INTERFACE BETWEEN COMPETITION LAW AND DATA PROTECTION LAW IN MONITORING ZERO-PRICE MARKETS: ACHIEVING THE BALANCE OF REGULATION

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Abstract

Zero-price markets have become important in the present digital society. The revenue models of Facebook and Google use targeted advertising for revenues. Due to the provision of services at zero prices, these entities are able to gain dominance in the market. However, it can be argued that zero-price products are not free as consumers "pay" in the form of attention to the targeted advertisements. Zero-price markets, therefore, can have anti-competitive effects where the dominant companies can abuse their dominance. This can be harmful to the consumers in the form of less privacy, less choices and stifling innovation. While the data protection law deals with the protection of personal data, this data is acquired by the companies on the basis of consent, performance of a contract or legitimate interests. Therefore, the research paper aims to provide a legal framework wherein the data protection law and competition law can come together to provide a balance in regulating digital markets. The research paper suggests ex-ante regulation through data protection law and ex-post regulation through competition law for effective protection of privacy.

Keywords: Zero-priced, targeted advertising, dominance, data protection, ex ante regulation, ex post regulation

Part I - Introduction

Zero-price markets have become important in the present digital society. Many digital products and services including social media apps such as Facebook, search engines such as Google, etcetera provide their services at zero prices. Zero-price products are not a new phenomenon. Radio and TV broadcasting employ similar revenue models based on advertising and zero pricing. However, the new models of Facebook and Google are different in as much as they use targeted advertising for revenues. Due to this model, it is now heavily debated whether these products are, in fact, free to the consumers. It can be argued that such products are not free as consumers "pay" attention to these advertisements. Moreover, it can also be argued that consumers actually pay consideration in the form of their data which is then transferred by these entities to third parties.

It cannot be denied that zero-price products have numerous benefits in the form of innovation and consumer welfare. This is the reason why competition authorities worldwide were initially reluctant to interfere in such markets. However, such markets have a few distinctive characteristics such as network effects and feedback loop which gives incumbents of these markets a first-mover advantage. This creates a situation where the winner takes it all, thus creating an entry barrier and concentration in the market. It has been also seen that this dominant position is then used by companies as leverage in other markets. This can be harmful to the consumers in the form of less privacy, less choices and stifling innovation.

Therefore, it cannot be said that no price means no abuse. Data is a non-rivalrous resource i.e. if a consumer provides data to one company it does not deprive another company from acquiring it. This means that it is possible to maintain competition in the market despite the dominant position of one entity. However, this is not the trend seen in these markets. This is because big data requires volume, velocity, value and variety for algorithms through which

the entities indulge in preference-shaping and algorithmic manipulation. While the dominant companies are able to take advantage of the access to data due to significant investments, other companies fail to do so, which helps the dominant companies in being able to create a monopoly in the market based on the data acquired by them.

The General Data Protection Regulation (GDPR)[1] in European Union or the Personal Data Protection Bill, 2019 in India deal with the protection of personal data. However, this data can be acquired by the companies on the basis of consent, performance of a contract or legitimate interests.[2] This is where the data protection law proves to be inadequate. While consumers do value their data, they are not willing to 'pay' for privacy. This has been termed as "privacy paradox",[3] where the consumers' desire is not in consonance with how they act. This does not leave any incentives for companies to come up with models which provide for data protection. This limitation of the data protection law is precisely why we require the intervention of competition law in digital markets to protect the privacy of consumers from exploitative practices by dominant platforms.

The research paper aims to provide a legal framework wherein the data protection law and competition law can come together to provide a balance in regulating digital markets. The research paper relies on the case laws and developments in the European Union, where both these laws are more developed when it comes to dealing with digital markets. However, these issues are important from an international perspective since various jurisdictions are dealing

[1] Regulation (EE) 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, 2016 O.J. (L 119/1).
[2] Regulation (EE) 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, art. 6, 2016 O.J. (L 119/1).
[3] Patricia A Norberg, Daniel R Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors*, 41 J. OF CONSUMER AFF. 100 (2007).

with competition issues in the online world. Part II of the paper discusses the distinctive features of the digital markets such as network effects which helps a single entity in becoming dominant which make it necessary for competition law to intervene. Part III discusses the harms that such entities can cause to the consumers and why data protection law would be inadequate to deal with such harms. Part IV then discusses how competition law can intervene in these markets and the extent to which it should intervene. Part V provides suggestions to improve the present legal framework dealing with the digital markets and concludes the work.

Part – II - Distinctive features of digital markets

1) Network effects

Digital markets have strong network effects. The success of social networking sites such as Facebook is dependent on the number of users on it. The value of the platform increases with the increase in the number of users on the platform. This is why social networking sites provide their services at zero price. Since the main revenue for their platform comes from advertising, the more the number of users will be on the platform, the more lucrative it would be for the advertisers to advertise their products on such a medium.[4] Two-sided network effects are also seen in other businesses such as online shopping or food delivery apps where the number of sellers or restaurants willing to provide their goods or services online depends on the number of users using these shopping sites or apps.

2) Dominant company becomes gatekeeper

[4] ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROBLEMS AND PERILS OF ALGORITHM-DRIVEN ECONOMY (2016).

Due to the prevalence of network effects, it is usually seen that in digital markets, the dominant company becomes a gatekeeper i.e. other companies have to be present on this dominant platform such as Amazon, Google, etcetera to be visible. The dominant companies then tend to use this to their own advantage.[5] This can be seen in the case of Google Shopping where Google engaged in favorable positioning and display of Google's own comparison-shopping service compared to competing comparison-shopping services.[6] This can be detrimental for other sellers and for consumers in form of available less choices.

3) Concentration, barriers to entry and leveraging

Due to the above features, digital markets have become very concentrated. It gives the dominant companies the power to decide which businesses should succeed, as seen in the Google Shopping case, which creates entry barriers for new companies trying to enter the market, thus stifling innovation. These companies also use their dominance to leverage their position in other markets through tying and bundling. This was seen in the case of Google Android where Google required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store)[7]. Therefore, Google tried to use its dominance in one market to become dominant in another.

Part – III - Harm to consumers and inadequacy of data protection law

There is no doubt that the consumers benefit due to zero prices and that is why the model of zero price markets creates efficiencies and consumer welfare. However, there are certain

[5] European Commission SPEECH/13/905, *Speech - Competition in the online world* (Nov. 11, 2013), *available at* https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_905

[6] Commission Decision of June 26, 2017, relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, Case AT.39740 - Google Search (Shopping) C(2017) 4444, *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

[7] European Commission Press Release IP/18/4581, *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine* (July 18, 2018), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

aspects of these markets which can be detrimental to the consumers in the long run. This can be seen in the form of less choices, stifling innovation and harm to consumer's privacy.

As discussed above, in cases such as Google Shopping and Google Android, consumers might suffer due to reduced choice. The dominant companies do not give incentives to new companies to enter the market, thus creating an exclusionary effect. This can then result in lower quality in the services for consumers due to lack of alternatives. The dominant companies such as Amazon, Google, etcetera have often been seen to impose unfair terms and unfair access for business users of platforms due to their weak bargaining power. The effects of these unfair conditions will then shift to the consumers in the form of prices, quality, and range of services they receive from those businesses[8].

The revenues of the zero price markets depend on targeted advertising. This can lead to the misuse of consumer data since these companies transfer it to third parties. This was seen in the Facebook Cambridge Analytica case where Facebook transferred user profiles to the data analytics firm Cambridge Analytica without their consent. Even after this scandal, the policies of Facebook have not changed.[9]

The data protection law can help in prohibiting the illegal transfer of data. However, the GDPR allows the transfer of data on the basis of consent, performance of a contract or legitimate interests[10]. Usually, the sites operating on zero prices provide it under their user's

[8] Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 Y.B. OF EUR. L. 448.
[9] Julia Carrie Wong, *The Cambridge Analytica scandal changed the world – but it didn't change Facebook*, THE GUARDIAN, Mar. 18, 2019, *available at* https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook.
[10] Regulation (EE) 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, art. 6, 2016 O.J. (L 119/1).

terms and conditions that if the consumers agree to use their services, they agree to the transfer of their data to third parties. It is usually observed that these terms and conditions are lengthy and not easily comprehensible, which is why most of the users do not read them before agreeing to them. Moreover, these terms and conditions are provided on a take it or leave it basis where the consumers do not have a chance to negotiate for terms providing for more privacy.[11] This leaves the consumers with no choice but to accept the terms and conditions due to lack of alternatives.

Part – IV - Why and how can competition law intervene?

As discussed above, competition law intervention is required to fill the loopholes in regulation regarding privacy, which the data protection law is unable to provide for. Lack of privacy protection should be seen as a consumer harm in competition assessments. In March 2016, the German competition law authority, Autorit´e de la Concurrence & Bundeskartellamt, formally initiated proceedings against Facebook based on the suspicion that the social networking site was abusing its market power by violating data protection rules. In December 2017, the authority published a detailed preliminary assessment and background information of the proceedings where it said that even if data protection and competition laws serve different goals, privacy issues cannot be excluded from consideration under competition law simply by virtue of their nature. Decisions taken by an undertaking regarding the collection and use of personal data can have, in parallel, implications on economic and competition dimensions.[12] In this case, the German authority issued a decision

[11] José Tomás Llanos, *A close look on privacy protection as a non-price parameter of competition*, 15 EUR. COMPETITION J. 225.

[12] Case B6-22/16, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, *available at* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3

in February 2019 finding that Facebook had abused its dominant position in social media by not complying with data protection rules (assigning data to Facebook users collected from third-party websites without the user's explicit consent) which constituted an exploitative practice by a dominant company.

For competition law to intervene and prohibit unilateral conduct of an enterprise, it is required to prove that the enterprise is dominant. Usually, dominance in various jurisdictions is ascertained through market share. However, it has been criticized that market share might not be the most appropriate criteria to ascertain dominance, especially in digital markets. This is because entities such as Facebook, Google, etcetera assert their dominance in the market through the amount of data that they acquire. Therefore, there is a need to redefine dominance. Some of the criterion for the same could be to measure dominance through strategic market status, which would include companies which are in a position to exercise market power as a gatekeeper, where they control others' market access.[13] The Competition Law Review Committee Report has stated that price also includes non-monetary consideration to determine relevant product market. The market value of data could be considered to be revenue generated from the data or through transfer of data to third parties.[14]

While dominance in itself is not a problem under competition law, it has been laid down that dominant companies have a responsibility to not abuse their dominance.[15] However, it is important that the competition authorities are careful while intervening. Some scholars suggest that one way for competition law to intervene would be if it considers the limitations

[13] DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (March, 2019), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[14] COMPETITION LAW REVIEW COMMITTEE, REPORT OF THE COMPETITION LAW REVIEW COMMITTEE, MINISTRY OF CORPORATE AFFAIRS (July, 2019), *available at* http://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf.

[15] Case 322/81, Nederlandsche Banden-Industrie-Michelin v. Comm'n, 1983 E.C.R. 3461.

of other companies to have data as a refusal of access to data. Since the dominant companies become gatekeepers, it could be considered as constructive refusal of access to data as small businesses rely on these dominant platforms to survive. However, dominant companies could not be forced to transfer or share the data as data is a non-rivalrous resource i.e. if a consumer provides data to one company it does not deprive another company from acquiring it. Imposing a duty on dominant firms to compulsorily share their data would lead to free-riding on the investments made by the dominant companies. Further, compulsory sharing or transferring of data would also raise privacy concerns as the data of consumers might be shared without their consent, thus, making it unlawful under the data protection law. Therefore, it is necessary that the markets are not over-regulated so as to not stifle incentives to innovate by dominant companies.

Competition authorities should only intervene if the conduct of the dominant firm is either exploitative to the privacy of its users or exclusionary to its potential competitors. Further, competition law should also be careful while assessing data–driven mergers. The test for mergers under EU Competition law is a significant impediment to effective competition. This test should include protection of privacy as one of the parameters. This can be highlighted through the Facebook/WhatsApp merger case. In the Facebook/WhatsApp merger, the Commission stated that privacy and data security constitute key parameters of competition.[16] The Commission, however, failed to assess the impact of the merger on the incentives of the parties to compete on privacy[17]. As a result, it was later seen that WhatsApp changed its

[16] Commission Decision of Oct. 3, 2014, pursuant to Article 6(1)(b) of Council Regulation No 139/2004, Case M.7217-Facebook/WhatsApp C(2014) 7239, *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

[17] Samson Esayas, *Competition in Dissimilarity: Lessons in Privacy From the Facebook/WhatsApp Merger* (University of Oslo Faculty of Law Research Paper No. 33, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3039440.

privacy policy to share and collect data from Facebook.[18] This case shows that while assessing the effects of a merger, it is important that competition authorities should have a forward-looking approach. While analyzing data-driven mergers, it must be assessed whether the merger would create incentives for companies to compete based on privacy policies. Further, the competition authorities must be careful while analyzing mergers between dominant companies and companies that can serve as potential competition for such dominant companies.

Part – V - Conclusion

Therefore, through the above discussion, it can be said that data protection law is in itself not enough to protect the privacy of users in digital markets. For effective protection of privacy, ex-ante regulation through data protection law and ex-post regulation through competition law is required.

Data protection law can ensure that the privacy policies of companies should be compliant by design i.e. the policies should be easy to read and clear to understand. Further, consumers should be allowed to negotiate as to how much amount of their data can be transferred to third parties for advertising. Data protection law can also ensure interoperability which can be helpful in easy switching from one company to another in order to avoid one company from becoming dominant. Further, multi-homing should be promoted so that users have more than one option which will give companies the incentive to compete on privacy.

[18] Commission Decision of May 17, 2017, imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information, Case M.8228-Facebook/Whatsapp C(2017) 3192, *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf.

Competition law authorities should be given resources for ex-ante monitoring to make sure that the dominant companies do not misuse data to become more dominant through exploitative practices. The need for swift actions and forward-looking approach should be recognized. Competition authorities should be careful to intervene at the right time so as to not stifle innovation. Further, consumer welfare standards should be redefined to not just include price but also innovation and choice. One more advantage of regulating the markets through competition law is to minimise the burden of compliance on smaller businesses and less regulation in markets where competition will work effectively without intervention.