

**ABUSE OF DOMINANCE BY FACEBOOK THROUGH USER DATA  
EXPLOITATION: MYTH OR REALITY?  
- LAKSHANA R**

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**INTRODUCTION**

The boundaries between the fields of competition, consumer and data protection law have become blurred in the digital economy. This is particularly the case for the rules governing practices of online social media players relating to the collection and use of personal data of individuals. The gathered user data can be used in various ways that affect competition in the free market. Recently, this issue has been in the limelight and it is gathering increased focus as users raise questions about the level of data and consumer protection offered by current market players in the social media space. The data pool can be easily misused to understand user preferences and manipulate the same through effective strategizing. A common application of the same is the concept of confirmation bias. Confirmation bias propagated by widely used social media platforms is certainly a cause for concern within competition law. The facebook scandal around US election time regarding how the existing belief systems of users were reinforced by selective news display on the facebook homepage is a case in point. This leads to people feeling more strongly about their view points, thereby making easier choices about whom they would like to vote for. Hence, their beliefs are confirmed through biased news. Certainly, this mechanism would work on a large scale if the news source is a market player on whom people significantly rely upon for such information. The news source should exercise sufficient market power that it is capable of influencing market trends and consumer behaviour. It is argued that Facebook is a dominant player and its news venture has replaced online news portals to a great extent, in the lives of ordinary men and women, as proved in several studies.<sup>1</sup> Hence, there is ground to consider facebook as a dominant player in the market for digital social networking in any territory where there is substantial usage. Similar to confirmation bias is the issue of fake news spread. It is known that fake news about Hillary Clinton was carried and political advertisements were shown as objective news on facebook. Studies show that most users blindly trust facebook news and even ads as true information. The fall-outs are politically and socio-economically significant but the relevant question is whether they necessarily translate into a SSNIP.

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<sup>1</sup> Amy Mitchell, Jeffrey Gottfried & Katerina Eva Matsa, *Facebook Top Source for Political News Among Millennials*, PEW RESEARCH CENTER JOURNALISM & MEDIA, June 1<sup>st</sup>, 2015, available online at <http://www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/>

In the US, price effect has been considered a major factor but we need to move beyond that in the digital age.

The aim of this article is to carve out the potential competition law problems with the activities of Facebook as an economic entity, in its capacity as a social media platform. So far, competition authorities have not intervened much in this field. The introduction in the first section is followed by a brief discussion on abuse of market dominance by facebook. The third section delves into data collection scandal involving facebook and its implications for competition law and the fourth section will address the issue of fake news and how they are anti-competitive. All sections mainly focus on European legal jurisprudence since recent developments in those jurisdictions greatly inform the academic discussion on this topic. The Shearman Act has not been discussed owing to space and time constraints. However, wherever possible the American and Indian legal positions have been included. The conclusion sums up the discussion and reiterates the need to liberate competitive effects from the chains of conventional instruments, such as the SSNIP test and adapt them in order to fit to the environment of ‘free’ internet services.

## **ABUSE OF DOMINANCE BY FACEBOOK**

### **A. RELEVANT MARKET- SSNDQ TEST**

The question of market dominance needs to be answered in terms of relevant product and geographical markets. Usually the SSNIP test is applied to identify the relevant product market. But the test loses meaning in the context of a free for use service such as facebook. It is submitted that the SSNDQ test must be applied instead to study if a small but significant decrease in quality will cause users to switch alternatives such as google+, Xing etc. If there is elasticity in this sense, it can be argued that facebook is not a dominant player. However, it has been seen in the past that log in problems and website downtime did not deter the vast user base from returning to facebook as loyal customers.<sup>2</sup> Even the recent Cambridge Analytica scandal has not significantly reduced the active user base of Facebook. It is inarguable that facebook has significantly more users as compared to other digital social media platforms. It has nearly 90% market share so it can be seen as a quasi-monopolist world-wide.<sup>3</sup> It is the largest social media network<sup>4</sup> in the world with 22.9% population

