

**DATA HARVESTING AND TARGETED ADVERTISEMENTS: A CASE AGAINST  
ANTI-COMPETITIVE PRACTICE IN THE DIGITAL ECONOMY**

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**ABSTRACT**

*In recent decades we have witnessed a shift from a conventional advertising model to a personalized model based upon heavy data contextualization through user-generated history. Data harvesting has consequently boomed into a billion-dollar industry. With the advent of personalized data, the digital markets have enabled easy facilitation of tailor-made solutions to consumer needs. However, heavy data harvesting and monopolistic access to data intelligence tend to skew the balance of digital markets paving the way to entry barriers and abuse of dominant position giving rise to sinister new centres of unaccountable power. We can't cognize the potential harm to competition posed by information exploitation through data harvesting if we measure competition primarily through price in the digital markets where products and services are given to users at 'zero' price but at the cost of their privacy. Specifically, current competition jurisprudence under appreciates non-price parameters like privacy. These concerns are heightened in the context of online platforms where major platforms have adopted an advertising model infrastructure to generate revenue that indiscriminately infests on user data. This paper maps out facets of the market concentration of digital platforms. Doing so enables us to make sense of platforms' business strategy and illuminates us on the anti-competitive aspects of the digital platforms, and highlights the deficiencies in the present Indian Competition Act, 2002 ["Act"]. After establishing a case of privacy as a non-price factor for the competition, the paper closes by giving out potential amendments to the Act.*

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## I. INTRODUCTION

The advent of sophisticated AI (Artificial Intelligence) technologies in the last few decades has enabled the capture, analysis and segregation<sup>1</sup> of raw data into data intelligence. This has changed the status quo of businesses from a conventional advertising model centered around general advertisements to consumers. In the conventional advertising model consumers were targeted with ads irrespective of their preferences. However, today's advertising model has undergone a massive revamp to give tailor-made ads to individual consumers which have been facilitated through a heavy contextualization of data.<sup>2</sup>

With the aid of AI, today's digital commerce is deeply penetrating the minds of the consumers<sup>3</sup> to better understand their consumers vis-a-vis their products to make informed business decisions. We find consumer data to be a pivotal part of today's digital commerce, wherein some companies have founded their entire business model around harvesting consumer data by either selling the harvested data to third parties or by creating personalized ads.<sup>4</sup> Harvesting of personal consumer data has boomed into a billion-dollar industry.<sup>5</sup>

Indiscriminate data harvesting of consumers' data has led to an age of targeted advertisements wherein companies deliver the most relevant ads to the consumers based on the data intelligence gathered from the former's digital footprint. The results of targeted advertisements have been quite impressive with the ability to serve tailored solutions to consumers' individual needs.<sup>6</sup> However, as consumers have become more privacy-conscious, targeted ads have become a double-edged sword wherein on one hand companies like Target operating in the food and general merchandise sector earned millions of dollars in profit turnover after employing algorithms for predicting consumer behaviour. After figuring out

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<sup>1</sup> Nate Philip, 'Big Data harvesting case study' (*Quoble*, 2014) <<https://www.quoble.com/blog/big-data-advertising-case-study/>> accessed 15 June 2021.

<sup>2</sup> Max Freedman, 'How Businesses Are Collecting Data (And What They're Doing with It)' (*Business News Daily*, 2020) <<https://www.businessnewsdaily.com/10625-businesses-collecting-data.html>> accessed 23 June 2021.

<sup>3</sup> Leslie John, Tami Kim and Kate Barasz., 'Ads that don't overstep' (2018) 96 HARV. BUS. REV. <<https://hbr.org/2018/01/ads-that-dont-overstep>> accessed 15 August 2021.

<sup>4</sup> *ibid.*

<sup>5</sup> Philip Lew, 'According to IDC Big Data market is projected to be a \$50 billion industry by 2019' (*Xbosoft* 2018) <<https://xbosoft.com/blog/big-data-50-billion-dollar-industry/>> accessed 18 June 2021); Research and Markets, 'The Global Big Data Analytics Market, 2027: A \$105+ Billion Opportunity Assessment' (*PR Newswire*, 2020) <<https://www.prnewswire.com/news-releases/the-global-big-data-analytics-market-2027-a-105-billion-opportunity-assessment-301014418.html>> accessed 18 June 2021.

<sup>6</sup> Avi Goldfarb, 'What is Different About Online Advertising?' (2014) 44 REV. IND. ORGAN. 115.

individual consumer quirks Target then marketed to people with personalized pitches tailored to appeal to consumers' unique buying preferences.<sup>7</sup> On the other hand, market trends and studies have shown consumer backlash over this type of big brother "surveillance".<sup>8</sup> For example, highly specific personalization in the notorious case wherein Target used a promotion model of sending coupons for maternity-related products to expecting mothers that its AI inferred to be pregnant.<sup>9</sup> Interestingly, when the *New York Times* reported this fiasco, Target had a major setback from consumer backlash.<sup>10</sup> A similar fiasco happened with Urban Outfitters' highly specific personalization, wherein the firm personalized their home page with gender-based personalization.<sup>11</sup> In the recent decade, with market regulators becoming more aware of the extent and pervasiveness of the targeted ads, they have taken proactive measures to balance the skewed nature of digital commerce. Recently, a new Antitrust suit was taken up by the European Commission and the UK's Competition and Markets Authority against Facebook's classified ad services.<sup>12</sup> In this investigation, the EU and UK are investigating if Facebook repurposes the harvested data to gain an illegal advantage over its

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<sup>7</sup> Charles Duhigg, *The Power of Habit: Why do we do what we do in life and business* (Random House Trade Paperbacks 2014).

<sup>8</sup> David Evans, 'The Online Advertising Industry: Economics, Evolution, and Privacy' (2009) 23 J. ECON. PERSPECT. 37; Avi Goldfarb & Catherine E. Tucker, 'Privacy Regulation and Online Advertising' (2011) 57 MANAGE SCI. 57; Yan Lau, 'Report on a Brief Primer on the Economics of Targeted January 2020' (Bureau of Economics Federal Trade Commission 2020) <[https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic\\_issues\\_paper\\_-\\_economics\\_of\\_targeted\\_advertising.pdf](https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf)> accessed 23 June 2021.

<sup>9</sup> Duhigg (n 7).

<sup>10</sup> Kashmir Hill, 'How Target Figured Out a Teen Girl Was Pregnant Before Her Father Did' (*Forbes*, 2012) <<https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/?sh=6f01e8906668>> accessed 10 June 2021; Charles Duhigg, 'How companies learn your secrets' (*New York Times*, 2012) <<https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>> accessed 20 June 2021.

<sup>11</sup> Natasha Singer, 'E-Tailer Customization: Convenient or Creepy?' (*New York Times*, 2012) <<https://www.nytimes.com/2012/06/24/technology/e-tailer-customization-whats-convenient-and-whats-just-plain-creepy.html>> accessed 20 June 2021; Eric Savitz, 'Making Sense of Online Personalization and Privacy' (*Forbes*, 2012) <<https://www.forbes.com/sites/ciocentral/2012/10/22/making-sense-of-online-personalization-and-privacy/?sh=25f3218e313c>> accessed 20 June 2021.

<sup>12</sup> Siladitya Ray, 'EU And U.K. Regulators Open Antitrust Probe Into Facebook's Handling Of Advertising Data' (*Forbes*, 2021) <<https://www.forbes.com/sites/siladityaray/2021/06/04/eu-and-uk-regulators-open-antitrust-probe-into-facebooks-handling-of-advertising-data/?sh=709d3c1a540a>> accessed 28 June 2021; Aoife White, 'EU, UK open first antitrust probe into Facebook in Europe' (*Forbes*, 2021) <<https://www.aljazeera.com/economy/2021/6/4/eu-uk-open-first-antitrust-probe-into-facebook-in-europe>> accessed 28 June 2021.

own services following scepticism over Facebook's abuse of dominant position in the digital advertising markets through its data harvesting.<sup>13</sup>

This paper analyses the nature of targeted advertisements becoming anti-competitive through the current WhatsApp's privacy policy change in the Indian regime. Further, this paper argues why privacy should be made a quality parameter for competition. Finally, the author suggests some amendments in the current Indian Competition Act to accommodate the digital sphere under its ambit.

## II. WHEN DO TARGETED ADVERTISEMENTS BECOME ANTI-COMPETITIVE?

Highly personalized ads apparently do not appear to be anti-competitive. However, a nuanced study on the effects of the targeted ads and the way it is sourced through an indiscriminate collection of consumer data highlights how and when targeted ads can become anti-competitive in the digital sphere. In this section, the author throws some light on "how" and "when" targeted ads become anti-competitive in the present market setting in the realm of the digital sphere.

