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Interplay between Privacy and Antitrust Law: In Emerging Digital Period

Satyavan Kumar Naik, Ph.D., Department of Law
University of Allahabad, Prayagraj, Uttar Pradesh, INDIA

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Author
Satyavan Kumar Naik, Ph.D.

shodhsamagam1@gmail.com

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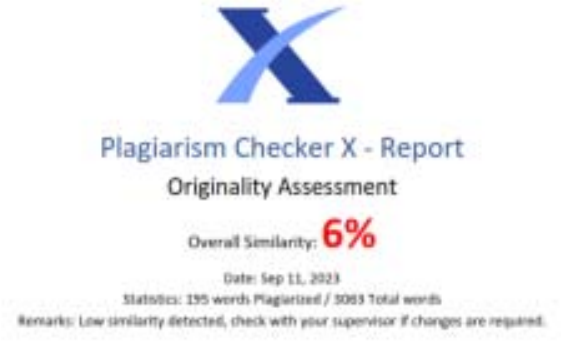

ABSTRACT

The development of technologies provides solutions to many current issues and encourages humanity to make constant progress. The regulation of their use in society is coming under equally intense demand. Antitrust laws have been adapting quickly to the changing market, helped by technical advice and suggestions from a variety of international institutions and domestic governments. The same degree to which they are enforced elsewhere, the principles of antitrust policies and data protection must also be upheld in the digital economy. Opponents of Antitrust laws argue that regardless of any merit they may have had in the past, they are irrelevant in a DE[1] because of the exponential rate at which dynamic technology development is accelerating. They contend that quick innovation has virtually eliminated the ability to amass market power. Whatever the rate of technological advancement, it is impossible to allow the markets, especially the digital market, to become anarchic since this could pose a threat to the orderly society. Therefore, it is important that we foster an environment where new economic activity may develop. This can be done by supporting sound and rigorous regulatory policy with complementing antitrust policy and by fostering the right regulatory framework for the DE.

KEY WORDS

DE, Big Data, Privacy Right, Law of Data Protection, Antitrust Law.

INTRODUCTION

This paper goal is to examine the privacy issues

in the DE[3] from an economics standpoint. The data that is being gathered by businesses like Facebook and Google, whether it is from user searches on Google or personal data profiles that are fed into large databases on Facebook, is causing anxiety among consumers all over the world. Technology's advancement has produced new tools for the state's potential invasion of privacy through monitoring, profiling, and the collecting and processing of data. Both the authority of the government & the influence of businesses in the private segment are constrained by privacy.

The idea of privacy is challenging and complicated. It is regarded as having a strong foundation in human autonomy & dignity, is connected to the preservation of one's private sphere, and is frequently operationalized as the right to defend one's privacy. It can also be seen as setting boundaries between the public and private domains.

In a mile stone case of *K. S. Puttaswamy (Retd.)* v. *UOI*[2]**,** *the SC* opined by nine judges' bench that all Indians have a right to privacy as a fundamental right in Art., twenty one of the Indian Constitution. The biggest issue is with data protection and privacy. Both the collection and analysis of private data by digital service providers and the security dangers associated with that data getting into the wrong hands are not usually known to users. Even if consumers are informed, many are unclear about how businesses use and safeguard the data they obtain from online purchases. The following steps should be taken to reduce the risk:

- CCI can do little to address to the problem for the reason that the problem exceeds their officially permitted authorization.
- Adapting data protection and privacy regulations should be the goal of policy action. The impact on the process of competition across digital platforms should be specifically examined in the impact analysis of a linked policy proposal while doing this.

Importance of Digital Technology

The market for DT (digital technology) has given rise to a variety of unique and creative business models and solutions, some of which have drawn the attention of enforcement agencies around the world for being anti-competitive, especially those connecting to "online and mobile advertising, social networking, internet search technologies, and interoperable software." Due to these developments, enforcement agencies now have to contend with disagreements between various legal systems, which could be problematic for both them and the organizations they are tasked with enforcing antitrust law against. With the growth of the digital technology market, there is a greater need than ever for action to safeguard anti-competitive practices in such a fast-moving sector.

The Meaning of the Word "Big Data"

Big Data is generally understood to be vast quantities of various sorts of data created quickly from several sources and requiring new, more potent processors and algorithms for handling and analysis. We are already witnessing large databases of consumer data as a result of network effects that have formed repositories with enormous collections that have tremendous commercial value, even though data collection may first seem irrelevant and difficult to sell. Not the data itself is of concern, but rather the information that the data provides about people, such as their behavior, preferences, age, geography, social position, and political beliefs, or the turnover of a commercial business.

Big Data and Its Nexus with Antitrust Law

Examples of merger cases involving data holding businesses that were submitted to the EUC[3] & antitrust commission[4] for approval and received merger approvals are available. When Facebook sought to merge with Whatsapp in 2014, the commission looked more closely at the privacy issues. It took note of issues like Facebook's ability to use Whatsapp data to improve its online advertising or worries regarding changes in end-to-end encryption, but approved the merger because there were enough competitors to exert competitive pressure. There have been attempts to create a case for the antitrust Commission to also look into

the merger of Facebook and Whatsapp.[5] While the CCI[6] has not yet examined Big Data and its effects on competition, it is important to remember that the CCI issued an opinion in which the Informant asserted that Whatsapp and Google had a dominating position.[7]

Judicial Approach towards Privacy

The privacy as a fundamental right is not explicitly stated in the supreme law of the land, and it has been interpreted by the courts. The Right to Privacy is included in the scope of Fundamental Rights according to the judicial interpretation. The legislation pertaining to privacy has developed and evolved under Indian judicial oversight.

J. K.S. Puttaswamy (Retd.) & Anr. v. UOI[8]

The Apex court issued a landmark ruling in this case, concluding that Arts., 14, 19, 21 of the Indian Constitution guarantee and uphold the right to privacy. The Right to Privacy is Inherent in the Right to Life and Personal Liberty Asserted in Article twenty, According to the SC. Additionally; it is one of the rights protected by the Constitution's Third part. The SC went on to say that the State has a duty to protect its citizens' privacy. The 'Aadhaar Card Scheme' was therefore proved to infringe the citizens' right to privacy. People are now able to seek legal recourse if their privacy rights are being breached thanks to the SC's verdict. The standards and guidelines created by Indian tech companies are also impacted by this verdict.

People's Union for Civil Liberties v. UOI[9]

The SC was asked to decide whether the tapping of cellphones in this case violated people's rights to privacy. Since phone calls are private and confidential, the Right to Privacy was violated in this case, according to the Honorable SC. The SC held that the specific facts of the case should determine whether or not the Right to Privacy is protected by Art. twenty of the Indian Constitution.

The Competition commission investigation on WhatsApp's Privacy Policy

The Competition commission requested an investigation into WhatsApp's updated privacy policy due to an alleged misuse of market dominance.[10] WhatsApp filed a case with the High Court of delhi , but the court sided with Competition commission in its decision. The apex court later declined to put a stop to the Commission investigation into WhatsApp's Privacy Policy.

In Harshita Chawla v. WhatsApp Inc.[11]

The Competition commission's justification for ordering a probe is sufficiently obvious, and it will be done in any situation where there are potential anti-competitive repercussions. The discovery of anti-competitive implications is influenced by the acknowledgment of privacy as a competitive parameter.

In "Vinod Kumar Gupta v. WhatsApp"[12]

The commission said that because the informant claimed a violation of sections of the IT Act, 2000 that are outside the purview of antitrust law, the Competition commission declined to get involved in the situation.

The Supreme Court opined in the case of "*CCI* v. *Bharti Airtel*"[13] It can be assumed that the Competition commission will have a secondary jurisdiction over problems involving privacy considerations if an authority is established for handling privacy issues and is recognized as a sector-specialized organization.

In the European Union, The European Court of Justice's verdict of the "*Asnef-Equifax* v. *Ausbanc*"[14] affirms that, even where consumer interests are impacted, issues relating to personal data should be settled in accordance with the pertinent data protection laws, not competition legislation.

Relation between Data Privacy and Competition Law

In digital marketplaces, which are frequently "zero-price markets," a concept at odds with the conventional legal and economic theories relating to competitive injury, the interpretation of the Antitrust Act[15] could become complex. These markets also have other distinctive features, for instance difficulty in determining

market power or market shares, low entry barriers for players, in contrast to network effects that may prevent new entrants from expanding or achieving economies of scale, and customers' ability to multihome while at the same time being locked-in due to a lack of interoperability (complicating the analysis of switching costs).

The Competition Commission released a report (the "CCI Telecom Report") on the Indian telecom industry in the year of 2021 of January, importance the convergence of data privacy & antitrust law. In digital marketplaces, which are frequently "zero-price markets," a concept at odds with the conventional legal and economic theories relating to competitive injury, the interpretation of the Antitrust Law could become complex. These markets also have other distinctive features, such as difficulty in determining market power or market shares, low entry barriers for players, in contrast to network effects that may prevent new entrants from expanding or achieving economies of scale, and customers' ability to multihome while at the same time being locked-in due to a lack of interoperability (complicating the analysis of switching costs).

The Competition Commission noted the confluence of data privacy & competition legislation in a study on the Indian telecom industry (the "CCI Telecom Report") that was published in the year 2021 of January. It refers to the use of data as non-price competition, which implies that an organization may use the data obtained from users to gain a competitive advantage over rivals. Another study from 2020 that was cited by the Commission of antitrust law similarly found that network effects brought on by enormous amounts of data collection allowed companies to compete on a level unconnected to pricing and develop a "winner takes all" system. As a result, data might be used as a stand-in for determining market power, and once that assessment has been made, data misuse could be seen as having a major negative impact on antitrust.

Data as a sign of Marker Influence

In line with Sec. twenty six (one) of the antitrust Law ("WhatsApp Suo Moto Order"), which views data as a non-price competitive criterion, the Competition commission had issued an order beginning an investigation against "WhatsApp & Facebook". In its order, the Commission took into account its prior rulings regarding WhatsApp to determine its market dominance and opined that "given its popularity and wide usage, for one-to-one as well as group communications, and its distinct and unique features, WhatsApp seems to be dominant". That discovery is significant since it depends on platform's user base creating a network effect.[16]

"In a data-driven ecosystem, the antitrust law needs to examine whether the excessive data collection and the extent to which such collected data is subsequently used or otherwise shared, have anti-competitive implications, which require anti-trust scrutiny," the Competition commission state.[17] The Competition Commission has also adopted a similar strategy in its evaluation of mergers, noting that in "new age dynamic markets" traditional market share research may merely serve as a starting point for inquest and isn't the merely factor to be taken into consideration when determining market dominance. Current choices in these areas have taken into account potential problems with data interchange and net neutrality.

Regulatory Intervention by the Competition Authority and Data Protection Law

The Antitrust Law's goal is to uphold and encourage markets' competitive nature, which ultimately benefits consumers. On the other hand, the "DPDP Act"[18] intends to give power to people by preserving their personal data and allowing lawful processing of that data. The Antitrust Law is intended to safeguard & encourage the competitive temperament of markets which in due course leads to customer benefits. "The DPDP Act", in contrast aims to give power to individuals by protecting their personal data & allow processing of their data in a legal way. The DPDP Act and the Competition Act are two significant legislative frameworks that address distinct yet interrelated aspects of the modern digital world. While the former focuses on safeguarding personal data and user privacy, the latter aims to ensure fair competition and prevent anti-competitive practices in the market. The interaction between these two legislations is crucial as they collectively shape the evolving digital ecosystem, ensuring a balance between data protection and healthy market competition.

The statement of the DPDP, 2023 Bill takes cognizance of the fact that data has a huge role to play in the growth of the digital economy and therefore protection of personal data is equally important and imperative. The economic essence of the Act and its impetus to businesses and start-ups can be gauged from the exemption provisions created in section 17(3).[19] The Competition Act, 2002, that closely governs digital markets and activities of market participants, was similarly enacted to support the economic development of the country. The Antitrust law governs the conduct pertaining to abuse of dominant position by an enterprise as well as keeps a check on agreements or combinations which will have AAEC[20] in the market. A closer analysis of the DPDP Act will exhibit its correlation and overlap with the competition act which businesses must be cautious about for business hygiene. In fact, section 6(2) of DPDP Act recognizes that consent shall be invalid even when it is taken in violation of any other law in force (for example, Competition law).

In s. 6(1) read with s. 5(2)[21] provides that the consent by data principal for already concluded contracts has to be unconditional. This clause also has the potential of addressing issues related to abuse of dominant position by those platforms whose services are unavoidable /necessary in their offerings. Also, the purpose and limitation framework in seeking consent should address the issues pertaining to excessive data collection, which can simultaneously be looked into by the Data Protection Board & the Indian Antitrust Commission.

It is also interesting to note that competition law and privacy laws go hand-in-hand in the European Union and the ripple effect can be seen globally, including India. A very seminal European Court of Justice ruling in *Meta Platforms and Ors*. v. *Bundeskartellamt*[22] pronounced recently on July 4, 2023, stated that member state antitrust authorities can enter into the exercise of finding a violation of the GDPR[23] while investigating a case of abuse of dominant position. It analysed several vital areas of intersection of both the laws with the crux being that certain conduct may be justified under the GDPR but can run foul under the antitrust laws.

S.7 (a), mentions the voluntary giving of personal data and non-indication of 'no consent' by data principal as a legitimate use case. Such an activity may be fine under the privacy law but will run foul under the antitrust law, especially in the digital market. An untrained user generally doesn't investigate the data he/she shares, and its purpose. The situation is exacerbated with the prevalence of dark patterns for taking consent in lieu of services. This is being examined by privacy regulators as well as competition law authorities. The US Federal Trade Commission is already examining usage of 'dark pattern' by Amazon for enrolling consumers in Amazon Prime without consent and making the cancellation process complicated. This also comes with tricked consent to onerous conditions of sharing personal data, wherein the consent withdrawal process is complicated. Such a provision of ease in withdrawing consent can be seen in section 6(4). All these issues around consent management have propelled the need for a new set of entities called 'consent-managers' under the Act, which is rare in privacy laws, globally.

The CCI Telecom Report notes that, contrary to antitrust law, which aims to preserve and develop competition rather than safeguarding specific market competitors, privacy may fundamentally be a consumer protection concern. The Competition commission should work with other organizations that have been given particular authority to establish guidelines for data protection. While the Competition commission may be aware of an anti-competitive deviation from these norms, the Competition commission's attempt to determine what constitutes a "excessive amount of data" may put it at odds through other authorities who may be in a superior position to do so anyhow

Conclusion

The fundamental ideology of autonomy and dignity of human can be used to defend privacy protection as a fundamental right. However, it can be confirmed from an economic perspective that with the aim of address major market failure issues with regard to privacy, the safeguard of privacy & personal data ought to be increased. Finding the ideal balance between safeguarding the privacy of specific individuals and the

enormous potential benefits of analyzing vast collections of collected data is crucial. The development of legal guidelines and regulatory measures for the security of privacy in these incredibly innovative digital marketplaces is a very challenging subject to solve without jeopardizing further innovation and jeopardizing the numerous future potential of the digital economy. With the intention of create a well-functioning lawful system for defending privacy in the digital economy, it is essential to build a "sophisticated integrated approach" of the appropriate lawful norms in competition, consumer, data protection & IPR.

Therefore, more study into the connections among consumer, competition, and data protection legislation is especially important. In these various policy sectors, it also necessitates cooperation from the enforcement agencies. In order to deal with privacy concerns and protect consumers, "antitrust authorities, consumer security agencies, and data protection supervisors" must come up with a shared strategy and apply it in a coordinated manner.

REFERENCES

Footnotes

1. DE (Digital Economy)
2. (2015) 8 SCC 735.
3. European Union Commission.
4. Competition commission of India .
5. Bose, A, A Review Is Needed : Why India's Antitrust Regulator Should Scrutinize the Facebook-WhatsApp Merger, COMPETITION LAW INSIGHT (2014) *available at* : https://ssrn.com/abstract=2534732, at 3-7 (visited on july 7,2022)
6. *Ibid.*
7. *Taj Pharmaceuticals Ltd. and others* v. *Facebook and others* ,case No. 83 of 2015.
   Mr. umar javed and others v. *google LLC.*, Case no 39 of 2018, the commission opined that mandatory pre-installation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and thereby in contravention of Section 4(2) (a) (i) of the Act. It also amounts to prima facie leveraging of Google's dominance in Play Store to protect the relevant markets such as online general search in contravention of Section 4(2) (e) of the Act.
8. *Supra* note 3.
9. AIR 1997 SC 568.
10. In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users , suo moto case no 1 of 2021 against WhatsApp LLC and facebook inc.
11. Case No. 15 of 2020.
12. Case No. 99 of 2016.
13. Civil Appeal no (s). 11843 of 2018.
14. Case C- 238/05.
15. The Competition Act ,2002 (Act 12 of 2003).
16. *Supra* note 11.
17. In the WhatsApp Suo Moto Order case.

18. The Digital Personal Data Protection Act, 2023 (Act 22 of 2023).
19. *Id*. s. 17 (3).
20. Appreciable Adverse Effect on Competition.
21. Supra note 19, ss. 6(1),5(2).
22. Case 252/21.
23. General Data Protection Regulation.

Statutes

24. The Constitution of India, 1950.
26. The Consumer Protection Act, 2019.
26. The Competition Act, 2002.
27. The Companies Act, 2013.
28. The Digital Personal Data Protection Act, 2023.

Books

29. Abir Roy And Jayant Kumar , competition law in india , (2004)
30. Fels, Allan.(2007).Competition and Regulation. Dhall,Vinod.(Ed.),*Competition Law Today.*(pp.195-197,206).New Delhi, Oxford University Press.
31. Mehta, S. Prdeep, A Functional Competition Policy For India, (1st edition 2006), Academic Foundation, new Delhi in association with consumer unity and trust Society(CUTS International), Jaipur
32. Taylor, D. Martyn, International Competition Law-A New Dimension For the WTO?,(1st edition 2006), Cambridge University Press, United Kingtom.
33. Dugar, S.M. ,Guide to Competition Law, Lexis Nexis Butterworths, Nagpur, (15th edition2010)

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