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<sup>3</sup> Silke Heinz, *Bundeskartellamt sends preliminary assessment to Facebook*, Kluwer Competition Law Blog, January 9, 2018, available online at <http://competitionlawblog.kluwercompetitionlaw.com/2018/01/09/bundeskartellamt-sends-preliminary-assessment-facebook/>

registered as active users. In India, there are more than 270 million registered active users and United States closely follows suit with 240 million. As per *Shamsber Kataria v. Honda*,<sup>5</sup> the abuse of dominant position analysis has been centered around the ability of an enterprise to operate independently of market forces, and its position of strength, which enables it to affect competitors or consumers or the relevant market in its favour. Further, Section 19(4) factors such as market share, size of the entity and its competitors, consumer dependence and economic power are established in the case of Facebook. It has commercial advantages over its rivals because of its successful operation model and its humongous size and economic capabilities are testimony to its resultant dominance. Facebook's dominance was affirmed as early as 2014 in a case involving approval for the Facebook/Whatsapp merger under sections 5 and 6 of the Competition Act 2002.<sup>6</sup> However, in 2017 the Competition Commission of India (CCI) dismissed an abuse of dominance case filed against WhatsApp under Section 26(2) of the Act.<sup>7</sup> The argument for abuse of market dominance was built on two grounds; whether whatsapp's conversion into a fully free service entails predatory pricing and whether mandatory sharing of whatsapp information with facebook post-merger amounts to an unfair condition. The CCI disagreed on both grounds. First, whatsapp is not the only free service. It became fully-free from 2016 but applications such as messenger, kik, hike, WeChat, Viber have always been completely free of charge. Hence, making a digital messaging service free of cost would not automatically result in predatory pricing. Second, on the question of compulsory sharing of information with facebook, the CCI sought several clarifications from Facebook. The latter explained that it is not technically possible to merge whatsapp and facebook services and that data pooling was only for administrative and business convenience purposes. The protections in the privacy policy were reiterated and facebook affirmed its commitment to the same. It is interesting to note that similar undertakings were also given in the United States at the time of antitrust approval.<sup>8</sup> There are no further judicial developments in India and United States with respect to abuse of dominance by facebook with respect to data collection and usage. The issue of

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<sup>4</sup> Social media may be defined as social networking sites that are web-based services that allow individuals to construct a public or semi-public profile within a limited forum, to articulate a list of other users with whom they share a connection ('friends' on Facebook), and to view and traverse their list of connections and those made by others within the system. See Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMMUNICATION 210, 211 (2008).

<sup>5</sup> *Shri Shamsber Kataria v. Honda Siel Cars India Ltd. & Ors*, Competition Commission of India, Case no.3 of 2011.

<sup>6</sup> Case No. Comp/M7217, decision dated 3.10.2014.

<sup>7</sup> Case No.99 of 2016.

<sup>8</sup> FTC, Press Release '*FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition*' dated 10.04.2014, available at <https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed>

confirmation bias perpetrated through facebook during the US election makes for an interesting analysis. Germany makes for a good study since the Federal Cartel Office is nearing the end of its probe of Facebook's activities and initial findings have already been released, citing negative results for the social media giant.

## **B. CASE STUDY OF GERMANY**

In Germany, facebook is by far the largest used social media network, though there are only around 28 million active users. This suffices to establish dominance. The Bundeskartellamt, which is the competition regulatory authority of Germany recently released the initial findings of its nearly two-year long probe into allegations of abuse of dominant position by the social-media giant facebook in German territory. It is interesting to note that the probe will not result in monetary fines for Facebook. It can only result in seeking clarifications and undertakings from the social media giant. The specific area of focus of the probe was the mandatory term of usage that required potential users to allow facebook to collect and use their data from external sources. The third-party sources from which facebook collects data can be viewed as twofold:<sup>9</sup>

- websites and applications which have an embedded 'Facebook Like' button, 'Facebook login' or 'Facebook Analytics' and
- other services offerings of Facebook that come under different brands such as WhatsApp and instagram.

It should be highlighted that whether or not a user actually chooses to log in using facebook or hits 'like' on a linked website, Facebook would still collect extensive personal information. This issue had ruffled a few feathers within data protection domain but this probe by the German competition authority is the first time that European authorities are looking at the matter from a competition law perspective. The argument of the Germany competition law authority is that facebook misuses its market dominance and requires users to accept such an exploitative business term in order to be eligible to use the social media service. Owing to the huge reach and spread of the website, it has become an essential element in people's online social life. Consequently, most people are willing to forego privacy concerns in order to be able to use the website.<sup>10</sup> As is the case with most online terms and conditions, a shocking majority also clicks yes without actually reading each and every

<sup>9</sup>Facebook data policy is available at <https://www.facebook.com/about/privacy/> (last accessed 8:15pm, May 5<sup>th</sup>).

<sup>10</sup>Charlotte Ducuing, *When competition law and data protection law embrace: the German Competition Authority investigates Facebook*, KU Leuven Centre for IT & IP. January 9, 2018, available at <https://www.law.kuleuven.be/citip/blog/when-competition-law-and-data-protection-law-embrace-the-german-competition-authority-investigates-facebook/>

clause.<sup>11</sup> Further, existing users are tied in and they do not have a fair choice to not accept the updated terms of usage. It should be highlighted that there are several problematic terms in Facebook's data policy but the scope of this paper is restricted to those relating to third-party data sourcing and usage by Facebook.