The author has identified two broad settings where the case of personalized ads and data harvesting can become anti-competitive. The first case relates to price discrimination in uncompetitive settings. In this model, the targeted ads lead to targeted pricing and a single company with market power including barriers to entry, segregates the market into different divisions and charges consumers present in each division separately.<sup>14</sup> This case presents an anti-competitive scenario where prices offered to the consumers who receive targeted ads are different from those who didn't receive those ads. Examples of price differential models include providing coupons and discounts specifically to targeted audiences while keeping inflated prices to the non-targeted consumers.<sup>15</sup>

The second case relates to market segmentation in a competitive setting. In this model, a target advertising firm finds it more beneficial to target a specific market of products thereby

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<sup>13</sup> *ibid.*

<sup>14</sup> Benjamin Reed Shiller, 'First Degree Price Discrimination Using Big Data' (2014) Brandeis University, Department of Economics and International Business School Working Paper 58, 2014, 1-3 <[https://www8.gsb.columbia.edu/faculty-research/sites/faculty-research/files/finance/Industrial/Ben%20Shiller%20--%20Nov%202014\\_0.pdf](https://www8.gsb.columbia.edu/faculty-research/sites/faculty-research/files/finance/Industrial/Ben%20Shiller%20--%20Nov%202014_0.pdf)> accessed 16 August 2021; Hal Varian, 'Price Discrimination and Social Welfare', (1985) 75 AM. ECON. REV. 870.

<sup>15</sup> Yan Lau (n 8) 7.

giving rise to mini-monopolists<sup>16</sup> and resulting in a price competition decline. Taking Target's case, Target through the deployment of algorithms had started to maintain a baby shower registry which helped them identify pregnant women which helped the company to decide when to send them coupons for prenatal vitamins or cradles etc.<sup>17</sup>

### A. Market Concentration of Digital Platforms

It has now widely been accepted that digital intelligence<sup>18</sup> through data aggregation and harvesting, has become an enabling asset for controlling the digital economy and thereby strengthens one's position.<sup>19</sup> This digital intelligence is used to channel economic activities by controlling distribution channels in the digital market. For example, Facebook and Google reorganize data using sophisticated AI tools to mobilize logistics and structures thereby redefining the conventional markets in the realm of digital markets.<sup>20</sup> During this transition of our understanding of conventional markets, one finds digital intelligence paving the path for digital platforms to become more data-prosperous. To optimize profits in an advertising model the platforms need a thorough understanding of their consumer base for effective redressal of consumer needs which is smoothly facilitated by the generation of data intelligence.

#### i. Rise of Monopolies

The agility in capturing data intelligence is critical in the digital markets owing to its 'time sensitiveness'<sup>21</sup>, which tends to bestow a competitive advantage.<sup>22</sup> However, on the other hand, over time digital intelligence becomes harder to emulate, leading to prospective entry

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<sup>16</sup> Santanu Roy, 'Strategic Segmentation of a Market' (2000) 18 INT. J. IND. ORGAN. 1279.; Ganesh Iyer, David Soberman and J. Miguel Villas-Boas, 'The Targeting of Advertising' (2005) 24 MARK. SCI. 461.; Andrea Galeotti and Jose Luis Moraga-Gonzalez, 'Segmentation, Advertising and Prices' (2008) 26 INT. J. IND. ORGAN. 1106; Nada Ben Elhadj-Ben Brahim, Rim Lahmandi-Ayed and Didier Laussel, 'Is Targeted Advertising Always Beneficial?' (2011) 29 INT. J. IND. ORGAN. 678.

<sup>17</sup> Duhigg (n 7) 82.

<sup>18</sup> Sunil Mithas and Warren McFarlan, 'What Is Digital Intelligence?' (2017) 19 IT PRO. 3.

<sup>19</sup> United Nations Conference on Trade and Development, 'The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development' (3-5 April 2019) U.N. Doc. TD/B/EDE/3/2.

<sup>20</sup> Cecilia Alemany and Anita Gurumurthy, 'Governance of data and artificial intelligence' (Global Civil Society 2019) <[https://www.2030spotlight.org/sites/default/files/spot2019/Spotlight\\_Innenteil\\_2019\\_web\\_gesamt.pdf#page=86](https://www.2030spotlight.org/sites/default/files/spot2019/Spotlight_Innenteil_2019_web_gesamt.pdf#page=86)> accessed 18 August 2021.

<sup>21</sup> Anusuya Kirubakaran and M. Aramudhan, 'Time Sensitive Business Intelligence - Big Data Processing Methodology for Frequently Changing Business Dimensions' (2016) 7 INDIAN J. SCI TECHNOL. 1.

<sup>22</sup> *ibid* [2].

barriers for new players to the market.<sup>23</sup> Consequently, an established platform's monopolistic access to the data would lead to a detrimental impact on the industry's overall competitiveness.

Google forms a classic example of this as in 1996 when it had revolutionized the search engine market by introducing a search engine algorithm.<sup>24</sup> The search engines since then have dynamically evolved. The contemporary search engines are operated on machine learning algorithms that combine thousands of factors including age, sexual orientation, political leanings among other parameters. One of the prominent factors is the historical search query logs and their complementary search result clicks.<sup>25</sup> Therefore, a lack of matching data intelligence of an incumbent player on a user's search history weighed in to create an entry barrier to new entrants in the search market. Such market distortion was experienced even by platforms with superior algorithms who found it difficult to enter the market and compete with the established Google. For example, when Microsoft entered the search engine market to compete with Google, it allied with Yahoo search<sup>26</sup>, thereby accessing the years of digital intelligence of user search behaviour. However, Google still outperforms Bing.

ii. Digital barriers to entry

Another setback of data intelligence is providing inequitable leverage to established players to enter into new markets. This leads to market concentration and digital markets being confined to a few players. For example, Google started as a search engine and later expanded into a leading ad company, video distributor and email service provider among other things. Google's methodology for entering into new markets is hardly a secret. Google's approach has been founded on a data-driven approach.<sup>27</sup> The aggressive data processing gives Google a

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<sup>23</sup> Kira Radinsky, 'Data Monopolists Like Google are Threatening the Economy' (*Harvard Business Review* 2015) <<https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy?registration=success/>> accessed 27 June 2021.

<sup>24</sup> *ibid.*

<sup>25</sup> Eugene Agichtein, Eric Brill and Susan Dumais, 'Improving Web Search Ranking by Incorporating User Behavior Information' (2018) 52 ACM SIGIR FORUM 19.

<sup>26</sup> Danny Sullivan, 'The Microsoft-Yahoo Search Deal, In Simple Terms' (*Search Engine Land*, 2009) <<https://searchengineland.com/microsoft-yahoo-search-deal-simplified-23299>> accessed 27 June 2021.

<sup>27</sup> Jefferson Lynch, 'How Google uses data and machine learning to enter a new market' (*LinkedIn*, 2017) <<https://www.linkedin.com/pulse/how-google-uses-data-machine-learning-enter-new-market-lynch>> accessed 27 June 2021.

competitive edge by identifying the weaknesses and inefficiencies in the current market and consequently, exploiting the gaps through its expansion.<sup>28</sup>

Presently, digital intelligence is generated through social interactions of people over various digital platforms leading to aggregation of data from networked data environments. This has led to a radical shift from the conventional way of how commerce functioned thus necessitating a new governance model to check on ‘corporate prying’ over individual lives. The ways through which digital intelligence is generated, i.e., from networked data environments and social interactions of people to produce profit turnovers marks a radical shift of the edifice of society and economy necessitating a new governance model. Thus, the owner of a dominant data harvesting platform such as social media networks etc. finds itself in a dominant position and with considerable market power.

iii. E-distortions

The author has borrowed the word e-distortion from Ezrachi and Stucke<sup>29</sup>. E-Distortion, mean the creation of distortion in a competitive market when consumers give power to a specific player over others through terms and conditions to provide them with a particular service in the context of digital markets. The Anti-competitiveness of market concentration in digital commerce can be explained through e-distortions.<sup>30</sup> According to Ezrachi and Stucke, primary concerns about e-Distortions include quality degradation, wealth transfer to data-polies (data- monopolies), costs on third parties and finally negative innovation.<sup>31</sup>

First, quality degradation concerns arise when leading platforms deny interoperability.<sup>32</sup> Consequently, leading to high switching costs for consumers who wish to switch to other platforms. For instance, denial of interoperability over social media platforms and the subsequent need to sign up individually to other social media platforms pose a discouraging factor to the consumers to switch over networks. Further in the context of social media platforms, one must also consider the network effect. When it comes to quality degradation concerns, Ezrachi and Stucke argue that when leading platforms deny interoperability and consequently slap high switching costs on consumers who wish to switch to outside options,

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<sup>28</sup> *ibid.*

<sup>29</sup> Ariel Ezrachi and Maurice E. Stucke, ‘Edistortions: How data-polies are dissipating the internet’s potential’ in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

<sup>30</sup> *ibid* [5].

<sup>31</sup> *ibid* [5-6].

<sup>32</sup> *See generally* Lina Khan, ‘Amazon’s antitrust paradox’ (2017) 126 YALE L.J. 710.

it provides a fertile ground for quality degradation.<sup>33</sup> Further, when leading platforms reduce privacy protection to increase data harvesting in a heavily concentrated market, this leads to degradation of privacy. This disincentivizes the smaller platforms to provide relatively high privacy than the big platforms.

