IX. ANTITRUST AND PRIVACY CONCERNS: A DILEMMA ACROSS JURISDICTIONS

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ABSTRACT

"Strikingly, the current approach fails even if one believes that consumer interests should remain paramount. Focusing primarily on price and output undermines effective antitrust enforcement by delaying intervention until market power is being actively exercised". – Lina Khan

This is a glaring issue that confronts antitrust regulators across jurisdictions especially in the context of digital platforms. Consumer harm in digital platform markets manifests in the form of reduced privacy and data protection concerns as opposed to harm in the form of pricing. This Article examines how the price theory fails in digital platform markets. It traces the evolving approach of antitrust authorities in digital markets by examining case laws that have been decided by antitrust regulators in the European Union, the United States and India. The article focuses on two case studies - the Facebook-Reliance Jio deal in India and the case of Amazon's misuse of third-party seller data before the European Commission to highlight the importance of using privacy and data protection principles as a parameter in competition analysis. Lastly, it seeks to provide a theoretical framework as to how such an approach can be applied by competition law regulators across different jurisdictions.

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I. INTRODUCTION

Recent antitrust investigations across jurisdictions pertaining to big-tech companies have compelled the antitrust authorities to address whether privacy concerns raised by these companies fall within the purview of their investigation. Such concerns arose in the Google-DoubleClick merger, Facebook-WhatsApp merger and more recently when India's Competition regulator in a preliminary examination observed that WhatsApp's new privacy policy was anti-competitive.[1] The United States Department of Justice also probed into whether Google's change in its cookie policy amounted to an abuse of dominance.[2]

Some scholars argue that anti-trust laws must be used for the traditional purpose of addressing anti-competitive behaviour and its scope must not be

[1] *WhatsApp's New Privacy Policy 'Exploitative And Exclusionary': CCI Orders Detailed Probe*, LIVEMINT (March 24, 2021), https://www.livemint.com/news/india/cci-terms-whatsapp-s-privacy-policy-as-exploitative-and-exclusionary-directs-detailed-probe-11616593279631.html.

[2] Paresh Dave and Diane Bartz, *Google's Privacy Push Draws U.S. Antitrust Scrutiny*, REUTERS (March 18, 2021), https://www.reuters.com/article/us-tech-antitrust-google-exclusive-idUSKBN2BA10I.

expanded to address non-competitive concerns.[3] However, others claim that the two fields inevitably overlap especially in cases where the investigation concerns practices by digital platforms.[4] The two schools of thought - Harvard and Chicago, vary in their approach to antitrust investigations. The Harvard school propounded that firms with enhanced market power would act in an anti-competitive manner.[5] Whereas the Chicago school of thought was inclined towards a consumer welfare-centric approach wherein the conclusion of the merger being anti-competitive was arrived at once factual evidence regarding the adverse impact on consumers in the market was obtained.[6] The Chicago school measures consumer welfare in terms of the price theory.[7]

Supporters of the latter school of thought often argue that antitrust laws can solve ancillary problems such as fake news issues, environmental

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[3] Maureen K. Ohlhausen and Alexander P. Okuliar, *Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121 (2015); Noah Joshua Phillips, *Should We Block This Merger? Some thoughts on Converging Antitrust and Privacy*, FEDERAL TRADE COMMISSION (UNITED STATES OF AMERICA), (January 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf.

[4] Harri Kalimo and Klaudia Majcher, *The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace*, 42 E.L. REV. 210 (2017); EDPS, "*Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data*" (March 2014); Jacques Crémer et al., *Competition Policy for the Digital Era*, EUROPEAN COMMISSION (2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Aymeric de Moncuit, *In which ways should privacy concerns serve as an element of competition assessment*, EUROPEAN COMMISSION (2018), https://ec.europa.eu/competition/information/digitisation_2018/contributions/aymeric_de_moncuit.pdf; *Competition Law & Data*, AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT, (May 29, 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591568.

[5] Thomas A Piraino, *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 84 INDIANA L. J. 2, (2007).

[6] *Id.*

[7] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979).

concerns[8] and privacy problems among others. Balkin, for instance, argues that pro-competitive policies ensure a more democratic environment.[9]

In the present paper, the authors side with the latter perspective. However, they attempt to argue that even though antitrust authorities can identify when privacy problems arise from anticompetitive practices, privacy laws must step in to correct this and in turn remedy the wrongful gain acquired in the market.

Part II of the paper deals with zero price markets, a common feature of digital platform markets that poses a major challenge to the traditional antitrust approach. Part III of the paper outlines the existing privacy and data protection framework in place in three jurisdictions - India, the European Union (**"EU"**) and the United States of America (**"US"**), on the grounds that recurring cases of competition concerns and privacy concerns have been addressed in these jurisdictions. Part IV traces the chronological evolution of antitrust law in digital markets by various competition authorities. In Part V, the authors focus on two case studies - the Facebook-Reliance Jio deal in India and the case of Amazon's misuse of third-party seller data before the European Commission (**"EC"**) to highlight the importance of using privacy and data protection principles as a parameter in competition analysis. Part VI seeks to provide a theoretical framework as to how such an approach can be applied by competition law regulators across different jurisdictions.

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[8] Grant Murray, *Antitrust and sustainability: globally warming up to be a hot topic?*, KLUWER COMPETITION LAW BLOG, (October 18, 2019) http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/; Simon Holmes, *Climate change, sustainability, and competition law*, 8 J. ANTITRUST ENFORCEMENT 2, 354 (July 2020).

[9] Jack M Balkin, *Free Speech is a Triangle*, 18 COLUMBIA L. REV. 7 (2018).

II. ZERO-PRICE MARKETS AND THE FAILURE OF TRADITIONAL ANTITRUST APPROACH

Digital platform economies refer to those wherein the consumers can discover and share information via digital platforms/means. This information is subsequently harvested and analysed by service providers.[10] Digital platform markets provide consumers with 'free' products (which merely refers to goods that are not monetarily priced, however the consumer does incur non price costs for the same). For instance, Facebook offers consumers an opportunity to interact with their peers over a platform at a zero-sum cost. Similar models have been adopted by Amazon, Spotify and others.[11] These entities receive varied and often detailed information on consumer preferences and other ancillary information.[12] For instance, in Facebook, an individual is merely required to create a user account. In this case, Facebook uses the personal information given during registration and information acquired with subsequent use of the platform, to develop targeted advertisements. Similarly, all digital platforms acquire information that can be translated into monetary benefits. The consumer also incurs non-monetary costs, such as 'information and attention costs.'[13]

Antitrust law has significantly relied on price factors to investigate instances of abuse in the market. The price theory falls short when examining

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[10] Keith Hylton, *Digital Platforms and Antitrust Law*, No.19-8, BOSTON UNIVERSITY SCHOOL OF LAW, LAW AND ECONOMICS RESEARCH PAPER (2019), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1606&context=faculty_scholarship.

[11] Daniel L Rubinfeld and Michal Gal, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L. J. 521 (2016).

[12] *Id.*

[13] John M Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PENN. L. REV. 149 (2016).

anticompetitive practices in a zero-price market as they fail to take into consideration other factors that affect consumer welfare,[14] for instance, reduced privacy. Further, Merger Guidelines fail to take into consideration data acquired as a result of the merger or acquisition. It requires entities to notify mergers or acquisitions only if it exceeds a specified threshold which is based on the turnover.[15] For instance, Section 20(4) of the Competition Act, 2002, of India specifies the factors that the Commission must observe whilst examining a combination to determine whether it leads to or is likely to lead to an appreciable adverse effect on competition in the market.[16] This section however leaves out of its scope privacy issues and volumes of data accumulated by the entity post the combination.[17] Thus, data-intensive mergers by digital platforms often escape scrutiny by competition authorities. Another challenge that competition authorities face whilst examining anti-competitive practices in digital economies is tackling privacy and data-related issues.[18]

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[14] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 720 (2017); Konstantina Bania, *The Role of Consumer Data in the Enforcement of EU Competition Law*, EUROPEAN COMPETITION JOURNAL 14:1, 38-80; David S. Evans, *The Antitrust Economics of Free*, 7 COMPETITION POL'Y INT'L 71, 72 (2011); *Competition issues in the digital economy* TD/B/C.I/CLP/54, ¶ 11, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (May 1, 2019), https://unctad.org/system/files/official-document/ciclpd54_en.pdf.

[15] *Stigler Committee on Digital Platforms Final Report*, STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE (Sept. 16, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E; Filippo Lancieri and Patricia Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, Stigler Centre Working Paper Series No. 303 (Oct. 26, 2020), Forthcoming, 63 STANFORD JOURNAL OF LAW, BUSINESS AND FINANCE, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681322.

[16] Competition Act, 2002, § 20(4), No. 12, Acts of Parliament, 2002 (India).

[17] *Id.*

[18] Annabelle Gawer, *Big Data: Bringing Competition Policy to the Digital Era*, DAF/COMP/WD (2016) 74, ¶54.