In terms of the harm caused as a result of incorporation of such unfair clauses, the German competition law authority makes a three-fold argument.

***i) Adverse Effect upon Rivals***

Facebook being a dominant player is under extra scrutiny because its market behaviour has the potential to have significant consequences for all stakeholders. Extensive data collection across linked-websites can be seen as a move to reinforce its dominance and make it even harder for competing social media websites to find their ground. This solidifies entry barriers and buttresses facebook's existing dominance. The anti-competitive effect should also be discussed from the angle of identity-based network effect. The more data that facebook collects, the more capable it is of customizing its services based on individual choices and preferences. This ones on to improvise the social media service which helps retain its huge customer base and thereby maintain its dominance.

***ii) Harm to Users***

In terms of harm to users, the idea of excessive pricing is rehashed to explain that excessive data collection as a pre-requisite for usage of said social media service is harmful to users. It deprives them of their ability to make an informed choice owing to the presumed necessity of the social media service. Facebook is ubiquitous and users are unable to relinquish it despite stark privacy concerns. This line of thinking has gained considerable recognition in academic circles.<sup>12</sup> In the digital economy, competition law analyses should move beyond SSNIP and recognize that exploitation could be intangible through massive and all-pervasive data collection, which can ultimately result in real harm in case of misuse. Users are usually unaware of the huge potential of such large-scale individual data collection. Though it is common for free-for-use websites to gather user data and sell them to advertising agencies, it is not conventional practice to collective user data from all linked-websites and merge them to create an information powerhouse. The information is then monetized by organizing targeting advertising campaigns, individualized price options and

<sup>11</sup>David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, THE GUARDIAN, March 3, 2017.

<sup>12</sup>Ingae Graef, *Blurring Boundaries of Consumer Welfare: How to Create Synergies between Competition, Consumer and Data Protection Law in Digital Markets*, SSRN (7<sup>th</sup> December, 2016). Available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2881969](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881969)

promoting tailored page choices on facebook. Data can thus be used for price discrimination if there is sufficient information and the player has enough market power.<sup>13</sup> Hence, the user pays a huge non-monetary price for using facebook. In Germany, the Federal Supreme Court has ruled that abuse of market dominance subsumes consumer protection concerns such as price discrimination.<sup>14</sup> However, it should be mentioned that the European Commission refused to recognize the impact of Facebook/Whatsapp merger on personal data collection. The Commission dismissed it as a data protection issue without competition law implications.<sup>15</sup> Hence, the line of argument adopted by the German Competition authorities does not have precedential backing. In any case, it can be argued that the data collective angle may not have sufficient consequences on competition, as analysed from the perspective of clearing a proposed merger between two social media giants. It can still be said to have anti-trust effects in light of recent developments that will be discussed in the subsequent sections.

### *iii) Indispensable to Online Advertisers*

Facebook provides an effective online advertising platform to small businesses and big companies alike and many such advertising customers have highlighted the lack of an equally good alternative avenue while explaining their rationale for continued use of facebook's advertising services, especially in light of the Cambridge Analytica scandal.<sup>16</sup> Advertisers do not have any other option that would help them utilize such an expansive data pool and reach the most relevant audience at such cost-effective prices. Hence, advertising customers of facebook are locked-in and left with no choice but to accept the unfair terms and conditions that the social media mogul imposes.

## **C. VIOLATION OF COMPETITION LAW PROVISIONS**

It is needless to state that violation of data protection laws by a dominant player would not automatically result in violation of competition law provisions. The European Court of Justice remarked in *Asnef-Equifax* case<sup>17</sup> that any matters concerning personal and individual data would not per se constitute competition law issues. They belong in the domain of data protection laws

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<sup>13</sup>Nathan Newman, *The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google*, 40 WM. MITCHELL L. REV. 850 (2013).

<sup>14</sup> German Federal Supreme Court (BGH), *Entega II*, KZR 5/10, judgment of 07.12.2010, available at <http://juris.bundesgerichtshof.de/cgi>

<sup>15</sup> Case No COMP/M.7217 - FACEBOOK/ WHATSAPP.

<sup>16</sup> Joyce M Rosenberg, *Businesses balance Facebook privacy concerns, ad needs*, CHICAGO TRIBUNE, April 25<sup>th</sup>, 2018.