One of the key accelerators of market concentration in the digital platform market is lowering the rate of multi-home tendencies as put forward by Evans and Schmalensee.<sup>34</sup> Here, multi-home tendency means the ability of the platform to bring two or more different types of the platform together to facilitate interactions between them.<sup>35</sup> Evans and Schmalensee identify ‘strength of indirect network effects’ and ‘degree of economies of scale’(refers to cost advantage gained by companies over the increased level of production) as important factors that weigh in to determine the concentration process. In terms of the degree of economies of scale, there appears a significant fixed cost for providing the platforms. In two-sided platforms like social media platforms, there is a fixed cost for providing the platforms however not a fixed rate in providing for advertisements.<sup>36</sup>

Thus, the economies of scale become dependent on the strength of the indirect effect to generate takers for advertisements. A user’s opportunity to multi-home (particularly in a social media platform) depends upon various factors including switching costs and the structure and height of platform charges. For example, it is easier for a user to switch from one online retailer to another, say from Amazon to Flipkart, where it does not necessarily matter how many users use. However, when we talk about social media networks, a user takes into account the strong direct network effect, say as in Facebook.

Second, the e-Distortion concern relates to wealth transfers to data-opolies (data-monopolies)<sup>37</sup> Albeit, products and services are deemed to be free of cost, data-opolies can

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<sup>33</sup> *ibid.*

<sup>34</sup> Daniel Evans and Richard Schmalensee, ‘Markets with Two-Sided Platforms’ (2008) 1 *Issues in Competition Law and Policy* 667; David Evans and Richard Schmalensee, ‘The Antitrust Analysis of Multi-Sided-Platform Businesses’ in Roger Blair and Daniel Sokol (eds), *Oxford Handbook on International Antitrust Economics* (vol. 1, 2015).

<sup>35</sup> David S. Evans and Richard Schmalensee, ‘The Antitrust Analysis of Multi-Sided Platform Businesses’ (2012) University of Chicago Law School Working Paper 623/2012, <[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1482&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1482&context=law_and_economics)> accessed 4 November 2021.

<sup>36</sup> David S. Evans and Richard Schmalensee, ‘Markets with Two-Sided Platforms’ in Wayne Collins (ed), *Issues in Competition Law and Policy* (vol 1, 2008).

<sup>37</sup> Ezrachi and Stuke (n 29) 6.

extract ostensible amounts of wealth from consumers through data harvesting without paying the fair market value of the personal data collected etc. For instance, predicting individual consumer quirks by prying on the consumer's lives can give a competitive edge to the firms to influence consumer shopping patterns by delivering the most relevant choices to the consumers. However, indiscriminately harvesting data without setting limits leads to consumer disadvantage especially when those individuals are privacy-conscious. This leads to an unfair bargain over data collection. This problem is aggravated when data-opolies unscrupulously collect data and engage in means such as discriminatory pricing and behavioural discrimination.

Third, e-Distortion concern is costs on third parties.<sup>38</sup> In this type of circumstances, a key platform like social media platform can engage in cheap exclusion. The type of exclusion we refer to in this paper is for example, to the detriment of rival sellers steering away prospective consumers and advertisers to the key provider's own products. For instance, the 'universal search' by Google excluded competitors in its specialized search.<sup>39</sup> In its universal search, Google provided favourable treatment to its own products to the detriment of its competitors and consumers.<sup>40</sup> Thus, by the cheap exclusion of rival products Google provided suboptimal results thereby eliminating consumer welfare gains. Moreover, Google's conduct excluded competitors without offering any efficiency justification.<sup>41</sup>

Fourth, e-Distortion concerns the rise of negative innovation, wherein data-opolies innovate to the detriment of consumer interests and markets. For instance, more data-centric applications, social media platforms run by popular data-opolies give fewer incentives to the new players in the market to provide for greater privacy protections. This leads to a vicious cycle of limitless data harvesting wherein with each passing day firms come up with new innovative ways to harvest novel data for say heart rate, blood pressure, etc. In the context of user privacy, this leads to a rise in innovative technologies to the detriment of consumers.

Neglecting true consumer behaviour is indeed problematic. Since the onset of the pandemic in India, many people have shifted from conventional markets to e-markets which are generally run through personalized ads. For example, buying a laptop requires one to search

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<sup>38</sup> *ibid.*

<sup>39</sup> Evans and Schmalensee (n 34).

<sup>40</sup> *ibid.*

<sup>41</sup> See Eric B. Rasmusen, J. Mark Ramseyer, and John S. Wiley, Jr., *Naked Exclusion*, (1991) 81 *Am. Econ. Rev.* 1137.

the web for the best laptops and then evaluate the options on big retail sites like Amazon or Flipkart. When assessing a market, it is important to take up the market realities including the consumer's knowledge over online personalized ads. Since often lesser technologically acquainted consumers tend to take personalized ads featuring in daily feeds as a substitute for neutral ads. This consequently leads to degradation of consumer welfare in the market setting when consumers, especially lesser technological savvy consumers are targeted with personalized ads. Hence resulting in quality degradation of the options which otherwise they would have been privy to if not for the personalized ads. It hardly comes as a surprise if the present Indian consumers are ill-equipped with sufficient know-how about the neutrality of these ads. Therefore, it would be absurd to assume that the consumers would know whether the personalized ads that they see would be favouring one platform over others. Many online shopping ads including one by Google, does not explicitly portray themselves as a neutral metasearch engine, unlike other shopping comparison sites.<sup>42</sup> The problem of neutrality is aggravated when metasearch engines and personalized ads are conceived as substitutes by consumers. Such inexplicit favouritism by Google results in neglect of effective alternative products, resulting in harm to consumers, competitors and merchants.<sup>43</sup>

### **B. Rise of 'Sinister New Centers of Unaccountable Power'**

While dealing with different types of forms and sources of power and platform abuses, academicians like Lina Khan have classified the forms and abuse of power into three categories, namely, gatekeeping power, leveraging, and information exploitation.<sup>44</sup> However, this paper is only concerned with information exploitation concerning social media networks. The source of information exploitation by social networking platforms comes from various methods of data collection in multiple markets.<sup>45</sup> These platforms collect enormous information including the time a user spends online on a particular page, the likes one easily gives to a specific type of content etc., thereby giving rise to information exploitation power and privacy threats.<sup>46</sup>

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<sup>42</sup> Justus Haucap, 'A German approach to antitrust for digital platforms' in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

<sup>43</sup> Evans and Schmalensee (n 34) 679.

<sup>44</sup> Lina M Khan, 'What makes tech platforms so powerful?' in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

Information exploitation leads to the business model problem<sup>47</sup>. By ‘business model problem’ the author refers to the tendencies of dominant firms to enter into distinct lines of business.<sup>48</sup> This places the dominant firms which can leverage information for its benefit in direct competition with the firms using their platforms.<sup>49</sup> This leads to competition concerns in e-markets through data control. From the view of privacy, it is of utmost concern that our digital footprints reveal a lot more about a user. Since our social media language can easily reveal our personality, further private traits and attributes are predictable from digital records of human behaviour.<sup>50</sup> The problem is aggravated due to sophisticated AI inferences of a particular data like the data on an individual’s lifestyle revealing current health issues or the potential risks.

In a market where data is valued for targeted advertisements, the concentration of unprecedented volumes of data poses a competition risk especially when the data intelligence can infer an individual’s preferences, habits, even moods. In furtherance of it, targeting users with personalized messages tailored to their respective psychological profiles remarkably increase clicks and purchases.<sup>51</sup> Targeted advertisements have led to a remarkable rise in the effectiveness of psychological mass persuasion to appeal to the psychological characteristics of the users. For example, in a study conducted to assess consumers’ purchase intentions, when the participants were provided with marketing messages tailored to their personality, the research saw a rise in the purchase intentions of the participants.<sup>52</sup>

Recent advancements have shown that this psychological persuasion could either be used to influence individuals’ behaviour in a healthy way. Conversely, these personalized appeals can leech on the weakness of its subject users and persuade them to take action to their detriment and cause harm to the consumers. Therefore, harvesting user data gives an edge to platforms by providing insights of prospective consumers, leading to an information

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<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> Park G et. al., ‘Automatic Personality Assessment Through Social Media Language’ (2014) 108 J PERS. SOC. PSYCHOL. 934; Michal Kosinski, David Stillwell and Thore Graepel, ‘Private traits and attributes are predictable from digital records of human behavior’ (2013) 110 PROC. NATL. ACAD. SCI. 5802.

<sup>51</sup> Sandra Matz et. al., ‘Psychological Targeting as an Effective Approach to Digital Mass Persuasion’ (2017) 114 PROC. NATL. ACAD. SCI. <<https://www.pnas.org/content/114/48/12714>> accessed 14 August 2021.