III. PRIVACY REGULATION FRAMEWORKS IN DIFFERENT JURISDICTIONS

Back in 2007, Google had urged international bodies such as the United Nations to call for the setting of international standards of privacy. The company had argued that the lack of regulatory standards across countries for privacy facilitates privacy breaches and loss.[19] This problem is still pervasive today. The regulatory frameworks governing privacy and data protection concerns in different jurisdictions are as follows:

A. India

The Information Technology (Intermediary liability) Rules, 2011 impose an obligation upon intermediaries to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource as per Rule 3.[20] Further, the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 lays down the rules governing collection, disclosure and transfer of sensitive personal data between body corporates.[21] These Rules however do not establish a cohesive framework to protect the privacy rights of individuals and are limited in their application.

The right to privacy was recognised as a fundamental right by the Supreme Court in the *Puttaswamy Judgement*.[22] Subsequently, the Justice

[19] Bobbie Johnson, *Google urges UN to set global internet privacy rules*, THE GUARDIAN, (2007), https://www.theguardian.com/technology/2007/sep/14/news.google.
[20] Rule 3, Information Technology (Intermediary Liability) Rules, 2011.
[21] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.
[22] (2017) 10 SCC 1.

Srikrishna Committee was constituted to formulate recommendations for the privacy regulatory framework in 2017. The Committee submitted its findings in the 'White paper of the Committee of Experts on Data Protection Framework for India' in 2018 and published the Draft Personal Data Protection Bill, 2018. In 2019, the Government released the Personal Data Protection Bill, 2019 which varied in essential features from the Srikrishna Committee report.[23] The Joint Parliamentary Committee recently stated that it is suggesting around 89 amendments to the Bill and an insertion of a new clause.[24] The Bill is yet to be formulated into law, after which it will come into force in a phased manner. The delay in bringing about a sound privacy regulatory framework gives rise to various challenges. Some of the largest big-tech mergers in India have taken place in the absence of a privacy regime, wherein the Competition Authorities have refused to address privacy concerns, often justifying this hesitation on the grounds that the issues ought to be addressed by privacy regulators. The Walmart-Flipkart deal,[25] the

[23]Anurag Vaishnav, *The Personal Data Protection Bill, 2019: How it differs from the draft Bill,* PRS BLOG (Dec. 27, 2019), https://www.prsindia.org/theprsblog/personal-data-protection-bill-2019-how-it-differs-draft-bill.

[24] Surabhi Agarwal, *89 amendments, 1 new clause in the final draft of India Data Protection Bill*, ECONOMIC TIMES, (Jan. 7, 2021), https://economictimes.indiatimes.com/tech/technology/89-amendments-1-new-clause-in-final-draft-of-india-data-protection-bill/articleshow/80144191.cms.

[25] Beena Saraswathy, *The Flipkart-Walmart Deal in India: A Look into Competition and Other Related Issues* 64 The Antitrust Bulletin 136, 145 (2019).

Facebook-Jio deal,[26] and Google's acquisition of a minority stake in Jio Platforms[27] are a few examples of this.

Concerning the non-personal data regulation framework, the Ministry of Electronics and Information Technology (**"MeiTY"**) formulated an expert committee chaired by Kris Gopalakrishnan in 2020.[28] The Report defines non-personal data negatively i.e. any data that is not categorised as personal data will be considered to be non-personal data. The Committee submitted its report entailing the following observations:[29]

1. A Non-Personal Data Regulatory Authority consisting of experts in the field will be set up which will oversee the governance of data.

2. Sharing of Non-Personal Data may be carried out for specific purposes such as for, *inter alia,* sovereign purposes, public interest purposes, and economic purposes.

The non-personal data regulatory framework will govern meta-data[30] which is used by commercial entities to observe consumer preferences and

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[26] *Notice under Section 6 (2) of the Competition Act, 2002 by Jaadhu Holdings LLC*, COMPETITION COMMISSION OF INDIA (June 24, 2020), https://www.cci.gov.in/sites/default/files/Notice_order_document/order-747.pdf?download=1.

[27] *Notice under Section 6(2) of the Competition Act, 2002 filed by Google International LLC*, ¶ 30, COMPETITION COMMISSION OF INDIA (Nov. 11, 2020) https://www.cci.gov.in/sites/default/files/Notice_order_document/Order775.pdf.

[28] Official Memorandum No. 24(4) /2019-CLES dated 13.09.2019, MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY, GOVERNMENT OF INDIA.

[29] *Report by the Committee of Experts on Non-Personal Data Governance Framework*, MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY, GOVERNMENT OF INDIA, https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf.

[30] *Report by the Committee of Experts on Non Personal Data Governance Framework*, MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY, GOVERNMENT OF INDIA, https://static.mygov.in/rest/s3fs-public/mygov_160922880751553221.pdf.

behaviour in the market.[31] Notably, the envisaged regulatory framework has not come into force, leaving a regulatory gap with regard to the manner in which personal and non-personal data is presently shared between various entities, whether government or private.

B. Europe

In 1995, the EU Data Protection Directive was brought about to regulate the processing of personal data whilst keeping intact the right to privacy.[32] The said directive then paved the way for the General Data Protection Regulation (**"GDPR"**) that was brought into force in 2018 across the EU to tackle various privacy concerns.[33] The GDPR is enforced by the European Data Protection Board at the EU level along with Data Protection Authorities in Member States of the EU.[34] The Data Protection Authorities either initiate action suo motu or on the basis of a complaint.[35] In cases where the action is initiated suo motu, there is a requirement of grounds of suspicion that a company is not complying with the privacy regulatory framework and hence breaching permitted data processing practices.[36]

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[31] Micah Altman et al., *Practical Approaches to Big Data privacy over time*, 8 INT' L DATA PRIVACY L 1 (Feb. 2018).

[32] Directive 95/46/EC, EUROPEAN PARLIAMENT, https://ec.europa.eu/eip/ageing/standards/ict-and-communication/data/directive-9546ec_en.

[33] ORLA LYNSKEY, THE FOUNDATIONS OF EU DATA PROTECTION LAW, (Oxford University Press 2015).

[34] *EU Data Protection Reform: ensuring its enforcement Fact sheet*, EUROPEAN PARLIAMENT (Jan. 2018), https://ec.europa.eu/info/sites/info/files/data-protection-factsheet-role-edpb_en.pdf .

[35] *Id.*

[36] *EU Data Protection Reform: ensuring its enforcement Fact sheet*, EUROPEAN PARLIAMENT (Jan. 2018) , https://ec.europa.eu/info/sites/info/files/data-protection-factsheet-role-edpb_en.pdf.

C. United States

The US does not have central legislation that tackles privacy entirely, however, various industry-specific legislations have been passed to combat privacy and data breaches. For instance, the Health Insurance Portability and Accountability Act, 1996 (**"HIPPA"**) was formulated on the notion that individuals should have the ability to control the possession and portability of their personal health information.[37] The Children's Online Privacy Protection Act, 2000 (**"COPPA"**) ensures that online platforms take parental consent before collecting personal information from minors.[38] COPPA was brought into force to prevent websites and online services from issuing targeted advertisements to children under the age of 13 that are particularly vulnerable and may not have an absolute understanding of their data and privacy rights.[39]

The regulatory gaps that arise apart from the industry-specific privacy legislation are covered by the Federal Trade Commission (**"FTC"**). The FTC as per the FTC Act of 1914 has the power to prohibit companies from engaging in unfair or deceptive practices.[40] In this context, it is clear that the EU privacy regime is in stark contrast to the legal regime in India and the US which do not have one privacy-specific law. While the US has sector-specific laws that address privacy issues to some extent, India lacks a robust data protection law.

In the antitrust analysis of mergers, competition authorities often state that the potential privacy issues can be tackled post-breach by regulatory

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[37] Health Insurance Portability and Accountability Insurance Act, 1996, (USA).
[38] *Protecting Children's Privacy under COPPA*, FTC, https://www.ftc.gov/sites/default/files/documents/reports/protecting-childrens-privacy-under-coppa-survey-compliance/coppasurvey.pdf.
[39] *Id.*
[40] Federal Trade Commission Act, 1914, (USA).

bodies established for data protection matters. However, this approach is problematic as privacy regulations across jurisdictions are triggered into motion, post the privacy breach taking place. They are reactionary and not anticipatory. In addition to this, privacy regulations are ill-equipped to deal with situations wherein competition issues are entangled with privacy concerns.

