises. It observed that the present framework may not be effective to address the irreversible tipping of markets in favour of large digital enterprises (permanent dominance of a firm in relevant market). The Committee recommended enacting the Digital Competition Act to enable the Competition Commission of India (CCI) to selectively regulate large digital enterprises in an ex-ante manner (intervening before an event occurs). The proposed legislation should regulate only those enterprises that have a significant presence and the ability to influence Indian digital market.
- **Systemically Significant Digital Enterprises (SSDEs):** The Committee noted that certain features of digital markets allow digital enterprises to swiftly gain influence. These features include: (i) collection of user data which can allow large incumbent enterprises to enter related markets, (ii) network effects where utility of a service increases when number of users consuming the service increases, and (iii) economies of scale wherein incumbents can offer digital services at lower costs as compared to new entrants. The Committee recommended designating entities offering certain core digital services as SSDEs for ex-ante regulation, which are susceptible to market concentration. These include search engines, social networking services, operating systems, and web browsers.
- **Thresholds for classification of SSDEs:** The Committee recommended using both quantitative thresholds and qualitative criteria to designate enterprises as SSDEs. The quantitative threshold can be based on a dual test of: (i) significant financial strength, gauged from parameters such as turnover, gross merchandise value, and market capitalisation and (ii) significant spread based on the number of business and end users of the core digital service in India. Digital enterprises fulfilling the quantitative thresholds would have to report the same to CCI, which will then designate them as SSDEs. The quantitative threshold may not cover all digital enterprises that may have a significant presence in Indian digital markets. The Committee recommended that a set of qualitative criteria may be used to designate such enterprises as SSDEs. These criteria include resources of the enterprise and volume of data aggregated by them.

[17] https://prsindia.org/policy/report-summaries/digital-competition-law

- **Associate Digital Enterprises (ADEs):** The Committee noted that in some cases, compliance may be required from multiple digital enterprises in a group that are engaged in providing a core digital service. The Committee recommended that notifying enterprises should identify all other enterprises within its group involved in the provision of a core digital service. These enterprises should be designated as ADEs under the proposed framework.
- **Obligations of SSDEs:** The draft Digital Competition Bill, 2024, as recommended by the Committee, prohibits SSDEs from carrying out certain practices. These include: (i) favouring their own products and services or those of related parties, (ii) use non-public data of business users operating on their core digital service to compete with those users, (iii) restrict users from using third-party applications on their core digital services, and (iv) requiring or incentivising users of an identified core digital service to use other products or services offered by the SSDE. Regulations may allow differential obligations for different SSDEs and ADEs based on factors like business models and user base.
- **Enforcement of provisions:** The draft Bill empowers the Director General, appointed under the 2002 Act, to investigate any contraventions when directed by the CCI. The Committee recommended that CCI should bolster its technical capacity including within the Director General's office for early detection and disposal of cases. It also recommended constituting a separate bench of the National Company Law Appellate Tribunal for timely disposal of appeals.
- **Penalties:** The 2002 Act provides for behavioural remedies and high monetary penalties to address anti-competitive practices.

The Committee noted that the central government has decriminalised various corporate offences to promote ease of doing business. It recommended that contraventions under the draft Bill should be addressed by imposing civil penalties. For calculating the ceiling on penalties, the Committee recommended the use of global turnover of enterprises. The Committee also recommended capping the penalty at 10% of global turnover of SSDEs.

CONCLUSION

As digital economies transform at a quickening pace and Big Tech companies become ever more powerful, competition law needs to evolve to deal with new threats. Old regulations are ill-equipped to deal with data-driven economies, artificial intelligence, and algorithmic decision-making. Powerful platforms use network effects and enormous pools of data to reinforce their dominance, making the case for proactive, ex-ante regulation to prevent anti-competitive practices in the first place.

Trans-border collaboration between regulators is necessary because online businesses do not exist within national borders and tend to use legal loopholes. Synchronization of enforcement strategies will avoid regulatory arbitrage. Future competition policies must incorporate technology developments, like AI-based surveillance, algorithmic explainability, and stronger protection of consumer data, to have equitable markets.

Finally, the secret to successful regulation is finding a balance between innovation and market fairness. An evolving legal system should both discourage anti-competitive behavior and encourage sustainable digital development that serves consumers and businesses equally.