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BREAKING TRUSTS: IS BIG TECH IN BIG TROUBLE?

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Adam Smith's free-market economy pivots around minimal government intervention so that markets can self-regulate and operate optimally. Unfortunately, in many cases, such environments allow the rise of monopolies through organic or inorganic growth. While true monopolies are rare in a free market economy, lack of government intervention often allows the rise of a single large player with many minor players with limited competitive ability. In these situations, the large firm is considered to have "*monopoly power*".

Interestingly, the genesis of competition / antitrust laws came as a response to the rise of firms with monopoly power in the 1880s and 1890s in America. With the principle, "*if we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life*", the Sherman Antitrust Act of 1890 (Sherman Act) came into force to break the dominance of various "trusts" (i.e., large integrated manufacturing conglomerates which often enjoyed monopoly power).

After protracted litigation, the US government in 1911 carved its first major trust, the Standard Oil Company (SOC) into 34 smaller companies. For background, after its incorporation in the 1860s, SOC began operations by selling oil at very cheap rates compared to its competitors. Parallelly, SOC engaged in strong business integration through steady organic growth and inorganic acquisitions. Soon after, SOC started raising oil prices significantly, and by the 1890s, if customers refused to pay the exorbitant prices, they would be rendered unable to procure oil. As such, the breaking up of SOC gradually improved the competitive character of the oil market and came as a respite to its consumers.

Another major divestment under the Sherman Act was of the American Telephone & Telegraph (AT&T) in 1984 which was broken up to form many "baby bell" companies. It is believed that while the breakup temporarily caused a reduction in service quality and increase in prices, the market ultimately settled through natural maturation.

Over the course of the century, many other trusts with monopoly power namely, the American Tobacco Company, Northern Securities (railroad company), National Packing Company (beef-packing company), etc., were divested to protect the competitive integrity of relevant markets. However, thanks to legislative evolution, governmental

authorities in the recent past have had very few reasons to cause the divestment of firms with monopoly power (outside of a merger control context).

That said, while the jury is still out on this, the long-standing *intervention-free* position maybe in for a change. It is a popular belief that the exponential rise of big techs like Apple, Google, Amazon, Facebook, etc. mimics the dominance enjoyed by trusts in the first half of the last century as discussed above. Over the years, many of these firms are believed to have systematically engaged in predatory conduct to drive out competition by way of "killer acquisitions" and anti-competitive practices for protecting their monopoly-like power in the relevant markets. For the uninitiated, killer acquisitions are competitor buy-outs with a view to shut it down than to compete.

The first response to this rise of big tech came in 2001 when the then US government advocated the breakup of Microsoft. While Microsoft's monopoly power was acknowledged, it escaped such fate for several reasons including political motivations.

However, the embers have been fanned once again with growing consensus that big tech now wields overwhelming power and influence resulting in tangible harm to competitors and consumers alike, and therefore needs curtailment. Although antitrust agencies world-wide are contemplating measures to reign Big Tech, the US appears to be leading this endeavour with the Congress seeking sweeping remedies to restrain further threat to competitors, consumers, and democracy itself. For instance, Facebook and Google are already facing heat in multiple states with many parallel investigations concerning their predatory market behavior and acquisitions. Many prosecutors have already called for breaking off Instagram and WhatsApp from Facebook with restrictions on their future deals. The US Department of Justice has also accused few Big Tech companies of illegally protecting their monopoly power in their markets. While it is unclear where the water will flow from here, given the convergence of political will and public sentiment against big tech, it is not out of place to expect a repetition of the SOC or the AT&T breakup.

Further, the impact of the west's events in India cannot be downplayed. Given the globalised era and the Competition Commission of India's (CCI) penchant to mirror US and the EU antitrust authorities, the probability that the CCI may initiate investigations to assess the dominance of individual big tech firms in India and assess the requirement for a breakup cannot be ruled out. The CCI is already seized with investigations against some big tech firms and the expansion of on-going investigations to include others would not be far-fetched.

Further, the thus far dormant Section 28 of the Competition Act, 2002 (Act) which empowers the CCI to divide a dominant firm to ensure that such firm does not abuse its dominant position may finally be invoked. Interestingly, the scheme of the said section does not require the CCI to make an actual finding of abuse to direct a firm's division. Mere apprehension of abuse by a dominant firm is sufficient to trigger the operation of this provision. It is intriguing that the Act itself does not provide any guidance for determining justifiable triggers to develop an apprehension of abuse *vis-à-vis* a dominant firm. This lack of guidance severely expands the scope of this provision and strengthens the CCI's power.

All in all, in view of the fast-paced and global development on this front, the recent surge of investigations by the CCI against big tech like Google and Amazon can act as a stimulus that the CCI needs to test the waters within the realm of its powers under Section 28 of the Act. That said, in the absence of defining contours of the scope and application of Section 28 of the Act, its true effectiveness as well as constitutional validity cannot be truly gauged at this early stage. Nonetheless, it goes without doubt

that we are sailing in novel waters, and the alarm bells tolled in the US can very well bring about a watershed moment even in the Indian competition law landscape.

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