<sup>52</sup> Jacob Hirsh, Sonia K Kang and Galen Bodenhausen, ‘Personalized persuasion: Tailoring persuasive appeals to recipients’ personality traits’ (2012) 23 PSYCHOL. SCI <[https://www.researchgate.net/publication/321043573\\_Psychological\\_targeting\\_as\\_an\\_effective\\_approach\\_to\\_digital\\_mass\\_persuasion](https://www.researchgate.net/publication/321043573_Psychological_targeting_as_an_effective_approach_to_digital_mass_persuasion)> accessed 15 August 2021.

advantage that the platforms can use to increase their digital monopoly and weed out nascent rivals thereby creating entry barriers.

Information exploitation and data monopolization by few data-polies provide them with the power to dictate which content a user is exposed to on their platform which consequently plays a catalyst to influence user behaviour. It is pertinent to note that in the digital markets precisely, there has been a rapid rise in the “economy of attention,”<sup>53</sup> wherein a user’s attention has become the primary commodity to be traded.<sup>54</sup> Many firms now have started to capitalize on our attention by having understood how scarce our attention is.<sup>55</sup> Again, it warrants a question, in an economy with poverty of attention are digital platforms paying a fair market price for surplus generating stimuli by prying individual’s behaviour traits. It would be quite absurd to envisage a model, where the internet would be free of advertisements, especially when most of the ‘zero’ cost services (wherein one can avail the services of the platform without incurring any cost) are provided on the advertisement model. However, it takes another absurd turn, if we allow platforms to mushroom data aggregation indefinitely to expand their advertisement business, creating higher leverage power and concentrating digital markets.

In a data-driven market, platforms are thrust upon costs in terms of lesser user privacy. The problem is worsened when consumers don’t have the choice to opt out of personalized advertisements when using such platforms.<sup>56</sup> Lack of consumer control is witnessed through unreasonable setting choices in the platforms where the user has no choice but to accept the personalized advertising to use the services like in the case of major social media platforms.<sup>57</sup> Another technique employed by digital platforms in making opt-out tedious for users is by using primary default settings which mandate the users to opt-out to make an effort to alter the default setting. The regulation of one’s privacy is worsened through complex engagement settings which discourages the users from effectively changing the privacy layout due to

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<sup>53</sup> Sandra Matz, Guy Rolnik and Moran Cerf, ‘Solutions to the threats of digital monopolies’ in Guy Rolnik (ed), *Digital Platforms and Concentration* (2018).

<sup>54</sup> L Weng et. al., ‘Competition among memes in a world with limited attention’ (2012) 2 SCI. REP. 335.

<sup>55</sup> ‘Paying Attention: The attention economy’ (*Berkeley Economic Review*, 2020) <<https://econreview.berkeley.edu/paying-attention-the-attention-economy/>> accessed 4 November 2021.

<sup>56</sup> Competition and Markets Authority, ‘Online platforms and digital advertising Market study final report’ (2020)

<[https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf)> accessed 17 August 2021.

<sup>57</sup> *ibid* [178].

uncertainty, poor accessibility and barriers to consumer actions.<sup>58</sup> Therefore, a user's ability to use the platform is contingent upon their permission on receiving targeted advertisements.

In the context of competition in a digital market, it becomes pertinent to discuss the advanced tactics employed in targeted advertisements to manipulate and prey upon the user's weakness. Interestingly, recent researches have demonstrated that exposure to content at a rate of three views per person suffices to generate conscious awareness of a brand in a user.<sup>59</sup> While ten views per person are sufficient to yield unconscious preference for a product.<sup>60</sup> In any competitive market, it becomes undesirable if targeted ads influence the consumers in a way that tends to imbalance consumer preferences by data monopolization. Since it creates an inequitable start for other players including new players and existing insignificant players to catch consumer attention in a scarcity of attention economy. Information leverage in such a context creates entry barriers for the latter's thereby raising competition concerns.

The hegemony of a few platforms augments due to a lack of transparency. At present, the users are kept in dark about the amount of data gathered from them, the way it is analyzed, and put into use as digital intelligence. In a study conducted by Matz et. al.,<sup>61</sup> it came as a surprise when the outcome of research revealed that the psychological targeting in advertisements can be made even without getting hold of an individual's direct access to data. For example, the type of reaction one gives to a Facebook post or the type of post one gives high preference to likes or shares. Simply analyzing the input given by an individual through their clicks and likes can reveal character traits of individuals without the users becoming aware that their information has been exposed.

Despite ethical concerns over transparency in a market setting, firms have legitimate interests in keeping their trade secrets.<sup>62</sup> The advocacy of trade secrets presents a strong case over speculation on exacerbated manipulation and abuse of transparency and gains momentum, especially where traditional IP protections are unavailable.<sup>63</sup> Nevertheless, transparency in its true sense, which is devoid of any ambiguity or dichotomy, becomes important for a user to

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<sup>58</sup> *ibid.*

<sup>59</sup> Herbert Krugman, 'Why Three Exposures May be Enough' (1972) 12 J. ADVERT. RES. 11.

<sup>60</sup> Martin Eisend and Susanne Schmidt, 'Advertising repetition: A meta-analysis on effective frequency in advertising' (2015) 22 J. ADVERT. 415.

<sup>61</sup> Sandra Matz et. al., (n 53) 2, 4.

<sup>62</sup> Stuart Meyer and Grace Fernandez, 'A Looming AI War: Transparency v. IP Rights' (*JD Supra*, 2019) <<https://www.jdsupra.com/legalnews/a-looming-ai-war-transparency-v-ip-34524/>> accessed 27 June 2021.

<sup>63</sup> *ibid.*

navigate the complex territory of ‘consent’ in the digital market. When a user is not properly acquainted with the platform of the consequences of the data being gathered, it presents us with an ‘actual consent conundrum’. By ‘actual consent conundrum’, the author refers to that situation wherein the users freely give their valuable consent over data harvesting to a platform without actually being able to gauge the severity of the consent and the consequent actions it can entail. Thus, it becomes important to draw a fine line over corporate profits and the self-determination of users through privacy.

In a competitive market where consumer attention has become the new commodity priced by platforms, it demands a serious discussion over balancing privacy over trade secrets. ‘Actual consent conundrum opens Pandora's box of market distortions and abuse of dominance. Transnational platforms (refers to platforms that connect to the Global markets) utilize the user data without any accountability to the users. In absence of any practical and effective governance framework, the transnational platform has started to create structural inequalities by information exploitation. Third world economies without adequate competition safeguard<sup>64</sup> risk to become an unregulated innovation playground for digital platforms to experiment in.<sup>65</sup>

### **III. ABUSE OF DOMINANCE - A CASE STUDY ON WHATSAPP'S NEW PRIVACY POLICY**

In this section, WhatsApp's recent privacy policy change has been analysed to understand why deep penetration of an individual's data by a dominant platform poses a threat to competition. On January 4, 2021, WhatsApp announced its revised privacy policy.<sup>66</sup> The policy highlighted certain features as to the prospective changes in how user accounts would be impacted. The initial announcement provided an ultimatum to the users to either accept the privacy policy changes allowing data-sharing between WhatsApp and Facebook or be unable

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<sup>64</sup> Padmashree Gehl Sampath, ‘Regulating the Digital Economy: Dilemmas, Trade Offs and Potential Options’ (2019) SOUTH CENTRE Research Paper, Paper No. 93/2019, 11-13 <[https://www.southcentre.int/wp-content/uploads/2019/03/RP93\\_Regulating-the-Digital-Economy-Dilemmas-Trade-Offs-and-Potential-Options\\_EN-1.pdf](https://www.southcentre.int/wp-content/uploads/2019/03/RP93_Regulating-the-Digital-Economy-Dilemmas-Trade-Offs-and-Potential-Options_EN-1.pdf)> accessed 16 August 2021.

<sup>65</sup> Alemany and Gurumurthy (n 20) 87.

<sup>66</sup> Tech Desk, ‘WhatsApp privacy policy update delayed: Everything that has happened’ *Indian Express* (2021) <<https://indianexpress.com/article/technology/social/whatsapp-privacy-policy-update-delayed-your-account-wont-be-deleted-7148553/>> accessed 23 June 2021, see Pallavi Bedi and Shweta Reddy, ‘PDP Bill is coming: WhatsApp privacy policy analysis’ (*The Centre for Internet Society*, 2021) <<https://cis-india.org/internet-governance/blog/pdp-bill-is-coming-whatsapp-privacy-policy-analysis>> accessed 23 June 2021.

to use WhatsApp post-March 15, 2021.<sup>67</sup> Following a public backlash, WhatsApp came up with a clarification that the data sharing between WhatsApp and Facebook did not incorporate personal communications but only included communication with businesses via WhatsApp.