IV. CASES WHEREIN THE PRIVACY CONSIDERATION CAME UP FOR HEARING IN ANTITRUST SUITS

A. Google-DoubleClick Merger: A Missed Opportunity [2008 - United States of America]

Previously, competition regulators have failed to adopt a harmonised view of competition and privacy concerns. The Google-DoubleClick merger case is an example of this. In the Google-DoubleClick merger case, one of the fundamental arguments against the merger was the consumer privacy issue. It was argued that the combined data sets of the two entities would lead to dominance in the hands of a single entity with regard to information. The FTC however, distanced itself from the privacy aspect of the merger focusing solely on whether the merger would adversely affect competition in the market.[41]

The majority's reasoning was based on various grounds. The Commission was concerned with antitrust issues solely and observed that it did not have the legal authority to enquire into privacy issues. Further, Google

[41] *Statement of Federal Trade Commision concerning Google-DoubleClick*, FTC FILE NO. 071-0170, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

and DoubleClick operated in different fields hence not impacting each other's price and non-price attributes, and information that was available with Google could also be accessed by its competitors thus making it non-rivalrous. Lastly, the said information was not an essential input hence the essential facilities doctrine could not be evoked.[42]

The Commission in the Google-DoubleClick merger case stuck to the traditional antitrust approach.[43] This approach fails to look beyond price analysis in determining whether antitrust laws have been breached.[44] Marc Rotenberg had stated during the merger that "Unless the commission establishes substantial privacy safeguards by means of a consent decree, Google's proposed acquisition of DoubleClick should be blocked."[45] Individuals arguing against the merger on the grounds of privacy concerns justified the said concerns by emphasizing that the merger would lead to: (i) human rights violation;[46] (ii) undue concentration of economic power;[47] (iii)

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[42] *Id.*
[43] ASNEF-EQUIFAX and Administración del Estado, C-238/05, EU:C:2006:734,¶ 63.
[44] ROBERT H BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, (1978)
[45] Marc Rotenberg's statement, *An Examination of the Google-Doubleclick Merger and the Online Advertising Industry: What are the risks for Competition and Privacy, Hearing before the Sub-committee on Antitrust, Competition policy and Consumer Rights*, 110TH CONGRESS, 29 (Sept 27, 2007), https://www.govinfo.gov/content/pkg/CHRG-110shrg39015/pdf/CHRG-110shrg39015.pdf.
[46] *Id.*
[47] Herb Kohl's statement, *An Examination of the Google-Doubleclick Merger and the Online Advertising Industry: What are the risks for Competition and Privacy, Hearing before the Sub-committee on Antitrust, Competition policy and Consumer Rights*, 110TH CONGRESS, (Sept. 27, 2007), https://www.govinfo.gov/content/pkg/CHRG-110shrg39015/pdf/CHRG-110shrg39015.pdf.

exploitation of consumer data and subsequent price discrimination by harvesting the data;[48] and (iv) there would be foreclosure of access to data.[49]

Commissioner Pamela Jones Harbour dissented in the present case. She stated that approving the Google-DoubleClick merger without imposing any conditions enhances the risk of harm to competition. The dissent stressed that the intention of these two firms behind the merger is to combine their datasets and become a 'super-intermediator'. The Commissioner warned that this will not only affect competition in the market but also raise consumer privacy concerns.[50] The Commissioner further suggested that to tackle these issues the representations regarding the handling of data should be made binding through a consent agreement and the enforcement of a firewall between the entities to prevent the exchange of data.[51]

Google's advertising business is once again a subject of antitrust investigation today.[52] William Kovacic, one of the majority votes in the FDA's

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[48] Nathan Newman, *The Cost of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google*, 40 WILLIAM MITCHELL L. REV. 870, (2014).

[49] *Dissenting Statement of Commissioner Pamela Jones Harbour, In the Matter of Google-DoubleClick*, FTC FILE NO. 071-0170, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf ; Pamela Jones Harbour and Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Version of the Relevant Product Market*, 76 ANTITRUST L. J. 775 (2010).

[50] *Dissenting Statement of Commissioner Pamela Jones Harbour, In the Matter of Google-DoubleClick*, FTC File No. 071-0170, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

[51] *Id.*

[52] *United States v. Google Inc., complaint filed by the department of justice against Google for violating antitrust law in the search and search advertising market*, https://www.justice.gov/opa/press-release/file/1328941/download ; *Justice Department sues Monopolist Google for violating Antitrust Law, Justice Department*, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws .

approval of the Google-DoubleClick merger said "If I knew in 2007 what I know now, I would have voted to challenge the Google-DoubleClick merger."[53] Observers have noted that the merger played a fundamental role in turning Google into an advertisement powerhouse. This case brought into light the need to address privacy concerns during antitrust investigations as failing to do so brings about repercussions in the long run.

B. Microsoft/LinkedIn merger [2016 - European Union]

In 2016, the EC examined the effects of Microsoft's acquisition of LinkedIn. In the market for online advertising services, it observed that data is an important factor in competition analysis and when there is an acquisition of large amounts of data in a merger, competition concerns may arise.[54] The EC approved the merger as it found that even if Microsoft was to combine the data obtained from LinkedIn, it would not raise barriers to entry or foreclose competition as the data could be accessed by competitors as well.[55] In the market for professional social networking services (**"PSN"**), it did note that privacy would be relevant only if consumers view it as an essential factor on the basis of which different service providers compete.[56] However, the

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[53] Steve Lohr, *This Deal Helped Turn Google into an Ad Powerhouse. Is That a Problem?*, NEW YORK TIMES, (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/technology/google-doubleclick-antitrust-ads.html .

[54] Dr. Michele Giannino, *Microsoft/LinkedIn: What the European Commission Said on the Competition Review of Digital Market Mergers* (July 19, 2017).

[55] Greg Sivinski, Alex Okuliar& Lars Kjolbye, *Is big data a big deal? A competition law approach to big data*, 13 EUROPEAN COMPETITION JOURNAL, 199 (2017) 216.

[56] Maria Wasastjerna, *Competitive Law, Big Data and Privacy*, 10 INT'L IN-HOUSE COUNSEL J. 1 (2017) 6.

Commission explicitly stated that subsequent loss of privacy by consumers is out of the ambit of competition law and will not be examined.[57]

C. Vinod Kumar Gupta v. WhatsApp Inc. [2016 - India]

The informant in the present case raised concerns over WhatsApp's change in its privacy policy compelling users to consent to share user data with 'Facebook' to continue availing Whatsapp's services.[58] The informant claimed that this violated Section 4 of the Competition Act, 2002, that is, Whatsapp was abusing its dominant position in the relevant market by introducing an unfair privacy policy. The Competition Commission of India (**"CCI"**) in its observation of this contention held privacy concerns to be outside its purview of examination. Here, the CCI briefly mentioned that there exist cases pending before the Delhi High Court challenging WhatsApp's privacy policy under the relevant Information Technology Act, 2000[59] and accordingly refrained from commenting on this contention.

Whatsapp recently released an in-app notification to its users informing them of its updated privacy policy.[60] According to the new terms of the policy, Whatsapp will be able to engage in sharing of the user's account registration information (including phone number), transaction and service-related data (including data relating to businesses operating using Whatsapp),

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[57] Anca D Chirita, *Theories of Harm in 'Data-Driven' Mergers*, DURHAM UNIVERSITY, https://ec.europa.eu/competition/information/digitisation_2018/contributions/anca_chirita.pdf .

[58] Vinod Kumar Gupta v. Whatsapp Inc., Case No.99 of 2016, https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf.

[59] Karmanya Singh Sareen and Ors v. Union of India, W.P (Civil) 7663/2016 & CM No. 31553/2016.

[60] *Whatsapp updated its notification on 4th January, 2021*, WHATSAPP, https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en .

IP address, mobile device information and more with Facebook.[61] The above-mentioned data-sharing terms do not have an opt-out option. Hence, consumers are entitled to use WhatsApp's services on the precondition that they agree to give up their data to WhatsApp's parent entity Facebook.

The updated privacy policy went against the initial declarations that were made by Whatsapp when the merger took place which inspired confidence that the entities would not share data between themselves without the user's consent. Facing widespread public backlash, WhatsApp has delayed the enforcement of the new privacy policy.[62]

Recently, the CCI in its preliminary examination ordered the DG to investigate WhatsApp's privacy policy on the grounds that it amounts to an abuse of dominant position under Section 4 of the Competition Act.[63] WhatsApp and Facebook challenged the order of the CCI on the grounds that the CCI cannot investigate privacy issues as the same was being heard by the Supreme Court. However, the Delhi HC has dismissed the petition[64] marking a turning point in the anti-trust approach towards consumer privacy issues.

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[61] *Privacy Policy*, WHATSAPP, https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en.

[62] *Whatsapp pushes back policy roll out to May 15*, THE HINDU, (Jan. 16, 2021), https://www.thehindu.com/news/international/whatsapp-delays-new-privacy-policy-by-three-months-amid-severe-criticism/article33585465.ece .

[63] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/sites/default/files/SM01of2021_0.pdf.

[64] Sushil Batra, *Setback for WhatsApp, Delhi HC refuses to stay CCI probe against privacy policy*, LIVEMINT, (June 23, 2021), https://www.livemint.com/companies/news/setback-for-whatsapp-delhi-hc-refuses-to-stay-cci-probe-against-privacy-policy-11624428281411.html.