<sup>17</sup> EU Court of Justice, *Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios*, C-238/05, ECLI:EU:C:2006:734 ¶63.

unless specific impact on competition in the market is established. There should a plus factor that creates ripples in the competition domain in the context of digital economy and online data protection. There is no clarity on what exactly the additional criteria entails. In any case, it is helpful to also take a look at relevant data protection law provisions and constitutional rights before delving into a competition law analysis.

Article 102 of the TFEU covers two forms of abuses. On the one hand, exploitative abuses which are designed to exploit customers or suppliers, for example getting consumers to pay more than justified by the costs incurred plus a reasonable profit, and exclusionary abuses, directed at competitors and attempting to limit their scope, eject them from or prevent them from entering the market. In European law, firms in a dominant position must not directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions, Article 102(2) lit. a TFEU. It is important to note that, according to this prohibition, potentially abusive conduct is not restricted to the field of price-related behaviour but can consist of any other exploitation of economic power conferred by the dominant position. In the same vein, the limitation of production, markets or technical development to the prejudice of consumers (Article 102(2) lit. b TFEU) may amount to an exploitative abuse.

Articles 7 and 8 of the Charter of Fundamental Rights of the European Union protect fundamental rights to privacy and data protection. Users do not have control over the use of their personal information and there is also breach of the reasonable expectations any user would have while using an online social media platform. The concept of biased consent largely informs the argument for violation of privacy and data protection. Further, Article 6 of the General Data Protection Regulation<sup>18</sup> mandates the lawful processing of user data and recital 47 speaks about reasonable expectations of users with respect to usage of the data collected. It is not in dispute that there must be some level of expectation that such data will be monetized by the entity that is collecting them as some sort of consideration for allowing free-access without paywalls.

Hence, it is tricky to locate the competition law issue in cases concerning digital economy and online social media platforms. The German competition law authorities have persuasively argued that the excessive data collection is a hidden non-monetary pricing strategy adopted by a dominant player that exploits users. This is said to constitute abuse of dominance.

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<sup>18</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

## PROPAGATION OF FAKE NEWS & CONFIRMATION BIAS

*“If I were to run, I’d run as a Republican. They are the dumbest group of voters in the country. They believe anything on Fox News. I could lie and they’d still eat it up. I bet my numbers would be terrific.”*

This quote seems very much like something US President Donald Trump would say and it was cited thus in Facebook news and attributed to an interview he gave to the People’s Magazine in 1998. But the truth is, this is fake news and he never said it.<sup>19</sup> This is just one example of the extent of false information that was circulated through facebook in the run-up to the US elections. Similarly disparaging content was spread about Hillary Clinton as well. Such information was shown to users segregated based on their ideals, which are identified through their online activity on facebook and linked websites. Before we discuss the extent of impact fake news spread can have and the anti-competitive effect it can cause, we need to venture into the related concept of confirmation bias.

Confirmation bias is the psychological tendency for people to embrace new information as affirming their pre-existing beliefs and to ignore evidence that doesn’t. This notion is gaining increased focus in the social ecosystem of Facebook. Unlike tawkers such as twitter or real-life situations, where encountering of dissenters is unavoidable, Facebook allows users to block, mute and unfriend any outlet or person that does not bolster one’s current worldview.<sup>20</sup> This leads to a situation where people get stuck in echo chambers hearing their own opinions and belief systems being reinforced. Some argue that it is not facebook’s fault that people choose to mute facebook pages that carry opposing view points. Facebook merely offers a customized social network experience to its users who have the choice to follow relevant information outlets and manage their social media presence accordingly. It is also worth noting that Facebook’s advertisement campaigns are also strategized by segregating its user base into silos based on their online activity. This helps target the most relevant audience for a certain product or service. This practice usually reaps mutual benefit since advertisers manage to reach their potential customers and users see only relevant advertisements. But when it comes to online news and information that users receive on facebook, such selectivity seems problematic. It was clarified in the CCI order in google case that a dominant player does not have a

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<sup>19</sup> Olivia Solon, *Facebook’s failure: did fake news and polarized politics get Trump elected?*, THE GUARDIAN, NOVEMBER 10, 2016.