For example, when you communicate to a business, it would be visible to WhatsApp and it can gather that information to use it for its own marketing purposes including the incorporation of such information for advertising on Facebook.<sup>68</sup> As mentioned earlier, even if content messages (direct data) still remain encrypted, sharing metadata with Facebook provides leverage to Facebook to boost its business strategy in targeted advertising. Recently, EU, UK competition watchdogs have launched antitrust suits against Facebook over allegations of Facebook's unfair use of consumer data to compete with advertisers.<sup>69</sup>

After WhatsApp's policy change, the Competition Commission of India ["CCI"] took a *suo motu* cognizance of the matter against WhatsApp and its parent company Facebook.<sup>70</sup> The CCI concluded that WhatsApp violated the provisions of section 4 of the Act and held it liable for abusing its dominance.<sup>71</sup> The CCI directed a detailed investigation to ascertain the full extent, scope and impact of data sharing through its new privacy policy.<sup>72</sup> In this section, the author analyses why deep penetration of an individual's data by a dominant platform poses a threat to competition. However, to establish abuse of dominance by WhatsApp, three steps must be followed. First, determination of the relevant market; second, determination of dominant position; and third, determination of abuse of power.

### A. Relevant market

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<sup>67</sup> Rohit Kulkarni, 'WhatsApp Will Stop Users From Reading, Sending Messages After May 15, If They Don't Do This' (*Trak*, 2021) <<https://trak.in/tags/business/2021/02/22/whatsapp-will-stop-users-from-reading-sending-messages-after-may-15-if-they-dont-do-this/>> accessed 24 June 2021); Ketan Pratap, 'WhatsApp privacy policy May 15 deadline is now sheer blackmailing for users' *India Today* (2021) <<https://www.indiatoday.in/technology/talking-points/story/whatsapp-privacy-policy-may-15-deadline-is-now-sheer-blackmailing-for-users-1801710-2021-05-12>> accessed 24 June 2021.

<sup>68</sup> WhatsApp Help Centre, 'Answering your questions about WhatsApp's Privacy Policy' (*FAQ WhatsApp*) <<https://faq.whatsapp.com/general/security-and-privacy/answering-your-questions-about-whatsapps-privacy-policy/?lang=en>> accessed 23 June 2021).

<sup>69</sup> Foo Yun Chee and Kate Holton, 'Facebook's Marketplace in EU and UK antitrust crosshairs' (*Reuters*, 2021) <<https://www.reuters.com/technology/eu-antitrust-regulators-investigate-facebooks-marketplace-2021-06-04/>> accessed 4 November 2021.

<sup>70</sup> Competition Commission of India, *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Case No.1/2021, [5].

<sup>71</sup> *ibid* [34]; Section 4, The Competition Act, 2002 (Act 12 of 2013).

<sup>72</sup> *ibid* [34].

The CCI, in its 2016 order, described the relevant market for WhatsApp as “the market for instant messaging services using consumer communication apps through smartphones.”<sup>73</sup> In its update of the definition, the CCI, in its 2020 order, noted that the relevant product market for WhatsApp was the “market for Over-The-Top (OTT) messaging apps through smartphones.”<sup>74</sup> Concerning this case study, the relevant geographic market is India.

It is interesting to note that in the very same order CCI distinguished between relevant markets held by WhatsApp and Facebook. For WhatsApp, the CCI described it as an OTT application, whereas Facebook was described as a social networking application. However, despite the different technical characteristics and applications of WhatsApp and Facebook, the CCI recognized that owing to Facebook’s ownership of WhatsApp, there exists an intrinsic link between the two in the digital marketplace.<sup>75</sup>

### **B. Dominant Position**

In the Indian jurisdiction, the dominant position of WhatsApp can be identified through analyzing the metrics provided in section 19(4) of the Act. However, for the purpose of this paper vis-a-vis economic factors, we analyze section 19(4) (a), (b), (c) and (d), i.e., market share of the enterprise, size and resource of the enterprise, size and importance of the competitors and economic power of the enterprise. Before starting the analysis, it is noteworthy that the Competition Law Review Committee [“CLRC”] report observed that the criteria laid down in section 19(4) is inclusive enough. Further, section 19(4)(b), which states about the “size and resources of the enterprise”, is flexible enough to include data ownership as a factor for the determination of dominance.<sup>76</sup>

The first step to determine the dominant position is to identify whether WhatsApp has advantages in user base, usage and reach. In the Indian jurisdiction, it comes as hardly any surprise that WhatsApp exerts an extensive advantage over its competitors like Snapchat<sup>77</sup> etc., in terms of the user base. In quantitative terms, WhatsApp boasts an enormous user base

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<sup>73</sup> Competition Commission of India, *Vinod Kumar Gupta v WhatsApp*, Case No.99/2016, [11].

<sup>74</sup> Competition Commission of India, *Harshita Chawla v WhatsApp*, Case No.15/2020, [70].

<sup>75</sup> *ibid* [80].

<sup>76</sup> Competition Law Review Committee (CLRC), ‘Report of the Competition Law Review Committee’ (Ministry of Corporate Affairs 2019) <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> accessed 17 August 2021.

<sup>77</sup> Harshita Chawla (n 74) [81], [84].

of around 530 million users in India.<sup>78</sup> The second most used messaging application amongst Indians was Facebook Messenger.<sup>79</sup> Interestingly, since Facebook is the parent company of WhatsApp, it can't be held that either of the two limits each other's competition in the instant messaging service industry.<sup>80</sup>

The second step in determining the dominant position is to identify any entry barriers for the competitors. When it comes to social networking sites, entry barriers to the marketplace become tricky since the success in such platforms is obtained primarily through first, network effect.<sup>81</sup> The network effect is defined as "any situation in which the value of a product, service, or platform depends on the number of buyers, sellers, or users who leverage it".

Second, the high-switching cost, in terms of operating social media platforms, is defined as "various economic and psychological costs incurred when a customer changes service suppliers."<sup>82</sup> Unlike online retail stores, it becomes difficult for users to multi-home since the viability of social networking sites depends upon the number of relative social connections present in a particular platform. Thus, we see the utility of social networking sites increasing in proportion to the number of users. In an advertising model like Facebook's, the number of users generates profitability of the platform through an increase in advertisements.<sup>83</sup> Since the "willingness to pay, for a buyer, increases as the number of buyers or sellers for the business grow".<sup>84</sup> Further, the non-interoperability between social media platforms leads to high switching costs to users in terms of creating a new account on another social media and sharing of information.<sup>85</sup> The absence of clear incentives for users to switch to other

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<sup>78</sup> 'Govt Announces New Social Media Rules to Curb Its Misuse' *The Hindu* (2021) <<https://www.thehindu.com/news/national/govt-announces-new-social-media-rules/article33931290.ece>> accessed 23 June 2021.

<sup>79</sup> Harshita Chawla (n 74) [20].

<sup>80</sup> *ibid* [84].

<sup>81</sup> Tim Stobierski, 'What are Network Effects?' (*Harvard Business School Online*, 2020) <<https://online.hbs.edu/blog/post/what-are-network-effects>> accessed 4 November 2021.

<sup>82</sup> Akihiro Nakamura, 'Estimating Switching Costs of Changing Social Networking Sites', 19th Biennial Conference of the International Telecommunications Society (ITS): "Moving Forward with Future Technologies: Opening a Platform for All", Bangkok, Thailand, (18 -21 November 2012).

<sup>83</sup> Fiona M. Scott Morton and David C. Dinielli, 'Roadmap for an Antitrust Case Against Facebook' (*Omidyar* 2020) <<https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>> accessed 10 June 2021.

<sup>84</sup> Stobierski (n 85).

<sup>85</sup> Bill Goodwin, Sebastian Klovig Skelton and Duncan Campbell, 'How Facebook's 'Switcheroo' Plan Concealed Scheme to Kill Popular Apps' (*Computer Weekly*, 2019) <<https://www.computerweekly.com/feature/How-Facebooks-Switcheroo-plan-concealed-scheme-to-kill-popular-apps>> accessed 15 June 2021.

competing platforms aggravates the existing Facebook's monopoly over social media platforms.

The third step concerns data availability and its consequent information exploitation. As aforementioned, the success of an advertising model heavily depends upon the data harvesting and consequent aggregation of data intelligence. Now, according to WhatsApp's new privacy policy, the platform would be able to amass information from the business accounts on WhatsApp and pass it over to Facebook. This would create an influx of data for easy customization of advertisements by the parent company Facebook. In this context, one must note that "access to data can represent a form of competitive advantage."<sup>86</sup>

### **C. Abuse of Dominant Position**

The abuse of dominant position by Facebook and WhatsApp needs to be looked into through the scheme of section 4(2)<sup>87</sup> of the Act. The scheme of section 4(2) envisages an abuse of dominant position if a firm directly or indirectly imposes an unfair or discriminatory condition in purchase or sale of goods or price in purchase or sale of goods or services etc. In the 2021 privacy policy<sup>88</sup>, there is no opt-out clause, therefore, a user cannot compromise his privacy. In such a case, there is an ambiguity in reasonable alternatives that WhatsApp provides amidst looming scepticism of the disablement of services. The 2021 policy imposes an unfair price on the consumers by taking away their privacy for the use of the former's services. Thus, the 2021 privacy policy fails on the 'user choice' test to determine the imposition of the unfair terms or conditions on the user under the aegis of section 4(2)(i)(a) of the Act.<sup>89</sup>

Second, contrary to the popular belief, during the Privacy Policy change of 2016<sup>90</sup>, the CCI held that the 2016 privacy policy change didn't fall under the abuse of dominance because the data sharing was facilitated to Facebook for legitimate purposes like improvising user and product experiences.<sup>91</sup> However, in recent years, the digital markets and advertising model has gone a major overhaul to get a grip of the non-transparent nature of data usage by the

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<sup>86</sup> CLRC (n 76) [2.15].

<sup>87</sup> Section 4(2), The Competition Act 2002 (Act 12 of 2013).

<sup>88</sup> 'WhatsApp Privacy Policy 2021' (*WhatsApp*, 2021) <<https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en>> accessed 4 November 2021.

<sup>89</sup> Section 4(2)(i)(a), The Competition Act, 2002 (Act 12 of 2003).

<sup>90</sup> 'WhatsApp Privacy Policy 2016' (*WhatsApp*, 2016) <<https://www.whatsapp.com/legal/privacy-policy/revisions/20160825>> accessed 4 November 2021.

<sup>91</sup> Vinod Kumar (n 73) [15].

digital platforms and their aggressive targeted advertisement strategy. Albeit digital platforms often put extensive data gathering in certain well-known euphemisms like improving user experience etc. Therefore, it becomes imperative to draw a line regarding what is, and what is not, permissible in the flourishing digital markets to avoid rampant abuse of dominant position.

#### IV. PRIVACY AS A QUALITY PARAMETER AFFECTING COMPETITION

Following the anti-competitiveness of targeted ads in certain settings, the author in this section makes a case of including privacy as a non-price factor affecting competition. In this section, the author tries to evaluate recent jurisprudential change in the attitude of market regulators across various jurisdictions in holding firms accountable for a breach of privacy violation through unconventional quality parameter analysis.

##### A. International trend in factoring non-price considerations as a parameter

In recent decades with increasing knowledge of the importance of data for commercial purposes, privacy has created a buzz during mergers or acquisitions of data-rich industries.<sup>92</sup> The developments in data harvesting and changes in privacy policies of WhatsApp, raises novel regulatory issues in competition law, including privacy concerns and the extent in the domain of digital markets and targeted advertisements. In the western countries, there is an emerging trend adopted by the European Commission [“EC”] and the US Federal Trade Commission [“FTC”] in weighing privacy as a non-price competition parameter. In various decisions including Facebook/WhatsApp merger decision,<sup>93</sup> Microsoft/LinkedIn,<sup>94</sup> Google/DoubleClick merger,<sup>95</sup> these regulators considered privacy as a significant quality parameter. Nevertheless, inducting privacy as a quality parameter comes with its set of chaos, particularly, in deciding the attributes of privacy that should come under the purview of competition. Amidst the uncertainties over privacy, the author explores ways in which

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<sup>92</sup> Samson Esayas, ‘Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers’ (2018) University of Oslo Faculty of Law Research Paper 26/2018, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3232701](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232701)> accessed 16 August 2021.

<sup>93</sup> *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision 139/2004/EC [2004] OJ L24/1, para 87.

<sup>94</sup> European Commission, ‘Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions’ (2016) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_4284](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284)> accessed 18 August 2021.

<sup>95</sup> Federal Trade Commission ‘Statement Concerning Google/DoubleClick’ (2017) <[https://www.ftc.gov/system/files/documents/public\\_statements/418081/071220googledc-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf)> accessed 17 August 2021; *Google/DoubleClick* (Case. COMP/M.4731) Commission decision C (2008) 927 [2008] OJ C184/10.

privacy fits into competition analysis as a non-price parameter vis-a-vis data harvesting by social media platforms.

At its crux, competition policy is concerned with balancing the market power that may detriment consumer welfare. In a highly effective competitive market, such a market benefits the consumer welfare through the diversity of choices, quality and lower prices.<sup>96</sup> In contrast, a market becomes anti-competitive when a transaction or conduct results in the accumulation of market power. Consequently, making that firm dictate prices, output, choice or quality of goods and services and adversely influencing other parameters of competition in its favour.<sup>97</sup> Logically speaking, it can be inferred that when few data-opolies single-handedly hold information on our data. It easily facilitates information exploitation by them through their business models like the advertising model.

Despite the inference, many academicians find taking privacy as a parameter quite tricky due to its multidimensional nature since the multidimensional concept holds many attributes.<sup>98</sup> This makes it difficult to figure out the specific attributes of privacy that are important for consumers in competition law analysis.<sup>99</sup> Since there is no consensus on what attributes of privacy are relevant for competition. Despite all of this, the author asserts that non-price considerations like privacy must feature in key areas of competition including abuse of dominant position in light of anti-competitive practice in digital markets. It needs to be mentioned that '[t]raditional competition analysis fails to capture the interests of all the relevant parties,' particularly 'consumers whose privacy is at stake.'<sup>100</sup>

Conventionally in the competition analysis price had been the primary competition parameter. Thus, the ubiquitous nature of 'zero' price services offered in the realm of social media platforms in exchange for personal data demands a policy change. However, a heavy

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<sup>96</sup> C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] OJ C151/4 para 22.

<sup>97</sup> 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004) para 8 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN)> accessed 17 August 2021.

<sup>98</sup> OECD, 'The Role and Measurement of Quality in Competition Analysis' (OECD, Policy Roundtables, 2013) <<https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>> accessed 18 August 2021; Essayas (n 92) 6.

<sup>99</sup> Ariel Ezrachi and Maurice Stucke, 'The Curious Case of Competition and Quality' (2015) 3 J. ANTITRUST ENFORC. 1.

<sup>100</sup> Federal Trade Commission, 'Dissenting Statement of Commissioner Pamela Jones Harbour' (2017) <[https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-matter-google/doubleclick/071220harbour\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf)> accessed 17 August 2021.

reliance on price starts to break down when such products and services are offered freely like on Facebook. Therefore, privacy and personal data must be considered as the chief parameter in such situations to judge whether such social media platforms are paying a fair price for the data collected from the users. Moreover, it must be noted that when a service is given at zero fees, quality becomes an essential and significant competition parameter.<sup>101</sup> In the realm of social media platforms where personal data has become the chief input for providing services and goods, privacy considerations could serve as a promising constraint to curb abuse of dominant position by such platforms.<sup>102</sup>

For determining data privacy as a quality parameter, it is important to get normative guidance on data privacy. EU's data privacy has robust guidelines on the different dimensions of privacy<sup>103</sup>, highlighting the attributes of privacy as a quality parameter.<sup>104</sup> In light of principles and rights embodied in the GDPR, data privacy as a quality parameter can incorporate the following aspects like the modalities of the information provided to the third parties<sup>105</sup>, limited access to the sensitive data of the consumers, induction of opt-in regime, the time frame of storing personal data to name a few. It is imperative to note here that the list is not exhaustive in itself but is mentioned here to provide a foundation for discussion on privacy as a quality parameter. Thus, investigating different attributes of privacy on the aforementioned lines can bring a consensus on the relevant attributes of privacy for competition analysis.

### **B. A case against Antitrust harms**

Targeted advertising that leads to 'a less privacy-protective structure' inevitably decreases consumer welfare since those consumers with particularly high privacy preferences invariably 'pay more for a good if greater privacy intrusions are contrary to their preferences'.<sup>106</sup> This leads to two observations, first enterprises at present are not paying a

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<sup>101</sup> *Microsoft/Yahoo! Search Business* (Case. COMP/M.5727) Commission Decision C (2010) 1077 [2010] [101].

<sup>102</sup> Facebook/WhatsApp (n 93) [174].

<sup>103</sup> See generally 'Guidelines 4/2019 on Article 25 Data Protection by Design and by Default' (European Data Protection Board, 2019) <[https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_guidelines\\_201904\\_dataprotection\\_by\\_design\\_and\\_by\\_default\\_v2.0\\_en.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf)> accessed 18 August 2021.

<sup>104</sup> Essayas (n 92) 10.

<sup>105</sup> General Data Protection Regulation 2016, Art. 5(1(a)) and Art. 12-14.

<sup>106</sup> Peter Swire, 'Behavioral Advertising: Tracking, Targeting, and Technology' 5 (Testimony to the Federal Trade Commission Behavioral Advertising Town Hall on Google/DoubleClick, Federal Trade Commission 2007)

fair share of the market price for indiscriminate mining of data, especially personal sensitive data. Consumers who might not have any problem with sharing their personal data might in some instances be wary to share their sensitive data. Here, we see a lack of division in personal and personal sensitive data. Secondly, there has been a significant rise in negative innovation pertaining to data collection with lesser privacy checks on digital platforms. This negative innovation has resulted in consumer harm, especially to privacy-conscious consumers. Since an increase in negative innovation vis-a-vis data harvesting by leading digital platforms gives fewer incentives to other like platforms to maintain user privacy. Here, we specifically refer to high switching costs, time and manual costs to sign up for different platforms and a decrease in network connectivity. If those platforms providing relatively higher privacy are less popular, for example switching from WhatsApp to say signal or telegram.

In the testimony before the FTC, Peter Swire in the Google/DoubleClick merger case argued that like other harms to consumer preferences, harms to consumers' privacy preferences must be a part of the conventional antitrust analysis.<sup>107</sup> If a platform using its dominant position, starts to require more personal data from the users then such a situation can be seen as an increase in the price for using the product or services.<sup>108</sup> For example, an increase in data collection by WhatsApp can drive away current and prospective consumers from the platform to other minor platforms thereby reducing the quality of services for consumers with high-privacy preferences. A decrease in the quality of product/service is an established category of antitrust harm. If privacy harms constitute a decrease in the quality of product/services, then privacy should inevitably be counted in the antitrust analysis.<sup>109</sup> Interestingly, privacy remains a relevant factor where it has a high likelihood to affect competition parameters. For example, in the famous Facebook/WhatsApp merger, the EC investigated how a decline in privacy could catalyze targeted advertising in WhatsApp, thereby augmenting Facebook's position in the online advertising market.<sup>110</sup>

### C. Consumer-choice Approach

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<[https://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/testimony\\_peterswire\\_/Testimony\\_peterswire\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/testimony_peterswire_/Testimony_peterswire_en.pdf)> accessed 18 August 2021.

<sup>107</sup> *ibid* [5].

<sup>108</sup> Eleonora Ocello, Cristina Sjödin and Subočs, 'What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU Merger Case' (2015) 1 Competition Merger Brief 6.

<sup>109</sup> *ibid*.

<sup>110</sup> Facebook/WhatsApp (n 93) [174].

There emerges such a circumstance wherein an increase in data harvesting to propagate targeted advertisements may not always lead to consumer harm especially in cases where consumers prefer personalized experiences. Therefore, it becomes important for us to effectively encapsulate harm by discussing the consumer choice approach.

Choice-based approach factors in non-price parameters thereby elevating non-price parameters like privacy in competition analysis. This approach stems from the fact that price is not the sole factor for the determination of the user's choice.<sup>111</sup> In a choice-based approach, non-price parameters are not converted into price terms.<sup>112</sup> The conduct is assessed in terms of antitrust violation if it hampers the choices available to a consumer in a free market to their detriment given that if the restraints were absent the market would otherwise have provided.<sup>113</sup> Therefore, this approach poses a question of whether a particular business practice resulted in some unreasonable and significant limitation on consumer choice, unmediated by a marketplace test.<sup>114</sup> Variety, as an ultimate goal of competition policy, is often associated with the Ordoliberal school of thought, which recognizes the positive role of the State actors in the protection of the economic freedom of market players and the subsequent competitive order.<sup>115</sup> Thus, protecting consumer choice assumes the existence of an ample number of producers in the market.<sup>116</sup> Pragmatically speaking, it would necessitate the competition policy to concentrate on protecting 'rivalry' and 'market structure' as its principal goals. In the context of the advertising model, 'variety as an ultimate goal of competition policy' would translate to curtail information exploitation through data harvesting to stop entry barriers and abuse of dominant position.

#### **D. Foreclosure effect- access to the market made impossible or difficult**

The EC, to demonstrate concrete harms on consumer welfare and efficiency, had laid down multiple economic tools. One such economic tool envisaged by the EU Commission is the

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<sup>111</sup> Esayas (n 92) 24.

<sup>112</sup> Niel Averitt and Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 ANTITRUST L. J. 175, 186.

<sup>113</sup> *ibid* [182] and [184].

<sup>114</sup> Averitt and Lande (n 112) 177.

<sup>115</sup> Mathias Siems and Gerhard Schnyder, 'Ordoliberal lessons for economic stability: different kinds of regulation, not more regulation' (2014) 27 GOVERNANCE 379.

<sup>116</sup> Peter Behrens, 'The 'Consumer Choice' Paradigm in German Ordoliberalism and its Impact Upon EU Competition Law' (2014) Europa-Kolleg Hamburg Discussion Paper 1/14, 23 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2568304](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568304)> accessed 16 August 2021.

‘As Efficient Competitor’ (AEC) test.<sup>117</sup> The AEC test investigates whether the alleged conduct of the firm leads to foreclosure of its competitors which are as efficient as dominant undertaking. Interestingly, in the Indian competition law jurisprudence, the dominant undertaking is not designated under mere price parameters. The dominance of the undertaking is to be determined by factors such as the ability of the firm to operate independently of competitive forces or to affect its competitors or consumers in its favour etc.<sup>118</sup> Thus, an effect-based approach is feasible vis-a-vis social media platforms in the Indian regime.

When applying effect-based tests over a firm’s conduct, many European Courts have emphasized that a decrease in consumer choice is, by their very nature, apt for foreclosing competitors.<sup>119</sup> In terms of targeted advertisements and data harvesting, it becomes easier to understand that the foreclosing model depends upon the ability of one firm to make access to the digital advertising market difficult for other firms.<sup>120</sup> The EU courts contrary to what the effect-based approach and the AEC test appears to require, have reiterated that for none of the aforementioned practices is there a necessity to lay concrete effects by using specific quantitative tools.<sup>121</sup> The AEC test does not mandate to show anticompetitive effects. It is enough to show that access to the markets has been made difficult.<sup>122</sup>

To paraphrase the aforementioned, it is sufficient enough to show that a dominant undertaking is engaging in conduct that can restrict access to the market of competitors. Alternatively, making access to the market for the competitors difficult. Such conduct would be then presumed to produce an anticompetitive effect.<sup>123</sup> To summarize, demonstration of mere foreclosure is enough to deem the conduct unlawful. An added benefit of incorporating data privacy into competition analysis through the effect-based theory of harm is that the burden of proof rests upon the defendant. The defendant has to demonstrate the efficiency of

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<sup>117</sup> Pinar Akman, ‘The Reform of the Application of Article 102 TFEU: Mission Accomplished?’ (2017) 81 ANTITRUST L.J. 1.

<sup>118</sup> Section 19, The Competition Act, 2002 (Act 12 of 2003).

<sup>119</sup> *Intel v Commission* (Case No.C-413/14) Commission Decision [2017] ECLI:EU:C:2017:632 para 85.

<sup>120</sup> *ibid* [77] [78] and [176].

<sup>121</sup> *ibid* [104].

<sup>122</sup> *ibid* [146-149].

<sup>123</sup> Paul Nihoul, ‘The Ruling of the General Court in Intel: Towards the End of an Effect Based Approach in European Competition Law?’ (2014) 5 J. E. C. L. & PRACT. 526.

benefits that can come from an increase in data harvesting that could outweigh the harms to competition as a defence mechanism.<sup>124</sup>

## V. NEW ANTITRUST LAWS FOR DIGITAL ECONOMY

In this Section, the author observes a few statutory changes in different jurisdictions following the incorporation of privacy in the competition law jurisprudence. Following such changes, the author envisages a few amendments in the current statutory structure of the competition Act to tackle new issues of the digital economy vis-vis targeted advertisements.

### A. Global practice compared with international jurisdictions

The recent trends in digital markets show that market power springs from data harvesting and monopolization. Therefore, competition analysis founded purely on arithmetic parameters like prices etc. is inadequate to demonstrate potential harm to competition in digital markets. In jurisdictions like Germany, the competition authorities have reinterpreted the conventional competition policy to accommodate it in the digital platform markets.

The newly incorporated §18 no. 3a of the Act against Restraints of Competition Germany<sup>125</sup> aims to proactively target non-price violations. An assessment of an undertaking's position in a market under §18 no.3a requires to weigh in: direct and indirect network effects, multi-homing and switching costs, economies of scale concerning network effect, access to data, and competitive forces of innovation. It is noteworthy that these factors steer away from the limited understanding of market concentration in the digital age. When these factors are measured through an understanding of the aforementioned harms to consumer choice and other theories adopted by the EC and the FTC, the lines of uncertainties start blurring to determine anti-competitive practices.

### B. Amendment for tackling new issues of the digital economy and target advertising

In the Indian regime, the present Act, as it stands, needs a revamp over its understanding of privacy to expand the ambit of privacy to include it as a non-price parameter of competition particularly to determine abuse of dominant position in the digital platform market landscape.

#### i. Privacy-specific amendments required in law

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<sup>124</sup> *ibid* [527].

<sup>125</sup> Section 18 no. 3a, Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition Germany) 2002.

While adopting non-price parameters like privacy, the current Act must draw specific amendments keeping in mind consumer choice approach and foreclosure effect in determining abuse of dominance in social media platforms. *First*, with recent trends of providing products and services for free by the social media platforms, it becomes important that the Competition Regulators take in privacy as a principal factor to determine competition parameters. Particularly to judge if the impugned digital platforms are paying a fair price for the data collected by the users.

*Second*, in absence of a data protection statute in the Indian jurisdiction, to study privacy with normative guidance, the Regulators must note certain parameters. These could include the type of data collected in terms of sensitivity and volume, the purpose of such data collection, the duration for which it is stored, and the number of parties with which it is shared. Further, the users must be made aware of the information gathered from them and if they deny an increase in the data extraction, would the services provided to them be disabled or suffer from degradation in quality. Another parameter could be whether the platform has privacy features or extracts data by default.

*Third*, in the Indian competition jurisprudence, there is a need to accommodate consumer welfare vis-a-vis privacy preference and investigate whether platforms engage in such behaviour which coerces users with high privacy preferences to pay more for goods and services. *Fourth*, a choice-based approach to investigate if the conduct of digital platforms has resulted in a reduction in choice to the detriment of consumers should also be a relevant factor to weigh in consumer harm. *Fifth*, the Act must adopt foreclosure effect analysis, wherein the regulators examine if the market access has been made impossible or difficult by the particular conduct of the digital platform.

The Act must actively intervene with the current status quo of data harvesting and the competition regulators could require platforms to give users a reasonable option to choose not to share their personal data albeit allowing access to platform services and products. In this scenario, users would be receiving contextual advertising which would be non-personalized and based upon the content of the web page.<sup>126</sup> For example, an ad for fitness equipment, while browsing through a health blogpost. Contextual advertisement could be done through contextual targeting i.e., based upon the context and the segmenting ads on different metrics

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<sup>126</sup> Ted Vrontas, 'Contextual Advertising 101: How it Works, Benefits & Why It's Necessary for Relevant Ads' (*Instapage*, 2020) <<https://instapage.com/blog/contextual-advertising>> accessed 27 June 2021.

including keywords or website topic etc.<sup>127</sup> Although, some platforms like Facebook, have shown scepticism on this model often claiming that contextual advertising would require data about the content a user is browsing.<sup>128</sup> However, one must understand that contextual advertising is not based on the collection of personal data like age, gender but is based upon the content a user is viewing.<sup>129</sup> The contextual advertising model could reduce the data collection and decrease market concentration in e-commerce.

Treading on the realities of the current advertising business model, the author believes that replacing personalized advertisement with general advertisement as adopted in conventional mass media wouldn't be practical. Nor would it be desirable since it tends to annoy users because of its heavy irrelevance. However, contextual advertising draws a fine line between relevant advertising and privacy provided we keep additional safeguard clauses.

ii. The overlap conundrum - CCI and Data Protection Authority

Taking privacy as a non-price parameter, there is an intersection of the CCI and the prospective Data protection authority. This may lead to regulation on similar aspects of data harvesting of corporate behaviour.<sup>130</sup> When different sectors overlap, there is an interface conundrum. For instance, in *CCI v. Bharati Airtel*<sup>131</sup>, Reliance Jio filed an application against Bharti Airtel, Idea Cellular Limited, Vodafone India Limited etc for the alleged cartelization under Section 3 and subsequent abuse of dominant position under Section 4. Reliance Jio also went forward with an application to Telecom Regulatory Authority of India [“TRAI”] to look into the conducts of cellular Operators Association of India and Idea Cellular Limited, Vodafone India etc. Herein, the SC while observing that CCI is a sector agnostic regulator while TRAI is a sector-specific regulator held that TRAI had priority to look into the jurisdictional issue first. While TRAI looks for any segments of anti-competitive practice the power of CCI though not completely washed away is pushed away for a while.

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<sup>127</sup> *ibid.*

<sup>128</sup> Competition and Markets Authority, ‘Online platforms and digital advertising market study’ (2020) <[https://assets.publishing.service.gov.uk/media/5fe36a658fa8f56af0ac66f2/Appendix\\_X\\_-\\_assessment\\_of\\_pro-competition\\_interventions\\_to\\_enable\\_consumer\\_choice\\_over\\_personalised\\_advertising\\_1.7.20.pdf](https://assets.publishing.service.gov.uk/media/5fe36a658fa8f56af0ac66f2/Appendix_X_-_assessment_of_pro-competition_interventions_to_enable_consumer_choice_over_personalised_advertising_1.7.20.pdf)> accessed 17 August 2021.

<sup>129</sup> *ibid* [X11-12].

<sup>130</sup> Competition Commission of India, ‘Interface between Competition Commission of India and Sectoral Regulators’ (2010) <<https://www.cci.gov.in/sites/default/files/speeches/interface.pdf?download=1>> accessed 17 August 2021.

<sup>131</sup> *Competition Commission of India v Bharti Airtel*, AIR 2019 SC 113.

While the role of sector-specific regulators and competition watchdogs can be complimentary, at times, it leads to a rise in tension. For example, sector-specific regulators identify a problem ex-ante and pursuantly build an administrative structure to address the issues before the onset of the problem,<sup>132</sup> while the competition policy generally addresses a problem ex-post in a market setting.<sup>133</sup> In times of uncertainty, incoherent legislation can increase the conflicts which would eventually hurt consumers. The author identifies that the damage caused by the jurisdictional conflict between the prospective data protection authority and CCI can lead to taxing maintainability issues in the Courts and other concerns in a data-driven economy.

The tension between sector regulators and CCI is aggravated due to the legislative inconsistencies in the provisions in dictating a precise procedure to be followed in case of such regulatory overlap. The crux of this interface is embodied in sections 18<sup>134</sup>, 21<sup>135</sup>, 60<sup>136</sup> and 62<sup>137</sup> of the Act. Section 18 mandatorily directs the CCI to eliminate practices that have adverse effects on the competition, promote consumer interests, and ensure freedom of trade for other players in the market. The wordings of section 18 is extraordinarily wide while being oblivious to the sector-specific regulators.<sup>138</sup> This empowers CCI to take action on sector overlapping issues. Further, while section 60 asserts the supremacy of the Act within the arena of competition enforcement, section 62 encourages the Act to work harmoniously with other statutes. Ironically, the statutory paradox begins when we analyze the language of both sections 60 and 62 which are drafted in a mandatory language. While section 60 necessitates the provisions of the Act to have an overriding effect, whereas section 62 requires that the provisions of the Act must align with any other provisions of law for the time being in force. Here both the sections run in opposite tangents while declaring two polar duties, i.e., legislative supremacy of the Act and harmonious adjustment with other sector-specific statutes.

To further alleviate the overlap paradox, section 21 of the Act recommends that in any proceedings for a statutory authority in case of a need the concerned statutory authority may

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<sup>132</sup> *ibid* [1].

<sup>133</sup> *ibid*.

<sup>134</sup> Section 18, The Competition Act 2002 (Act 12 of 2003).

<sup>135</sup> Section 21, The Competition Act 2002 (Act 12 of 2003).

<sup>136</sup> Section 60, The Competition Act 2002 (Act 12 of 2003).

<sup>137</sup> Section 62, The Competition Act 2002 (Act 12 of 2003).

<sup>138</sup> CCI (n 130) 2.

refer to the CCI. Interestingly, upon reference, the opinion of the CCI is only persuasive in nature.<sup>139</sup> This provision thus creates a fertile ground for jurisdictional overlaps between the sectoral regulators like the prospective data protection authority and CCI. However, there is a stark difference in their functioning since the sectoral regulators may not always have a holistic understanding of the economy as a whole and generally apply distinct yardsticks to other regulators.<sup>140</sup> On the other hand, CCI is the champion of the economy and addresses behavioural issues in the market.<sup>141</sup> Thus, the CCI plays a superior role in maintaining the balance in the economy while the prospective data authorities would be limited to ensuring the data protection of the users. Presently, the provisions under the Act are not adequate to solve this overlap conundrum thereby requiring specific amendments to acknowledge data protection authority and its jurisdiction in the digital market. Necessary amendments are required to identify concerning issues,<sup>142</sup> channel concerns to the proper authority,<sup>143</sup> and establish a framework to limit the CCI's work to market regulation.<sup>144</sup>

## VI. CONCLUSION

The recent growth of Silicon Valley giants has expanded the role of data in the e-commerce and digital economy. While a data-driven economy paves the way to new opportunities and wealth creation in the digital sphere. It also gives rise to potential concerns of antitrust issues especially market concentration through data monopolization by few data-opolies. Particularly social media platforms that are more or less founded on an advertising model infrastructure. Another concern addressed by the author is the abuse of dominance by social media platforms and a consequent compromise over user privacy through data harvesting. For transforming the opportunities and challenges offered in the digital platform market adequate policy responses and a thorough amendment are needed. The paper analyzed that the CCI can adopt various approaches including the effects-based, consumer-choice, foreclosure etc. to better equip themselves with the digital age anti-competitive practices brought in through data harvesting. Lastly, the paper attempted to highlight the issues involved in a possible jurisdictional overlap between the two regulators over a similar subject matter.

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<sup>139</sup> Section 21(1), The Competition Act, 2002 (Act 12 of 2013).

<sup>140</sup> CCI (n 130) 10.

<sup>141</sup> *ibid* [10].

<sup>142</sup> *ibid* [4].

<sup>143</sup> *ibid*.

<sup>144</sup> *ibid*.