D. Apple-Shazam Case [2018 - European Union]

The EC in its investigation of Apple's acquisition of Shazam briefly touched upon issues of consumer privacy and data protection. The services offered by Apple and Shazam were complementary. Shazam offered music recognition services whereas Apple offered Apple Music, a platform to stream music. The merger would primarily result in data transfer between the two entities. Margrethe Vestager, the commissioner in charge of competition policy observed that 'data is key to a digital economy', stressing the importance of reviewing the impact of data transfer between these entities on competition in the music streaming industry.[65] However, the EC could not find significant adverse implications on competition arising out of the merger. Concerning the privacy and consumer data-sharing concerns, the EC noted that the companies would still be bound by all data protection laws,[66] indicating that any privacy concern arising out of the merger would have to be tackled by privacy norms and laws. The above-mentioned observation demonstrates that the EC was not oblivious to the privacy challenges faced in digital markets, however, chooses not to bring it within the ambit of competition analysis.

[65] Mergers: Commission clears Apple's acquisition of Shazam, Press Release, EUROPEAN COMMISSION, (September 6, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662 .
[66] *Id.*

V. ANALYSIS OF THE APPROACH BY COMPETITION AUTHORITIES ACROSS JURISDICTIONS

A. Facebook-Reliance Jio Deal [2020 - India]

In April 2020, Jio announced that social media giant Facebook had gained a minority stake (9.99%) in the company through its wholly-owned subsidiary Jaadhu Pvt. Ltd. and invested Rs. 43,574 crores in the Indian telecommunications company. Facebook also rolled out WhatsApp Pay a payments gateway on its subsidiary platform WhatsApp Messenger.[67] After the launch of JioMart, it will play a crucial role in stimulating digital transactions with approximately three crores *Kirana* (a local store that provides daily grocery items) shops in India. The merger was promoted as being in lieu of the government's flagship 'Digital Indian Mission'.[68] However, it did garner the attention of the CCI.

The two companies have traditionally disagreed on key policy issues relating to data privacy and data sovereignty.[69] Hence, the present deal raises important questions over the level of cooperation that the entities will be willing to engage in especially when they have explicitly stated that no data sharing agreement has been entered into.[70]

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[67] Danny Cyril D Cruze, *How to order from Reliance Jio-Mart on Whatsapp*, LIVEMINT, (Apr. 26, 2020), https://www.livemint.com/companies/news/how-to-order-from-reliance-jiomart-on-whatsapp-11587886799536.html.

[68] David Fisher, *Facebook invests $5.7 Billion in India's Jio Platforms*, FACEBOOK, (Apr. 21, 2020), https://about.fb.com/news/2020/04/facebook-invests-in-jio/ .

[69] Arindrajit Basu and Amber Sinha, *The Realpolitik of the Reliance Jio-Facebook deal*, THE DIPLOMAT (Apr. 29, 2020), https://thediplomat.com/2020/04/the-realpolitik-of-the-reliance-jio-facebook-deal/ .

[70] Romit Guha, *Reliance Jio says no preferential access to Facebook, Whatsapp*, ECONOMIC TIMES (Apr. 22, 2020), https://economictimes.indiatimes.com/opinion/interviews/reliance-

The CCI scrutinized the deal to understand whether the merger will adversely impact competition in the market. As per Section 6 of the Competition Act, 2002, it is a mandatory requirement that enterprises entering into a merger meeting the minimum threshold must obtain prior approval from the Commission.[71] This provision aims to achieve ex-ante regulation, to prevent the possibility of anticompetitive harms from taking place. The CCI's review however was restricted in its approach. It observed that both parties involved in the merger operated in completely different markets that had low entry barriers, ease of entry and exit and high competition.[72] The CCI failed to give due consideration to the fact that such a merger will essentially lead to both parties gaining control over large amounts of user data. This is in line with the competition authority's traditional position of taking into consideration only price factors. The Commission observed that the merger will lead to procompetitive effects on the market and facilitate the Digital India project.[73] However, antitrust inquiries are required to look at not just the immediate impact of a merger on the consumer but also the impact such an agreement can have in the future.

I. Relevant Market

In its submission under Section 6(2) of the Competition Act, 2002, Jaadhu Holdings submitted that it was not necessary to define the relevant market because the acquisition was only of minority shares and the entities

jio-says-no-preferential-access-to-facebook-whatsapp/articleshow/75305116.cms?from=mdr
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[71] Competition Act, 2002, § 6, No. 12, Acts of Parliament, 2002 (India).

[72] *Summary of the Combination between Jaadhu Holdings and Jio Platform*, COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/sites/default/files/notice_order_summary_doc/C-2020-06-747.pdf.

[73] *Id.*

would continue operating independently, not affecting competition dynamics in any relevant market.[74] However, if the CCI was to define a market, it should be defined as the 'market for user attention'. This classification is broad and vague. The market for user attention would essentially encompass all digital products and services that cater to users. Jaadhu Holdings went on to state that even if the Commission considered a narrower market such as consumer communication services, the minority acquisition would still not trigger anti-competitive concerns.[75] The Commission adopted the narrow market definition of consumer communication applications as it did in *Vinod Gupta v. Whatsapp Inc.*[76] In the relevant market, the combined share of Whatsapp and Facebook Messenger was estimated to be 45% to 50%. Whereas Jio had upto 5% share of the relevant market. However, despite the narrow market definition, the Commission's findings could not demonstrate that the merger resulted in anticompetitive effects on the market and the acquisition was approved.[77]

In its market analysis, the Commission did touch upon network effects and data sharing between the parties. It was also cognisant of a potential threat of data sharing, however, the Commission refused to go beyond this to analyse the privacy drawbacks of such sharing. The Commission noted that if

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[74] *Notice under Section 6(2) of the Competition Act, 2002 by Jaadhu Holdings LLC*, COMPETITION COMMISSION OF INDIA (June 24, 2020), https://www.cci.gov.in/sites/default/files/Notice_order_document/order-747.pdf?download=1.

[75] *Id.*

[76] Shri Vinod Kumar Gupta, Chartered Accountant Vs. WhatsApp Inc., Case No. 99/2016 (CCI).

[77] *Notice under Section 6(2) of the Competition Act, 2002, filed by Jaadhu Holdings LLC*, COMPETITION COMMISSION OF INDIA (June 24, 2020), https://www.cci.gov.in/sites/default/files/Notice_order_document/order-747.pdf.

anticompetitive effects arose out of data sharing between these entities, it would be covered under Sections 3 and 4 of the Competition Act, 2002.

II. Analysis of Facebook-Reliance Jio Deal

The Facebook-Jio transaction is similar to the Google-DoubleClick merger in many ways. Both took place between entities functioning in different markets and did not *per se* reduce the competition in their respective markets. In fact, the regulatory authorities in both mergers recognised the potential for pro-competitive effects of the merger.[78]

The CCI refused to examine data as a crucial factor whilst examining the effects on the market mainly because the parties stated that data sharing was not the purpose of the agreement. The potential effects of the merger in terms of reduced privacy and increased market power as a result of the data acquired were considered insufficient to prevent the merger.[79] In the case of *FTC v. Procter and Gamble*, the Court of Appeals had reversed the lower court's findings of illegality in the merger by stating that it was based upon 'treacherous conjecture'. The Court emphasised that the illegality of a merger cannot be based upon mere suspicion or possibility.[80] In the Facebook-Jio merger too, the CCI refused to declare the merger as illegal due to no immediate evidence that the following will adversely impact the market.

The CCI should be wary of accepting such representations made by the parties as it is non-binding. This concern was also expressed by

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[78] *Summary of the Combination between Jaadhu Holdings, LLC and Jio Platforms Limited*, COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/sites/default/files/notice_order_summary_doc/C-2020-06-747.pdf.
[79] *Id.*
[80] FTC v. Proctor and Gamble Co., 386 US 568 (1967).

Commissioner Pamela Jones Harbour in Google-DoubleClick.[81] These representations do not prevent parties from subsequently engaging in anti-competitive activities due to the increased power acquired from consumer data sharing.

III. Increased Network Effects

A multi-sided market/platform economy usually has two defining features: (i) distinct groups of consumers that are related either directly or indirectly and (ii) network effects are either positive or negative between these different groups.[82] The most commonly cited example of a multi-sided platform economy is the credit card market/video games market.[83] Multi-sided platforms connect various players across different markets by addressing problems of interconnected demand. For instance, Amazon connects merchants, consumers, and advertisers on a single platform. Here, the merchants wish to sell their products as well as advertise their products on a platform that helps consumers compare varied sellers. There exist reduced negative externalities through the establishment of a digital platform.

In the present case, JioMart will act as a multi-sided platform connecting (i) Consumers of various *Kirana* shops; (ii) Various shop vendors; and (iii) Advertisers including *Kirana* shop vendors. Multi-sided platforms

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[81] Dissenting Statement of Commissioner Pamela Jones Harbour, In the Matter of Google-DoubleClick, FTC File No. 071-0170, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf .

[82] OECD, Policy Roundtable on Two-sided markets, (Dec. 17, 2009), DAF/COMP (2009)2 0, https://www.oecd.org/daf/competition/44445730.pdf.

[83] Patrick R Ward, *Testing for Multi-sided Platform Effects in Antitrust market definition*, THE UNIVERSITY OF CHICAGO LAW REVIEW.

aim to internalise the externalities that usually exist in a market,[84] for example, the consumer's demand for 'digital payment at the local store/*Kirana* shop' and the vendor's demand for network services are linked.[85] The platform provider internalises the costs that arise out of network externality and maintains consumers on both sides of the market.

These multi-sided platforms rely on the increase in the number of users on one side of the market to enhance profitability for users on the other side. For instance, if a large number of an individual's acquaintances are on Facebook, one is inclined to join the platform which in turn induces other users to join the platform, making it an appealing platform for advertisers.[86] Multi-sided platforms rely on their ability to compound data from different consumer sets to improve their services to customers on both sides of the platform.[87] The data collected and analysed by digital platforms is often the personal data of consumers.[88] This raises privacy costs for customers. Consumers disclose varied information either directly (by creating an account and filling in personal information) or indirectly (by the entity tracking consumer behaviour, likes, preferences and more) at zero costs to the platform. The platform then utilises this data to obtain revenue through targeted

[84] *Id.*
[85] *Id.*
[86] RICHARD WHIST & BAILEY, COMPETITION LAW, (9th ed. 2018).
[87] Ingae Graef, *Market definition and market power in Data: The case of Online platforms*, WORLD COMPETITION LAW AND ECONOMIC REVIEW 476, 477.
[88] Bruno Lasserre and Andreas Mundt, *Competition Law and Big Data: The Enforcers' View*, RIVISTAITALIANA DI ANTITRUST ITALIAN ANTITRUST REVIEW, 2017, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Competition_Law_and_Big_Data_The_enforcers_view.pdf?__blob=publicationFile&v=2 .

advertisements, discriminatory pricing and other practices, negatively affecting consumers.[89]

IV. Data as a Source of Market Power

There are two key factors that competition authorities must take into consideration while determining whether the data acquired as a result of a combination adds to or preserves the market power of the undertaking. Firstly, the volume and nature of the data and secondly, the competitors' access to this data.[90] Through the present deal with Facebook, Jio will gain access to extensive nuanced data on consumer habits[91] that its competitors in the retail market do not possess,[92] thus, posing serious competition concerns by raising barriers to entry in the market for retail goods in India. How Jio will have access to such data will be further examined in the paper. Access to Facebook's data on consumer behaviour will give Jio an upper hand in the retail market and reinforce its position in this market[93] as the data obtained will be used to

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[89] Nathan Newman, *The Cost of Lost Privacy: Consumer Harm and the rising Economic Inequality in the Age of Google*, 20 WM. MITCHELL L. REV. (2014).

[90] Autorité de la concurrence &Bundeskartellamt, *supra* note 4, at 13; Aymeric de Moncuit, *supra* note 4.

[91] Asuncion Esteve, *The Business of Personal Data: Google, Facebook, and Privacy Issues in the EU and the USA*, 7 INTERNATIONAL DATA PRIVACY LAW 36 (2017); Cristian Santesteban, Shayne Longpre, *How Big Data Confers Market Power to Big Tech: Leveraging the Perspective of Data Science*, 65 THE ANTITRUST BULLETIN 459 (2020); Ira S. Rubinstein & Nathaniel Good, *Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents*, 28 BERKELEY TECHNOL. LAW J. 1333 (2013); Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html.

[92] Inge Graef, *Market Definition and Market Power in Data: The Case of Online Platforms*, 38 WORLD COMPETITION LAW AND ECONOMICS REVIEW 473, 479 (2015).

[93] A.P. Grunes & M.E. Stucke, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, 14 ANTITRUST SOURCE 1-14 (2015); Lima Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 785 (2017); Trefis Team, *Google's Strategy Behind The $3.2 Billion Acquisition Of Nest Labs*, FORBES (Jan. 17, 2014), https://www.forbes.com/sites/greatspeculations/2014/01/17/googles-strategy-behind-the-3-2-billion-acquisition-of-nest-labs/?sh=5c37b3fa1d45; Andrés Arrieta and Mitch Stoltz,

improve its products that are offered to consumers under its private label.[94] Reliance will then be able to dominate the retail market with its private label products.[95] This is termed as cross usage of data and can have a foreclosing effect. Jio could also utilize Facebook's advertisement services to nudge consumers[96] to purchase its private label products through targeted advertisements.

V. Data Sharing and Privacy Concerns

The shortcomings of antitrust law can be overcome by using data protection laws. Presently, there exists no-data sharing agreement between the two parties, however, if such an agreement is entered into by the players, it needs to comply with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (**"SPDI Rules, 2011"**). The SPDI Rules, 2011 merely provide that the privacy policy and data sharing terms concerning sensitive personal data must be known to the provider of information and such data shall be shared after the latter's consent is obtained.[97] The present regulatory framework lacks an outline of the data principal's rights and data fiduciary obligations concerning

Google-Fitbit Merger Would Cement Google's Data Empire, ELECTRONIC FRONTIER FOUNDATION (Apr. 7, 2020), https://www.eff.org/deeplinks/2020/04/Google-fitbit-merger-would-cement-googles-data-empire.

[94] Kalpana Pathak, *For Reliance Retail's JioMart, private labels are the way to go*, LIVEMINT (May 25, 2020), https://www.livemint.com/companies/news/for-reliance-retail-jiomart-pvt-labels-are-the-way-to-go-11590344650286.html .

[95] Abhirup Roy and Aditya Kalra, *How Ambani's Snac Tac is Giving Maggi A Run For Its Money In India's Retail Market,* LIVEMINT, (March 22, 2021), https://www.livemint.com/companies/news/mukesh-ambani-s-not-so-secret-weapon-to-grab-a-bigger-slice-of-india-s-retail-market-11616384823101.html.

[96] J.E Richard & Sarita Guppy, *Facebook: Investigating the Influence on Consumer Purchase Intention,* 4 ASIAN J. BUS. RES. 1, (2014).

[97] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

the handling of personal data. The Personal Data Protection Bill, 2019 that addresses these issues is yet to be promulgated into a legislation.

At the outset, both parties had specified to the CCI that data sharing was not the purpose of the agreement. Further, they elucidated that only 'limited data' will be shared to carry out e-commerce transactions and the following data will be proportionate to the purpose.[98]

The parties did not specify what data amounts to 'limited data' raising fundamental privacy concerns. Commercial entities often collect and process what is known as 'personal data' as per India's Draft Personal Data Protection Bill, 2019. The Bill defines personal data as:[99]

> Data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling.

It is important to have an overview of Facebook, Whatsapp, and Reliance Jio's current data-sharing policies to understand whether data sharing between these two entities is a foreseeable possibility. According to

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[98] *Notice under Section 6(2) of the Competition Act, 2002 filed by Jaadhu Holdings LLC*, COMPETITION COMMISSION OF INDIA, (June 24, 2020), https://www.cci.gov.in/sites/default/files/Notice_order_document/order-747.pdf?download=1 ; Aditya Chunduru, *Facebook assures CCI its deal with Jio involves Exchange of only Limited Data*, MEDIANAMA, October 8, 2020, https://www.medianama.com/2020/10/223-cci-facebook-jaadhu-jio-platforms-limited-data/; Payaswini Upadhyay, *Data Sharing Not The Purpose Of the Deal, Reliance Jio, Facebook tells CCI*, BLOOMBERG QUINT (Oct. 7 2020), https://www.bloombergquint.com/law-and-policy/data-sharing-not-the-purpose-of-deal-reliance-jio-facebook-tell-cci.

[99] Personal Data Protection Bill, 2019, Clause 2(28).

Facebook's data policy, it engages in sharing certain consumer data with its third-party partners.[100] Third-party partners refer to entities that help Facebook provide and improve various Facebook business tools to grow their businesses.[101] The definition of third-party partners is broad and can be said to include Reliance-Jio's new venture JioMart. It aims to connect consumers to local *Kirana* shops and payments for these goods will be facilitated through WhatsApp Pay.[102] The data that will be shared by Facebook with 'partners offering goods and services in Facebook's product',[103] this includes information collected through Facebook profiles of users and other information necessary to complete the said transactions. WhatsApp's privacy policy also states that it engages in sharing and receiving consumer information to assist and operate Facebook's varied services and companies.[104] Further, WhatsApp's recent changes to its privacy policy make it evident that transaction and service data will be shared with Facebook.[105]

Further, Reliance Jio in its privacy policy states that it engages in collecting personal and non-personal data from consumers for a wide variety of purposes including analytics and reviews for improvement of service and improvement of user experiences by tailoring advertisements.[106] The policy

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[100] Data Policy, FACEBOOK, https://www.facebook.com/policy.php.
[101] Ariel Ezrachi and Viktoria HSE Robertson, *Competition, Market Power and Third-Party Tracking*, 42 WORLD COMPETITION 5, 7 (2019).
[102] Kalpana Pathak and Abhijit Ahaskar, *Reliance aims to embed Jiomart in Whatsapp*, LIVEMINT, (Jan. 18, 2021), https://www.livemint.com/companies/news/reliance-aims-to-embed-jiomart-in-whatsapp-11610929194919.html.
[103] *Security and Privacy*, *The Facebook Companies*, WHATSAPP, https://faq.whatsapp.com/general/security-and-privacy/the-facebook-companies.
[104] *Privacy Policy*, WHATSAPP, https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en.
[105] *Id.*
[106] *Privacy Policy*, RELIANCE JIO, https://www.jio.com/en-in/privacy-policy.

goes on to state that "In a scenario where we or our assets are merged or acquired by the other business entity, or during restructuring of business or reorganization, we may have to share information provided by you with the other business entities."[107]

The above-mentioned privacy policies indicate that contrary to the claim that data sharing was not the purpose of the merger, consumer data will be shared between the two entities. The present SPDI Rules, 2011 merely require updating of privacy policies when sensitive personal data sharing terms change, this does not adequately safeguard an individual's personal data in case body corporates go back on their previously promised data-sharing agreements.

The loopholes in the present SPDI Rules, 2011, and the absence of a data protection framework can lead to multiple consumer harms such as loss of privacy, targeted advertisement and price discrimination.[108] Apart from the said concerns, competitive concerns may also arise, as WhatsApp hosts multiple business transactions on its platform, the said transaction details, according to its updated privacy policy, can be shared with Facebook, which in turn can share the said data with Reliance Jio without violating its own privacy policies and terms of service. WhatsApp's position as a platform for communication between various businesses and consumers across services can lead to it leveraging its market position to favour Reliance Jio's product JioMart which will be facilitated on WhatsApp, this can be done by sharing

[107] *Id.*
[108] Micah Altman, Alexandra Wood, David R O'Brien, Urs Gasser, *Practical Approaches to Big Data Privacy Over Time*, 8 INTERNATIONAL DATA PRIVACY LAW 29, 38 (2018).

third party business details with JioMart in which Facebook, WhatsApp's parent company has a stake.

Incorporation of a dynamic analysis by competition authorities would benefit consumers in the long run[109] and ensure a more holistic approach to competition analysis. The dynamic analysis focuses on the future capabilities of entities and is therefore predictive in nature. In contrast, the focal point of static analysis of competition, especially in the case of mergers, is concentration in the market. As J. Gregory Sidak & David J. Teece observe, "such an analysis is unlikely to help consumers".[110] The dynamic analysis will allow regulators to examine the impact a merger will have on the privacy enjoyed by consumers and the use of consumer data.[111]

B. Facebook v. Bundeskartellamt [2020 - Germany]

In 2019, the EC initiated a formal investigation into Amazon's misuse of third-party seller data.[112] The FTC has also followed suit.[113] Amazon has been accused of using third-party seller data that it obtained as a marketplace,

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[109] Douglas H. Ginsburg and Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. (2012).

[110] J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION LAW ECON. 581, 611 (2009).

[111] Andressa Lin Fidelis & Zeynep Ortaç, *Data-driven Mergers : A Call For Further Integration Of Dynamics Effects Into Competition Analysis* (2017), https://www.semanticscholar.org/paper/Data-driven-mergers-%3A-a-call-for-further-of-effects-Fidelis-Orta%C3%A7/78925edd4455c67e18be76e89cbf5aa8a0dd65cf.

[112] *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/mt/ip_19_4291.

[113] Spencer Soper and Ben Brody, *Amazon Probed by U.S. Antitrust Officials Over Marketplace*, BLOOMBERG (Sept. 11, 2019), https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants.

to boost its position in retail.[114] While Amazon has claimed that its internal policy prohibits the transfer of data from Amazon marketplace to its retail wing, in practice, the policy is often flouted.[115] There are numerous takeaways from the Facebook case that would come in handy to regulators in examining Amazon's practices. One of the most important is that competition authorities can and must use data protection obligations as a parameter while assessing an abuse of dominance.[116]

The recent decision of the Cartel Senate of Germany's Federal Court of Justice (**"FCJ"**) in *Facebook v. Bundeskartellamt*[117] provides an invaluable and novel means to prevent abusive practices such as the excessive collection of consumer data by dominant enterprises. The authors argue that the reasoning of this judgment if applied to the Amazon case can ensure that third-party seller data collected by Amazon marketplace is not transferred to Amazon retail. For this purpose, this section of the paper, will first analyse the Facebook decision and then delve into how data protection principles can be applied to the Amazon case.

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[114] Valentina Pop and Sam Schechner, *Amazon to Face Antitrust Charges From EU Over Treatment of Third-Party Sellers*, THE WALL STREET JOURNAL (June 11, 2020), https://www.wsj.com/articles/amazon-to-face-antitrust-charges-from-eu-over-treatment-of-third-party-sellers-11591871818.

[115] Dana Mattioli, *How Amazon Wins: By Steamrolling Rivals and Partners,* THE WALL STREET JOURNAL, (Dec. 22, 2020), https://www.wsj.com/articles/amazon-competition-shopify-wayfair-allbirds-antitrust-11608235127?mod=djemalertNEWS.

[116] Moncuit, *supra* note 4, at 29.

[117] Facebook v. Bundeskartellamt, KVR- 69/19 (2020), https://www.bundesgerichtshof.de/SharedDocs/Termine/DE/Termine/KVR69-19.html;jsessionid=F09CB5804920B1DDFF6B994C11C0E3D8.2_cid286?nn=11439166; Rupprecht Podszun, *Facebook Case: The Reasoning,* D' KART (Aug. 28, 2020), https://www.d-kart.de/en/blog/2020/08/28/facebook-case-the-reasoning/.

Facebook's terms and conditions of use permitted it to obtain data that consumers had given to Instagram, WhatsApp, and other services owned by Facebook; which *inter alia* included third-party websites that used Facebook Tools.[118] This data collected was then merged with personal data that was obtained on Facebook without further consent of users. The FCJ held that Facebook was undoubtedly in a dominant position in the market for social networks. By virtue of this position that Facebook occupied, it was able to impose unfair terms and conditions on consumers that were in violation of the GDPR.[119] This, in turn, was held to be an abuse of dominant position in contravention of Section 19(1) of the German Competition Act (**"GWB"**) which is pari materia to Article 102(a) Treaty on the Functioning of the European Union (**"TFEU"**).[120]

Central to the Court's finding was the interpretation of 'consent', a term that is frequently used in data protection laws. The GDPR recognizes consent as a legal ground[121] on which the processing of data can be conducted. As the terms and conditions were imposed as a result of Facebook's dominance, any consent to such conditions would be vitiated.[122] Such consent was found not to be free consent within the meaning of the GDPR. Working Party 29 had

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[118] Christophe Carugati, *The 2017 Facebook Saga: A Competition, Consumer and Data Protection Story*, 2 EUR. COMPETITION & REG. L. REV. 4 (2018).

[119] Fabiana Di Porto & Gustavo Ghidini, *Big Data Between Privacy And Competition : Dominance By Exploitation? Which Remedies?*, 23 ASCOLA, (2018), https://www.law.nyu.edu/sites/default/files/upload_documents/Di%20Porto%20and%20Ghidini.pdf; Maximilian N. Volmar & Katharina O. Helmdach, *Protecting Consumers And Their Data Through Competition Law? Rethinking Abuse Of Dominance In Light Of The Federal Cartel Office's Facebook Investigation*, 14 EUR. COMPET. J. 195, 202 (2018).

[120] *Supra* note 117.

[121] General Data Protection Regulations, 2016, art. 6(1)(a).

[122] *Article 29 Data Protection Working Party, Opinion 15/2011 on the definition of consent*, 01197/11/EN WP187 at 18 (July 13, 2011), https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf .

previously objected to WhatsApp's Terms of Service and Privacy Policy on the same grounds.[123]

Despite the FCJ's judgment, appearing to focus primarily on data protection, the Court has also adequately addressed the competition issues that arose. Super profiling and tracking[124] that is done by Facebook have been recognized as an indicator of market power.[125] Further, there are competitive harms that arise as a result of this which is in the form of exploitation of consumers[126] and exclusion of competitors.[127] It is important to recognize that the heart of this tracking is consumer data. In this case, the merging of data by Facebook would result in a significant increase in identity-based network effects. This would allow Facebook to cement its dominant position in the market for social networking, raising barriers to entry. The FCJ opined that harm is also caused to the online advertising market as Facebook can improve its targeted advertising service.

The EC has adopted similar reasoning as that of the FCJ though it did not do so explicitly. In the Google search case,[128] the restriction on data portability[129] that was imposed on users of Google's AdWords API was

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[123] *Article 29, Data Protection Working Party, Objections to changes in the WhatsApp Terms of Service and Privacy Policy* (Oct. 24, 2017), https://ec.europa.eu/newsroom/just/document.cfm?doc_id=47964.
[124] Reuben Binnset al, *Measuring Third Party Tracker Power Across Web and Mobile*, 18 ACM TRANSACTIONS ON INTERNET TECHNOLOGY 27 (2018).
[125] OECD, *Big Data: Bringing Competition Policy to the Digital Era*, DAF/COMP/M (2016)2/ANN4/FINAL at 3 (26 Apr. 26, 2017); Fabiana Di Porto, *supra* note 116, at 5.
[126] Frank Pasquale, *Privacy, Antitrust, And Power*, 20 GEO. MASON L. REV 1016 (2013).
[127] Ariel Ezrachi and Viktoria HSE Robertson, *Competition, Market Power and Third-Party Tracking*, 42 WORLD COMPETITION 5, 7 (2019).
[128] Press Release 10/1624, *Antitrust: Commission Probes Allegations of Antitrust Violations by Google*, EUROPEAN COMMISSION (Nov. 30, 2010).
[129] General Data Protection Regulations, 2016, art. 20 & recital 68,

considered anti-competitive. Google restricted the transfer of advertisement campaigns from AdWords to other competing search advertising competitors. This restriction raised concerns of the EC as such restrictions would lead to high switching costs thereby creating a lock-in of advertisers as they would not be able to transfer certain data to Google's competitors. This lock-in would increase barriers to entry. Google submitted a commitment that it would remove the clauses in the agreement that restricted the right of portability. This illustrates that the EC has previously viewed violations of the GDPR as a violation of competition law when such practices lead to a distortion of competition in the market.[130] It is crucial to note that the GDPR was not in force at the time the matter was concluded. Furthermore, the right of data portability applies to personal data however the Regulation on the free flow of non-personal data[131] creates a right of data portability[132] over non-personal data as well.

C. Applying the Ratio in Facebook to Amazon's Misuse of Third-Party Seller Data

There are three prerequisites that emerge from the Facebook ratio that is necessary for a finding of exploitative abuse under Article 102 of the TFEU. Firstly, the entity in question must be dominant in the relevant market. Secondly, the privacy or data protection violation must flow from this

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[130] Konstantina Bania, *The Role of Consumer Data In The Enforcement Of Eu Competition Law*, 14 EUR. COMPET. J. 38, 58 (2018); Aysem Diker Vanberg& Mehmet Bilal Ünver, *The Right To Data Portability In The GDPR and EU Competition Law: Odd Couple Or Dynamic Duo?*, 8 EUROPEAN JOURNAL OF LAW AND TECHNOLOGY (2017).

[131] *The Regulation on Free Flow of Non-personal Data Regulation* (EU) 2018/1807 (Nov. 14, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1807

[132] Press Release, *Digital Single Market: Commission Guidance on Free Flow of Non-Personal Data*, EUROPEAN COMMISSION (May 29, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2749.

dominance and lastly, but most importantly, there must be competitive harm as a result of this act.

Amazon acts as a digital ecosystem[133] thus making it difficult to define the relevant market[134] and establish a finding of dominance. Competition authorities must be cognisant of the role that Amazon plays as a multi-sided platform. Multi-sided platforms have at least two distinct customer groups[135] and thus separate markets must be defined for each customer group.[136] In this case, the customers of the Amazon marketplace are buyers on one hand and third-party sellers on the other. If the relevant product market in the case is defined based on customer group, the market would be an online marketplace platform.[137] However, if a single market encompassing all customer groups is defined, the relevant market would be retail e-commerce.[138] Adopting such a definition would be to adopt an overly broad market definition thus making it almost impossible to establish a finding of dominance.

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[133] Dr Christian Karbaum & Dr Max Schulz, *Ecosystems – New Challenges For Competition Law Enforcement, European Commission: Shaping Competition Policy In The Era Of Digitisation* p. 4, EUROPEAN COMMISSION (Sept. 30, 2018), https://ec.europa.eu/competition/information/digitisation_2018/contributions/glade_michel_wirtz.pdf.

[134] *Antitrust and "Big Tech",* CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019); Ashlyn Myers, *Amazon Doesn't Have an Antitrust Problem: An Antitrust Analysis of Amazon's Business Practices*, 41 HOUS. J. INT'L L. 387 (2019).

[135] Nizar Abdelkafi et al., *Multi-Sided Platforms*, 29 ELECTRON MARKETS 553 (2019).

[136] Sung Yoon Yang, *Rethinking Modes of Market Definition for Multi-Sided Platforms*, 4 INTERNATIONAL JOURNAL OF TRADE, ECONOMICS AND FINANCE, 164 (2018); Thomas Hoppner, *Defining Markets for Multi-Sided Platforms: The Case of Search Engines,* 38 WORLD COMPETITION, 349 (2015).

[137] Jacques Crémer et al., *Competition Policy for the Digital Era: Final Report*, EUROPEAN COMMISSION (2019), http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf .

[138] Ashlyn Myers, *supra* note 130, at 387.

The type of platform is an important factor that should be considered while deciding whether to define a separate market based on customer group.[139] When the platform is a matching platform with differentiated possibilities of substitution, a separate market approach should be applied. This approach has been adopted by the Bundeskartellamt in its proceedings against Amazon concerning its treatment of third-party sellers. It defined the relevant market as online marketplace services and found that Amazon was in a dominant position.[140]

Multiple antitrust regulators in the EU have also found Amazon to be dominant as a platform. The Italian Competition Authority in its investigation against Amazon for leveraging its position as a marketplace into the market for logistics found that Amazon was dominant in the market for e-commerce platforms.[141] The Austrian Competition Regulator[142] observed that irrespective of a precise market definition, Amazon occupies a position of relative market dominance. It took into consideration the role that Amazon plays as a gatekeeper and the absence of any real alternatives from the sellers' perspective.

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[139] Jens Uwe-Franck & Martin Pietz, *Market Definition Market Power in the Platform Economy*, CENTRE ON REGULATION IN EUROPE (2019), https://cerre.eu/wp-content/uploads/2020/05/report_cerre_market_definition_market_power_platform_economy.pdf.

[140] Amazon, B2 - 88/18, BUNDESKARTELLAMT (July 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html;jsessionid=CADD9A91BACC6091246C10AD8696C001.1_cid381?nn=3600108.

[141] Italian Competition Authority Press Release, *A528 - Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services* (Apr. 16, 2019), https://en.agcm.it/en/media/press-releases/2019/4/A528.

[142] Federal Competition Authority, *Amazon.de Marketplace*, ¶ 7 (July 17, 2019), https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf.

Traditional theories of harm often do not work in the digital context. Most competition law regimes prohibit the exchange of competitively sensitive information between competitors as it facilitates concerted action among firms[143] resulting in anti-competitive effects. Information relating to prices and quantity fall within the ambit of sensitive commercial information.[144] When information exchanges relating to current and future price parameters take place it is likely to be viewed as anti-competitive.[145]

While the information relating to third-party sellers is competitively sensitive, the sharing of data by Amazon marketplace to Amazon retail may not fall within this theory of harm as Amazon retail falls within the umbrella brand of Amazon. The primary requirement is that the exchange of commercial information must take place between competitors as the assessment of its legality takes place under the framework of cartelization in most jurisdictions,[146] however, this is absent in the present case. In the *Google Shopping case*,[147] the EC ordered equal treatment of Google's own comparison shopping service and its competitors. While the ratio in this decision may seem more appealing to regulators due to the similarity in facts, it will not solve the problem of addressing Amazon's misuse of third-party seller data. This

[143] Hercules Chemicals NV v. Commission of the European Communities, (T-7/89) [1991] ECR II-1711 ¶ 256 (17 December 1991).
[144] Sofia Competition Forum, *Guidelines on Information Exchange Between Competitors*, UNCTAD, https://unctad.org/system/files/non-official-document/ccpb_SCF_InfoSharing_en.pdf.
[145] United States v. Sinclair Broadcast Group, Inc., et al., ECF No. 1, No 1:18-cv-02609 (D.D.C. Nov. 13, 2018).
[146] OECD, *Information exchanges between Competitors under Competition Law*, DAF/COMP (2010)37 (July 11, 2011), http://www.oecd.org/competition/cartels/48379006.pdf.
[147] *Google Search (Shopping)*, Case at. 39740, ¶ 671, EUROPEAN COMMISSION (June 27, 2017), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

highlights the pretense of adopting a new theory of harm that factors in violation of data protection principles.[148]

The theory of harm that was adopted by the FCJ can be applied to this case. However, it is not as straightforward. Amazon marketplace cannot be held liable for non-compliance with the obligations of a controller under the GDPR as it applies to the processing of personal data.[149] However, the authors argue that Amazon's use of third-party seller data is in breach of its duties as an information fiduciary.[150] According to Balkin,[151] two requirements must be fulfilled to be termed as an information fiduciary. First, the relationship that exists must be one of trust, and second, the information should have been received during the subsistence of this relationship. Amazon marketplace fulfils both of these requirements.

In order to determine whether there exists a fiduciary relationship between parties, there must be an implicit or explicit invitation to trust. One factor that plays an important role in this context is the existence of

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[148] Preliminary Opinion of the European Data Protection Supervisor, *Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy*, ¶ 71 (March, 2014).

[149] General Data Protection Regulations, 2016, art. 1-4(1); Hoofnagle, C. J., Van der Sloot, B., & Zuiderveen Borgesius, *The European Union General Data Protection Regulation: What It Is and What It Means*, 28 INFORMATION & COMMUNICATIONS TECHNOLOGY LAW, 65- 98 (2019).

[150] Stigler Committee on Digital Platforms Final Report, STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE (Sept. 16, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E.

[151] Jack M. Balkin, *Information Fiduciaries and the First Amendment* 49 UC DAVIS L. REV. 1185, 1209 (2016); Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law* 19 STAN.TECH. L.REV. 431 (2016); Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE U. L. REV. 1057 (2019).

dependency.[152] As third-party sellers are highly dependent on the Amazon marketplace[153] as a channel through which they can reach consumers there is a heightened imbalance in power between the Amazon marketplace and the sellers. This was specifically pointed out by the Austrian FCA in its decision.[154] Due to this inherent vulnerability of third-party sellers, the law must impose fiduciary duties on Amazon.[155]

As Amazon has a fiduciary duty towards third-party sellers, therefore, it is immaterial that the data received by it is non-personal data. As an information fiduciary, Amazon marketplace has a duty to not to use data that was received by it as a marketplace to confer an undue advantage to its private label products. Such acts would be in contravention of its primary duty which is not to act adversely to the interests of third-party sellers.[156] Additionally, it would also amount to a breach of the duty to limit the sharing of data to a third party.[157]

While data protection and privacy laws must be applied as a parameter by competition regulators they must be mindful of the fact that a violation of the GDPR is not an automatic violation of Competition Law.[158] There are two

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[152] Jack M. Balkin, *The Fiduciary Model of Privacy*,134 HARV. L. REV. F 11 (2020) Claudia E. Haupt, *Platforms As Trustees: Information Fiduciaries And The Value Of Analogy*, 134 HARV. L. REV. F 34 (2020).
[153] *Supra* note 145.
[154] Federal Competition Authority, Amazon.de Marketplace ¶ 24 (July 17, 2019), https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf.
[155] Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 500 (2019).
[156] Jack M. Balkin, *supra* note 148.
[157] Ariel Dobkin, *Information Fiduciaries in Practice: Data Privacy and User Expectations*, 33 BERKELEY TECHNOL. LAW J. 3 (2018).
[158] Viktoria H.S.E. Robertson, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, 57 COMMON MARK. LAW REV. 161 (2020).

conditions for violations of privacy and data protection laws to constitute an abuse of dominance within the purview of competition law. First, the entity must be in a dominant position, and second, the end result of the acts that violate data protection principles must be a distortion of competition.[159]

Amazon marketplace plays a dual role of an intermediary that facilitates transactions between consumers and third-party sellers and at the same time, is a competitor of such sellers as it sells its own products on the platform. By self-preferencing[160] its private label products, Amazon violates platform neutrality.[161] It introduces competing products that do well on its marketplace based on the commercial information it obtains[162] thus, undercutting competitors. Due to the unique information that Amazon obtains as a platform, it has an unfair advantage which allows it to distort competition in two ways. First, it can drive out third-party sellers from the marketplace as it can sell the same product at a lower price[163] and source the product directly

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[159] Maximilian N. Volmar & Katharina O. Helmdach, *Protecting Consumers and Their Data Through Competition Law? Rethinking Abuse of Dominance in Light of The Federal Cartel Office's Facebook Investigation* 14 EUROPEAN COMP. JOURNAL 195 (2018).

[160] Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 YEARBOOK OF EUROPEAN LAW 448 (2019).

[161] *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, Press Release, EUROPEAN COMMISSION (June 27, 2017); *Market Study On E-commerce In India Key Findings And Observations*, COMPETITION COMMISSION OF INDIA (2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

[162] UNCTAD Secretariat, *Note On Competition Issues In The Digital Economy*, ¶ 18 TD/B/C.I/CLP/54 (May 1, 2019).

[163] Lina M. Khan, *The Separation Of Platforms And Commerce*,119 COLUM. L. REV. 993 (2019); Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MANAGEMENT JOURNAL (2018); Jennifer Rankin, *Third-party sellers and Amazon - a double-edged sword in e-commerce*, THE GUARDIAN (June 23, 2015), https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact; Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products* WALL STREET JOURNAL (April 23, 2020),

from the manufacturer completely eliminating third-party sellers. While price competition is beneficial to consumers,[164] such tactics by Amazon reduce the incentives of third-party sellers to innovate, which is the second way in which there is a distortion of competition.[165]

VI. ANALYSING THE MEANS OF COMBATING PRIVACY CONCERNS THAT ARISE IN DIGITAL PLATFORM ECONOMIES

Most cases show that competition authorities are aware of the competitive advantage of data but, they fail to foresee the privacy harms that will be caused to consumers in the future as a result of the merger.[166] The best example of this is Facebook/WhatsApp merger.[167] While this approach in itself is a step in the right direction, it is still insufficient. Consumer harm in the form of reduced privacy or breach of data protection principles must be woven into competition analysis both in the case of mergers as well as abuse of dominance cases. This can be done by adopting a dynamic analysis that factors in future privacy concerns.

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https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

[164] Andrei Hagiu, Tat-HowTeh & Julian Wright, *Should Platforms Be Allowed to Sell on Their Own Marketplaces?* (June 15, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606055.

[165] Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 214 (2019).

[166] Anca D.Chirita, *Data-Driven Mergers Under EU Competition Law*, (July 13, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199912*; Preliminary Opinion of the European Data Protection Supervisor, Privacy And Competitiveness In The Age Of Big Data: The Interplay Between Data Protection, Competition Law And Consumer Protection in the Digital Economy*, ¶ 64, EUROPEAN DATA PROTECTION SUPERVISOR (March, 2014), https://edps.europa.eu/sites/default/files/publication/14-03-26_competitition_law_big_data_en.pdf.

[167] European Commission, Case COMP/M.7217 Facebook/Whatsapp 3 October 2014, 2014/C 417/02.

The authors propose that if the below-mentioned conditions are met, competition authorities must simultaneously call for an investigation by data protection authorities into the merger/acquisition in the digital platform market. The conditions are:

1. There exists a digital platform/market that caters to different consumers and facilitates transactions between these two sets of consumers; and

2. The digital platform or entity is engaged in a zero-price market. That is, the platform does not charge its consumers in monetary terms; and

3. The digital platform relies on its acquisition of consumer data through various means to obtain revenue, either by engaging in targeted advertisements or selling the said data to third-party entities without the consent of the consumer.

The above-mentioned conditions have been observed to be recurring traits in digital platform mergers wherein subsequent privacy concerns arose and hence have been suggested as prerequisites before a privacy investigation is initiated.

However, such an approach is bound to result in jurisdictional conflict between competition regulators and data protection authorities. Competition authorities are also reluctant to examine privacy aspects as they are sectoral regulators and thus their powers are limited by the statute under which they are established. Examining privacy issues could amount to a transgression of their powers. The authors thus propose that while competition authorities must take into consideration privacy issues when such issues are identified a

separate investigation by privacy authorities must take place.[168] This will ensure that appropriate remedies will be applied by the respective authorities.[169]

For instance, in the US, there exists a patchwork framework for the regulation of privacy interests, wherein the FTC covers the regulatory gaps.[170] The FTC is also responsible for regulating unfair practices in the market. The authors suggest that along with investigating competition concerns, specifically for digital markets, a separate investigation must be initiated by the FTC simultaneously[171] to look at the privacy challenges that the merger/amalgamation poses.

In India, the Personal Data Protection Bill, 2019 is presently under consultation before the Joint Parliamentary Committee. Until the data protection authority is established, a separate privacy investigation wing must be established to look into privacy concerns arising in mergers or abuse of dominance cases in digital markets. However, once the Data Protection Authority (**"DPA"**) is established, this role should be taken over by the DPA. The DPA will be vested with the power to suggest regulatory safeguards such

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[168] OECD, *Consumer Data Rights and Competition - Background note*, ¶ 193, DAF/COMP (2020)1 (April 29, 2020); OECD, *Quality Considerations In Digital Zero-price Markets*, ¶ 145, DAF/COMP (2018)14 (Nov 28, 2018).

[169] Marco Botta & Klaus Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, 64 THE ANTITRUST BULLETIN 428 (2019).

[170] U.S. SAFE WEB Act, Amendments of 2006.

[171] *Stigler Committee on Digital Platforms Final Report*, STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE (Sept. 16, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E.

as a firewall or consent agreement between the merging entities to safeguard consumers against a threat of privacy or data breaches.

The EU has proposed a new competition regulation for digital markets in the form of the Digital Markets Act.[172] Marketplaces, social media platforms and search engines will fall within the ambit of this regulation. The Regulation goes a long way in preventing the misuse of consumer data by dominant platforms. It prevents the combining of user data obtained from the core business with different services carried out by the gatekeeper.[173] It also prevents a platform from using data obtained from its business users to undermine them.[174] The Regulation ensures that any planned acquisitions or mergers by such gatekeepers will have to be intimated to the EC irrespective of whether it meets the thresholds under Merger Regulations. This will ensure that data-intensive mergers undergo scrutiny by Competition authorities.

[172] *Proposal for a Regulation Of The European Parliament And Of The Council on contestable and fair markets in the digital sector (Digital Markets Act)*, EUROPEAN COMMISSION (Dec. 12, 2020). https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en; https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349.
[173] *Id.*, ¶ 36.
[174] *Id.*, ¶ 43.