<sup>20</sup> Scott Bixby, *‘The end of Trump’: how Facebook deepens millennials’ confirmation bias*, THE GUARDIAN, October 1<sup>st</sup>. 2016, available at <https://www.theguardian.com/us-news/2016/oct/01/millennials-facebook-politics-bias-social-media>



duty per se to spread unbiased and reliable information even if most users depend on it as their main source of news.<sup>21</sup> Despite this, google was eventually fined for abuse of dominant position.<sup>22</sup>

On the issue of facebook advertised news spread during the US election campaign, there has been a lot of public discourse. It has been revealed that during the 2016 election, President Doanld Trump's campaign actually paid higher rates to advertise on the social media platform overall than Hillary Clinton's campaign did. Facebook's algorithms prioritize more engaging content, meaning the more Facebook believes its users will click, comment on, or share a given ad, the less an advertiser will have to pay to reach a given audience. It is common knowledge that users tend to click on provocative content that is more glaring than usual news related posts. Hence, there is much public outcry centered around the idea that Facebook's system actually prioritizes more provocative or outrageous political ads. That, in turn, has stoked fears about whether Facebook's ad algorithms reward mudslinging and fear-mongering. Facebook has failed to clarify its stance on this issue.

Coming to the competition law implications, the massive data pool that facebook manages enable such conduct on its part. It has the ability to influence voter preferences and there is evidence from the US election that voters have indeed been persuaded to vote in a certain fashion.<sup>23</sup> Russia-backed fake news content reached as many as 126 million Americans on Facebook during and after the 2016 presidential election, according to the company's prepared testimony submitted to the Senate judiciary committee in early October 2017.<sup>24</sup> Around 120 fake Russian-backed pages created 80,000 posts that were received by 29 million Americans directly, but reached a much bigger audience by users sharing, liking and following the posts. This means that approximately 126 million people may have been served one of their stories at some point during the two-year period. This equals about four-thousandths of 1% (0.004%) of content in news feed, or approximately one out of 23,000 pieces of content.<sup>25</sup> Facebook claims to have now closed the malicious accounts that have ties to Russia. Such "organic" posts are distinct from more than 3,000 advertisements which, were viewed

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<sup>21</sup> *In re: Matrimony.com Ltd & Ors*, Competition Commission of India, Case Nos. 07 and 30 of 2012, decided on February 8<sup>th</sup>, 2018.

<sup>22</sup> *Google told to pay Rs 135.86 crore fine for abusing its power in India*, ECONOMIC TIMES, February 9<sup>th</sup>, 2018 available at [http://economictimes.indiatimes.com/articleshow/62838992.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/62838992.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>23</sup> Issie Lapowsky, *What Facebook Isn't Saying About Trump And Clinton's Campaign Ads*, WIRED, 27 February, 2018, available online at <https://www.wired.com/story/facebook-trump-clinton-campaign-ad-cpms/>

<sup>24</sup> Julian Borger, Lauren Gambino Ben Jacobs & Shaun Walker, *Trump-Russia inquiry beats up as three key aides indicted*, THE GUARDIAN, 31 OCTOBER 2017, available online at <https://www.theguardian.com/us-news/2017/oct/30/paul-manafort-robert-mueller-donald-trump-russia-inquiry>

<sup>25</sup> Sabine Siddiqui & Olivia Solon, *Russia-backed Facebook posts 'reached 126m Americans' during US election*, THE GUARDIAN, 31<sup>st</sup> October 2017, available online at <https://www.theguardian.com/technology/2017/oct/30/facebook-russia-fake-accounts-126-million>

by up to 10 million Facebook users. Twitter and Google found similar activity on their own platforms. Facebook has earlier reported that there has been instances of misuse of its platform to sway elections.<sup>26</sup>

Hence, as a dominant player with a gargantuan data pool, facebook has the capacity exploit the same and manipulate market behaviour. It has knowingly or unwittingly done so during the US elections and other instances in the past. As discussed in the previous section, the users are usually unaware of the same and they do not suspect such blatant misuse of their personal data. They blindly believe the news information they view on facebook and even if the social media network does not have a legal duty to censor and vet the same, it certainly has a responsibility to do so. Though there has been no investigation of this issue by competition authorities, it is submitted that there should be.

## CONCLUSION

Competitive behaviour in free market is stifled by the actions of the dominant social media player in terms of the data policy, advertising content and biased news that is spread on the platform. The competition angle in the exploitative business terms of the data and privacy policy of facebook has gained traction thanks to the commendable and proactive investigation undertaken by the German competition law authorities. However, the competition dimensions in the matter of fake news and confirmation bias has not been discussed much in the public discourse surrounding facebook. Online advertisers are tied in and the users are manipulated through unfair treatment. Though this has not been explicitly recognized as an aspect of adverse effect on competition, there is scope for expanding competition law's reach and there is a pressing need to. It is important that competition law is always one-step ahead of the market because, prevention is better than cure owing to the inherent problems concerning lack of market evidence and the absence of a constant check mechanism.

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<sup>26</sup> Jen Weedon, William Nuland & Alex Stamos, *Information Operations and Facebook*, April 27, 2017, available online at <https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf>