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Antitrust and Zero-price Digital Platforms: An Indian Regulatory Approach

Bhusan Jatania

IDFC Institute

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Abstract

This paper looks at digital platforms that provide “free” services and analyses the application of Indian competition law to them. It elaborates on why the scale and characteristics of zero-price digital platforms pose unique challenges to traditional regulatory practices. A critical examination of the traditional approach to estimating consumer welfare loss and why that falls short in this case follows. The paper ends with a discussion on the evolution of Indian competition law and arguments for why a ‘form-based approach’ is more appropriate than an ‘effects-based approach’ while regulating zero-price digital platforms. It specifically advocates for adopting users’ loss of control over data as a *per se* standard to limit abuse of market power by zero-price platforms.

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1. Introduction

India is one of the fastest growing digital economies in the world¹ with the second largest digital consumer base (behind China), possessing over 1.2 billion mobile and 560 million internet subscriptions.² Between 2013 and 2018, over 207 million Indians went online in addition to a quadruple increase in smartphone adoption.³

In terms of mobile applications, users in India downloaded 12.3 billion applications in 2018.⁴ It is estimated that the average Indian user has 68 applications on their phone of which 35 are actively used each month.⁵ In particular, social media usage in the country has exploded in the past few years. India now has 294 million active users on social media platforms with over 200 million active users on instant messaging platforms such as WhatsApp.⁶ Additionally, the average Indian spends around 17 hours per week on social media, more than both the United States and China.⁷ The number of downloads and usage has been spurred by major drops in mobile data costs due to technical innovations by telecom providers in India.⁸

The most frequently downloaded and used digital products in India continue to be offered at zero-price — that is, products available to consumers without a monetary charge — from platforms such as Google and Facebook.⁹ India is now Facebook's largest user-base with over 241 million active users, surpassing the United States.¹⁰ Capitalising

1 According to the Country Digital Adoption Index, India has the second highest rate of growth over the past four years. In particular, its digital score rose by 90% between 2014 and 2017.

2 Indian telecom services performance indicators, Telecom regulatory Authority of India, as of September, 2018; Strategy Analytics, as of December 2018; digital in 2018: Southern Asia, eastern Asia, Northern America, We Are Social, December 2018.

3 Indian telecom services indicators, Telecom Regulatory Authority of India.

4 India's trillion Dollar Digital Opportunity, Ministry of Electronics and Information Technology, February 2019.

5 App Annie, *State of Mobile 2019* Report.

6 Digital in India. "Whatsapp now has 1.5 billion monthly active users, 200 million users in India." Financial Express, February 2018.

7 Digital in 2018: Southern Asia, Eastern Asia, Northern America, We are Social, January 2018.

8 Boston Consulting Group. *The Mobile Economy*. Accessed August 2019.

9 "The top 10 downloaded apps in 2018 were Facebook, Messenger, UC Browser, WhatsApp, SHAREit, TikTok, Bigo Live, Hotstar, Truecaller, and MX player. The 10 top most frequently used applications are Whatsapp, Facebook, SHAREit, Messenger, Truecaller, MX player, UC browser, Instagram, Amazon and Paytm made up the rest of the top 10. Source: App Annie, *State of Mobile 2019* Report.

10 Fuscald, D. "Facebook has more users in India than any other country". Investopedia, 2019. <https://www.investopedia.com/news/facebook-now-has-more-users-india-any-other-country/>

on the boost in Indian social media usage, Facebook now supports 12 Indian local languages and its Express WiFi project is being rolled out across 20,000 hotspots across the country.¹¹ Google controls close to 96% of the Internet search market in India with the product processing close to 5.6 billion searches per day worldwide.¹² Due to its dominance in the Indian market, Google is concentrating on increasing Indian language processing capabilities across its products since it estimates that Indian language users (who have already surpassed English search users) will reach 536 million by 2021.¹³ In particular, such users will contribute over 35% of the country's \$5.6 billion spent on digital advertising. Social media platforms are the biggest segment of digital advertising contributing over \$3.3 billion in 2019. By 2023, the digital advertising sector is expected to reach over \$10.5 billion, at a 25% year-on-year growth rate.¹⁴

This rapid growth of the digital economy, the concurrent concentration of market power in certain sectors and the tendency of this concentration to take place in multi-sided markets are global phenomena. Regulators across jurisdictions are examining the particular challenges they pose for competitive market structures and processes, innovation and productivity growth, and consumer welfare. In the context of the Indian market, Parsheera, Shah and Bose (2017) have presented a way forward for adapting the Competition Commission of India's (CCI) regulatory approach to the 'new economy'. However, their work looks at positive price products and markets. Applying existing regulatory logic to zero-price platforms such as Google and Facebook present unique challenges.

A key objective of the paper is to keep the door open for potential competition regulation of zero-price platforms in India, as the notion that such platforms fall within the purview of antitrust laws has been successfully contested elsewhere. In a suit by a website for being downranked from Google search results resulting in

11 Choudary, K. "Facebook eyes more likes from Bharat to expand user base" Business Standard. October 2018; "Facebook partners with Airtel to roll out Express WiFi to deploy 20,000 hotspots in India", Financial Express, May 2017.

12 Google's share of the search market. Statista, 2019. <https://www.statista.com/statistics/220534/googles-share-of-search-market-in-selected-countries/>

13 "Google says Indian language users to reach 536 million by 2021" Financial Express, June 2018. <https://www.financialexpress.com/industry/technology/google-says-indian-language-internet-users-to-reach-536-million-by-2021/1222633/>

14 Statista outlook on Digital Advertising in India. June 2019. <https://www.statista.com/outlook/216/119/digital-advertising/india>

financial loss, a US federal court has concluded that antitrust law does not concern itself with the provision of free services and held that:¹⁵

Providing search functionality may lead to revenue from other sources, but KinderStart has not alleged that anyone pays Google to search. Thus, the Search Market is not a “market” for purposes of antitrust law.

The paper is structured as follows. Section 2 examines the interface of antitrust with data protection and is followed by a discussion on the characteristics of digital markets and zero-price platforms in Section 3. Section 4 explores the prevailing antitrust doctrines, surveying the strengths and limitations of both market structure and consumer welfare approaches to regulating anti-competitive behaviour. Section 5 examines the history of Indian jurisprudence on competition regulation, establishing a legal precedent for focusing on competitive processes rather than structural inputs to competition or outcomes such as consumer welfare that are unquantifiable when it comes to zero-price platforms. Section 6 applies existing Indian law to zero-price platforms by analysing the questions of consideration, relevant market, assessing dominance and setting standards for enforcement, all of which form part of an antitrust evaluation.

The paper concluded by arguing for adopting users’ loss of control over their data as the standard for antitrust intervention, to be applied on a case specific basis. In doing this, the paper aims to provide a roadmap for foregrounding control in regulation of zero-price platforms in India. The paper also acknowledges the limitations of this approach, being that the issue of users’ loss of control is not unique to zero-price platforms and that the approach may lead to overlap with regulatory framework for data protection.

2. Interface with Data Protection

One of the objectives of India’s proposed Personal Data Protection Bill, 2018 (PDPB) is “to protect the autonomy of individuals in relation with their personal data” (PDPB, 2018). This puts the paper’s recommendation to regulate zero-price platforms in India

¹⁵ KinderStart.com, LLC v. Google, Inc., 2007 WL 831806 (N. D. Cal.) [online] Available at: https://www.wsgr.com/attorneys/BIOS/PDFs/kinderstart_google.pdf [Accessed 30 June 2019]

through the lens of control over data seemingly at odds with a specialised legislation proposed with the same purpose. However, such a view fails to consider that the Competition Commission of India (CCI), which is tasked with protecting the interest of consumers, may be better placed in tackling systemic abuse of dominant position by firms when dealing with personal data, as is particularly applicable in the case of zero-price platforms.

In regard to the effectiveness of data protection laws, it has been argued that such laws are largely operationalised through the notice and consent mechanism which leaves “individuals’ privacy badly exposed, as individuals are forced to make overly complex decisions based on limited information” and that there is a need to re-examine the right mix of instruments to safeguard data privacy given the prevalence of Big Data (Cate and Mayer-Schönberger, 2013).

It is also argued that data protection laws may point out abuse of market power in the context of free services. Violation of data protection laws by a firm or using dominance to effect a “legal decrease in control over personal data or an increase in the extent of processing” are potential instances of the same (Costa-Cabral and Lynskey, 2017).

The importance of expanding the scope of the competition law to cover related data protection issues is increasingly being recognised by prominent competition regulators. EU competition commissioner Margrethe Vestager has submitted to the European Parliament in this regard that (Vestager, 2019):

When firms collect personal data, a degradation of data protection may result in harm to competition that can be addressed by EU competition law. Data accumulation and data protection have already been taken into account in EU competition cases, such as the recent Apple/Shazam and Microsoft/LinkedIn merger cases. The Commission will continue investigating any such data-related concerns in future merger and antitrust cases.

The Director of the US Federal Trade Commission’s Office of Policy Planning has remarked in a recent speech that “our highest priority is to complete and release a guidance document on the application of the antitrust laws to conduct by technology

platforms” (Sayyed, 2019). The guidance aims to limit the amount of personal information collected and held by technology platforms, among other issues.

Interestingly, Clause 67 of the PDPB expressly mandates that if the proposed Data Protection Authority (DPA) has concurrent jurisdiction with another regulator, it should consult the same prior to taking an action. The PDPB also recommends that the DPA enter into a memorandum of understanding with other regulators to coordinate actions in spheres of regulatory overlap. This is an important recommendation as the CCI and the proposed DPA are both sector agnostic regulators and there is potential for harmonised enforcement in situations where data protection and competition issues converge.

3. Attributes of Digital Markets and Zero-price Platforms

To effectively survey viable approaches to regulation of anticompetitive behaviour in digital markets, it is important to first understand what makes digital markets unique. Digital markets possess certain attributes that make them more prone to “tipping” — that is, “a cycle leading to a dominant firm and high concentration” (Morton et al, 2019).¹⁶ These attributes include:

(1) *Increasing returns to scale*: Digital markets provide information goods, which often “require a fixed cost and no or little variable cost” (Morton et al, 2019).¹⁷ For example, Google can simultaneously update its products for all its users with the same costs needed to update its products for a sub-set of its users. This results in higher barriers to entry, wherein potential entrants to the market must be able to incur high fixed costs to compete.

¹⁶ Stigler Center for the Study of the Economy and the State. (2019). Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report.

¹⁷ Ibid.

(2) *Economies of scope*: Digital platforms possess strong economies of scope. Incumbent firms can leverage access to stockpiles of user data in order to improve the quality of products or services in ways that small firms and potential new entrants cannot.

(3) *Network effects*: Digital markets are characterized by strong network effects. In the case of direct network effects, “the more users there are on the network, the richer the users’ experience is likely to be” (Morton et al, 2019).¹⁸ An example of this would be in the case of services such as Twitter or eBay, where users can communicate information to larger audiences or benefit from a larger range of products posted or bid on by other users. Indirect network effects stem from the availability of complementary products or services that increase the overall attractiveness of a digital platform. For example, “customers of a widely-used social media site benefit from the many games designed for that social media site, which in turn are driven by the large number of consumers” (Morton et al, 2019).¹⁹ Together, these effects engender a trend towards concentration in digital markets.

(4) *Low marginal and distribution costs*: Digital markets often benefit from low to zero marginal costs and distribution costs. Expanding access and distributing products or services to additional consumers is largely inexpensive, which means that entrenched firms can scale quickly and expand their market share.

These features pose unique challenges in regulating digital markets. The current US framework on antitrust has a sharp focus on consumer welfare loss as the primary metric for regulatory intervention. This focus — a paradigm shift brought about in large part by Robert Bork’s *The Antitrust Paradox* (1978) — has been exported to varying degrees to a number of other jurisdictions, including India. Khan (2017), however, suggests that this framework fails to adequately address the full scope of digital market operations.

She notes that by “pegging competition to ‘consumer welfare,’ defined as short-term price effects — [the current antitrust framework] is unequipped to capture the architecture

¹⁸ Ibid.

¹⁹ Ibid.

of market power in the modern economy” (Khan, 2017).²⁰ In other words, when digital platforms charge consumers below-cost prices, the result is that consumers celebrate low prices in the short term but easily discount other pernicious outcomes, including structural market instability, long-term price effects, and non-price effects in both the short- and long-term. For this reason, she advocates for the structuralist approach — that is, improving market structure as a precondition to healthy competition and mitigating behaviours that produce barriers to entry for other competitors, such as predatory pricing.

While Khan mounts a strong offense against the consumer welfare approach, structuralism is still likely to fall short in grappling with the unique features of zero-price platforms. It is difficult for regulators to subject zero-price digital platforms to structuralist jurisprudence for reasons both general to digital markets and specific to zero-price platforms. First, the market structure approach suggests that anticompetitive behaviour can be precluded by addressing structural issues, such as firm dominance and market power concentration. However, the unique attributes of zero-price platforms ensure that the markets they operate in naturally tend towards monopolistic or oligopolistic outcomes. A regulatory approach that attacks such outcomes runs the risk of decreasing the allocative efficiency of such markets.

Second, within digital markets, whereas positive-price platforms might intentionally disrupt market structure through predatory pricing and fall within the remit of structuralist jurisprudence, zero-price platforms cannot be easily accused of the same kind of behaviour. Khan (2017) argues that the current doctrine on antitrust “underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive.”²¹ Since Amazon pursues a growth-over-profits strategy and demonstrates reasonable evidence of predatory pricing behaviour, a structuralist approach to market regulation is then in fact better equipped to curb related structural harms.

²⁰ Lina M. Khan. (2017). “Amazon’s Antitrust Paradox.”

²¹ Khan. (2017). “Amazon’s Antitrust Paradox.”

However, zero-price platforms do not necessarily demonstrate the same patterns of predatory pricing behaviour. While it is true that some firms may choose to “charge zero prices temporarily for promotional or predatory purposes,” Evans (2011) notes that platforms like Google and Facebook are examples of providers “in which the price is ordinarily zero – that is, where \$0.0 is the long-equilibrium price for a product.”²² Firms accused of predatory pricing choose to incur losses in the short- to mid-term in order to dominate a market, foreclose competition and recoup costs in the long term. For zero-price platforms, free is not a temporary situation. Instead, these zero-price platforms, which are the focus of our study, can provide search engine or social networking services free-of-charge in the long term while making money from digital advertising.

4. Regulatory Intervention in Zero-price Platforms

It is thus clear that the long-term equilibrium price level on the consumer side of zero-price platforms poses significant challenges to regulating them effectively. In order to identify the appropriate point of regulatory intervention, it would therefore be helpful to consider the multiple markets such platforms operate in.

On the consumer-facing front, there is a consumer surplus in each transaction in a strict monetary sense given that the price of the service or product is zero. Further, the nature of the market allows for economic value to be multiplied at very low cost. There is a distinction between monetary value and economic value here (Polverino, 2012). Economic value refers to the maximum amount a user is willing to pay, i.e., the benefit to the user. The monetary value is the real price of the transaction. Due to zero-price, economic value can be multiplied without any increase in monetary value. Free and Open Source Software (FOSS) is one such example: being zero-priced aids the development of that product, improving its economic value even as it remains free. In fact, this has two healthy consequences for a market regime: a) increases

²² David S. Evans. (2011). “The Antitrust Economics of Free.”

and improves incentives for developers to contribute to improving the product, and b) improves competition between FOSS and commercial firms, hence improving the market (Gal, 2011).

Traditional economics would argue that if the price is zero, then the consumer surplus is maximum and there is no producer surplus. However, digital zero-price platforms have tapped into a matching market — that of advertisers. This is where the producer surplus originates. Evans (2011) notes with respect to zero-price platforms, “Charging nothing for a product or service enables them to make money, somehow, somewhere else.” Information gathered from consumers is sold to third parties and therefore forms the basis of the transaction making it, in effect, profitable.

Thus, it is information from one market which is channelled to another market, which then leads to producer surplus. Antitrust concerns therefore need not necessarily be predicated on the price or the profit as is done in traditional cases. For zero-price platforms, the concerns stem from three primary factors: a) the collection, processing and sharing of the information that is collected at zero-price but is leading to revenue and profit generation; b) the terms to which the consumer must agree in order to access the service at zero-price; c) the nature and amount of the data collected, and due to the network externalities that are inherent in the business models of zero-price platforms, the extent to which this data entrenches firms and decreases the contestability of the relevant markets.

This represents a new challenge for antitrust law: determining the allocative efficiency that forms the basis of the widespread consumer welfare standard of competition regulation requires more readily quantifiable metrics. Estimating consumer welfare loss using non-monetary parameters is a tricky business. To begin with, users are subjected to information and attention costs of which they are not aware either before getting into the transaction or while transacting (Newman, 2015). Further, there are transaction costs that customers bear on certain activities like: “(1) the tracking of consumers, (2) the consumer’s need to monitor the firm’s activities, (3) the lock-in associated with switching costs, (4) a number

of insecurities, including potential financial costs, stemming from the consumer's inability to compel firms to invest in information security, and (5) cancellation costs" (Hoofnagle and Whittington, 2014).

'Free goods' also have a strong behavioural effect on consumers and it can be argued that they decrease consumer agency; there is thus some degree of 'consumer harm' which is both inalienable to the actor and undetectable by the consumer. Sampaner and Ariely (2006) conduct an experiment to find that people "overreact" to the free product as if zero price meant not only a low cost of buying the product, but also increased consumers' valuation of the product itself.

Intuitively, we can ascertain that consumer welfare is impacted in various ways through these processes and costs. But antitrust has to answer the question of 'how much' of a loss of or gain in consumer welfare has taken place. Placing a money value on the various costs is hard. There can't be a price list because the value of consumer data 'depends on the business possessing that data and the markets the business participates in with that data' (Hoofnagle and Whittington, 2014).

Many look towards a companion market (such as advertising) where transactions have a defined monetary value and make a case for why that should be used in the complementary market as well. Definitions of product markets therefore become important in understanding if companion markets are the same market or a different one. There are inherent issues here if relevant market analysis doesn't keep market power in mind, or is subject to 'perfunctory market power analysis'. This leads to both false positive and false negative cases when competition law is applied to it. If the Small but Significant Non-transitory Increase in Price (SSNIP) test is satisfied in the companion market, it may be concluded that there is no competition issue at stake, yet the test fails to reflect the impact and effect on the zero-price market. False positives may arise if a paid product's market power is determined, but it is not considered that the market power diminishes when it is clubbed with a free product (Evans, 2011). Thus, there are substantial issues to this approach of attempting to quantify the loss to consumer welfare in zero-price digital markets as well.

One therefore has to look beyond consumer welfare considerations in order to apply antitrust regulation. One way to achieve this is to take a form-based approach to prevent abuse of market power by dominant zero-price platforms. To adequately assess the viability of such an approach, it is important to examine the history of Indian competition jurisprudence.

5. Competition Regulation and Jurisprudence in India

The evolution of India's competition regulatory regime towards allocative efficiency-based approaches must be placed within a broader economic context. In the central planning years, changes in price structure were seen as a policy target to be linked to changes in income levels and distribution²³, not a function of efficient markets. The Monopolies and Restrictive Trade Practices Act (MRTP Act) of 1969, the predecessor to the current competition framework, reflected this. It had its genesis in the Monopolies Inquiry Commission constituted in 1965. The Commission's report adopted a particularly rigorous version of the market structure argument prevalent across jurisdictions before Bork (1978) and now being espoused by Khan (2017). Chaudhary (2016) has persuasively argued that the Commission saw the concentration of market power as the central problem, with monopolistic practices as adjuncts.

The MRTP Act consequently contained provisions to break up large companies regardless of the existence of monopolistic practices. The exclusion of state-owned enterprises from the ambit of the MRTP Act and the inclusion of subjective, non-quantifiable criteria for breakup such as the public good further limited the regime to monopoly rather than competition regulation.

Supreme Court jurisprudence introduced more rigorous methodology to the MRTP Act framework. Two cases are of particular note here. In *Tata Engineering and Locomotive*

²³ Planning Commission (1951). *1st Five Year Plan*. Retrieved from <http://planningcommission.nic.in/plans/planrel/fiveyr/welcome.html>. [Accessed 5 July 2019]

Co. Ltd. v. Registrar of Restrictive Trade Agreements, 1977, the Supreme Court adopted the rule of reason standard (an effects-based approach based on holistic assessment that includes the actual or probable anticompetitive effects of a given action on the relevant market²⁴) established by US jurisprudence. In *Chicago Board of Trade v. United States*, the ruling had observed that “legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”²⁵ With the Telco case, the Supreme Court thus established jurisprudential precedent for tempering the market structure metric by applying the rule of reason test in the case of agreements that constituted restrictive trade practices²⁶. In *Mahindra & Mahindra Limited v. Union of India*, 1979, it formally adopted this standard, shifting the regulatory framework towards an effects-based approach to the market actions of dominant entities²⁷.

The post-1991 reforms, in altering the contours of the Indian economy, had an implicit assumption that the increased contestability of the Indian markets would boost efficiency. Given this, the MRTP Act framework, with its non-efficiency normative basis, was a poor fit. The High-Level Committee on Competition Policy and Law (Raghavan Committee) was constituted in 2000 to recommend a competition regulatory architecture better suited to the purpose and more in keeping with the direction in which jurisprudence had taken regulatory logic.

Section 18 of the consequent Competition Act, 2002 clearly delineates the shift towards a competition framework aimed at protecting competitive processes, not structures:

*Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India*²⁸.

24 Malik, P. (2016). Competition Law in India: Developing Efficient Markets for the Greater Good. *Vikalpa* 67 (2). 175–181.

25 *Board of Trade of City of Chicago et al v. United States* 246 U.S. 231 (1917). [Accessed 3 August 2019]

26 Patil, S., Chatterjee, P., Gautam, S., Ananth, M.S., Jha, A., Reis, S. & Jain, P. (2013). *Competition Law in India: A Report on Jurisprudential Trends and the Way Forward*. [Accessed 3 August 2019]

27 Ibid.

28 *The Competition Act, 2002*. [Accessed 5 August 2019]

The Preamble, however, introduces ambiguity by adding the caveat of national economic development. There is thus a balance in the institutional framing of India's current competition regulatory regime between allocative efficiency — that is, protecting competitive processes that promote consumer welfare — and dynamic efficiency²⁹. This allows for a nuanced approach to zero-price digital markets where the latter is prevalent, sometimes to the detriment of the former: the CCI must maintain a fine balance between consumer welfare and the natural tendency to market concentration and monopolistic practices in such markets.

This is useful in assessing a critical metric for regulatory intervention: abuse of dominance. Section 4 of the Competition Act, which deals with this, is ambiguous. There is a lack of clarity on whether a form-based approach which considers the features of market action independent of its effect on consumers should drive intervention or an effects-based approach. Malik (2016) notes that the Raghavan Committee report had envisaged an effects-based approach, explicitly framing key questions for adjudication using a rule of reason approach.

Such an approach may well be effective in regulating platform economies broadly speaking. However, as this paper has shown, it is difficult to quantify the metrics needed to effectively use an effects-based approach to regulating zero-price platforms. The Competition Act provides the flexibility for using a form-based approach when necessary. For instance, it may be possible to apply two of the criteria listed in Section 4(2) — if a company, as noted in 4(2)(d), makes contracts conditional on supplementary obligations unrelated with the subject of the contracts; or as per 4(2)(e), uses its position of dominance in one relevant market to enter into or protect another relevant market — to zero-price platforms (Competition Act, 2002).

The Competition Law Review Committee (CLRC)³⁰ further points out that the text of Section 4(2) of the Competition Act has no reference to the effect of actions committed by dominant and hence supports the view abuse should be determined under a *per se*

29 Malik, P. (2016). Competition Law in India: Developing Efficient Markets for the Greater Good. *Vikalpa* 67 (2). 175–181.

30 Paragraph 4 of Chapter 6 of the Report.

approach, as opposed to a rule of reason analysis. The CLRC however goes on to consider the decisional practise of the CCI and finds that the regulator has shown flexibility in this regard by applying an effects-based approach as well, depending on the type of case being decided by it. The CLRC closes the discussion in this regard by holding that “it may not be necessary to undertake an effects analysis on all kinds of abuse, e.g. exploitative abuse” giving credence to the view that certain forms of conduct can be intrinsically barred without necessarily analysing the impact of such forms of conduct.

There is a rich vein of jurisprudence that uses the form-based approach. As Malik et al (2017) have noted, “competition law on abuse of dominance in India is primarily enforced using a form-based approach where in most cases emphasis is laid on assessing dominance of the firm in the relevant product and geographic markets and then assessing if the action pursued by the dominant firm falls into one or more of the five categories” listed in Section 4 of the Competition Act. Thus, “in Faridabad Industries Association v. Adani Gas Limited (2014) and GHCL Ltd v. Coal India Ltd (2015), the very stipulation of certain terms in the supply agreements, which the CCI viewed as unfair, was sufficient for it to arrive at the finding that the parties in question were abusing their dominant positions.”³¹ Using such precedence to analyse the ways in which the provisions of the Competition Act can be interpreted to and provide for a form-based approach to the new economy is essential for regulating zero-price platforms.

6. Applying Form-based Approach to Zero-price Platforms

This section of the paper looks at the legal considerations for applying the abuse of dominance prohibition under the Competition Act to zero-price platforms. As this

³¹ Malik, P., Singh, N.M., Tamara, R., Ubeoi, N.K. (2017). Legal Treatment of Abuse of Dominance in Indian Competition law: Adopting an Effects-Based approach.

paper has shown, the CCI often undertakes a structured form-based approach in this regard which consists of the steps listed below.³²

- (i) establishing that a transaction has taken place,
- (ii) identification of the relevant product and geographic markets,
- (iii) assessment of the dominance of the firm under consideration, and
- (iv) determination of whether the dominant firm conducted an activity which constitutes an abuse of dominance under the Competition Act.

We expand on each of these aspects in the context of zero-price platforms.

6.1. Understanding Information Costs

As has been pointed out³³, users pay with information or attention instead of money in zero-price markets (Newman, 2015). It is then pertinent to assess if such costs incurred by users of zero-price platforms satisfy the criteria of “price” under the Competition Act. The definition of price is linked to consideration³⁴ and includes “every valuable consideration, whether direct or indirect, or deferred”.³⁵ The implication of this is that we need to consider if information or attention are seen as having value in the eyes of the law. We look at jurisprudence available in this regard and the relevant policy exchanges.

In the case of *Gottlieb v. Tropicana Hotel & Casino*³⁶, the plaintiff took up free membership of the casino’s ‘Diamond Club’. This allowed her access to a daily spin of the Million Dollar lottery which she won. The casino refused to honour the claim arguing it had not received anything in return for the membership and so was not bound by a valid

32 Malik, Payal et. at., Legal Treatment of Abuse of Dominance in Indian Competition law: Adopting an Effects-Based Approach [online] Available at: https://www.cresse.info/uploadfiles/2017_pa14_pa5.pdf [Accessed 28 August 2019]

33 Newman, JM (2015) Antitrust in Zero-price Markets: Applications [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681304 [Accessed 30 April 2019]

34 Section 2(d) of the Indian Contract Act, 1872 explains that consideration is said to flow between parties when one party either does (or agrees to do) something or refrains (or agrees to refrain) from doing something at the instance of the other party.

35 Section 2(o) of the Competition Act, 2002.

36 U.S. District Court for the Eastern District of Pennsylvania – 109 F. Supp. 2d 324 (E.D. Pa. 2000) July 5, 2000 as cited from Newman, JM (2015) Antitrust in Zero-price Markets: Applications [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681304 [Accessed 30 April 2019]

contract. It was, however, held that the casino had collected information at the time of giving the membership and tracked the plaintiff's gambling activity, which were a form of consideration to the casino. The case supports the view that consideration can be paid through sharing of information.

In an assessment of the Customer Rights Directive, 2011 (CRD) which sets customer protection standards in the EU, the European Commission has highlighted a flaw in the regulation as it only applies to paid digital services and not when consumers provide personal data to avail free digital services.³⁷ It thereby argues that payments by way of personal data should be treated the same way as payments by way of money, supporting the view that consideration can be in non-monetary terms such as personal data.

The CLRC³⁸ directly considers the question of whether the definition of price in the Competition Act is satisfied when users pay for the services of a platform in the form of personal data and revealed preferences instead of 'money'. It notes that the definition of price is "wide enough to include non-monetary consideration in the form of 'data'" due to (i) the inclusive framing of the definition, (ii) its reference to both direct and indirect forms of valuable consideration and (iii) inclusion of consideration which in effect relates to a particular thing (such as using the data to sell targeted advertisements) while appearing to relate to something else (such as using the data to provide services) (CLRC, 2019).

6.2. Delineating the Relevant Product Market(s)

As an important legal consideration, the Competition Act identifies the relevant product market(s) for the entity under examination. The goal of this exercise is to provide a basis for assessing market power and the determination of the relevant market is "not an end in itself".³⁹

37 Commission Staff Working Document Impact Assessment [online] Available at https://eur-lex.europa.eu/resource.html?uri=cellar:ba7bffc9-3e34-11e8-b5fe-01aa75ed71a1.0001.02/DOC_1&format=PDF [Accessed 15 May 2019]

38 Paragraphs 2.1 and 2.2 of Chapter 8 of the Report.

39 Harris, Robert and Jorde, Thomas (1984) Antitrust Market Definition: An Integrated Approach [online] Available at: <https://www.crai.com/sites/default/files/publications/antitrust-market-definition-an-integrated-approach.pdf> [Accessed on 26 August 2019]

The Competition Act defines the relevant product markets through the lens of interchangeability or substitutability in the eyes of the consumer⁴⁰. For instance, if a Netflix subscription accessed over the Internet is regarded as interchangeable with a cable television subscription due to product characteristics, price and intended use, they constitute the same product market. The CCI is further required to consider aspects such as consumer preferences and existence of specialised producers in determining the relevant product market.⁴¹

This paper has noted that zero-price platforms are multi-sided and operate in the user and advertiser markets. Katz and Sallet (2018) have argued that the market definition question in such settings should consider the reality that platforms operate in “multiple separate, yet deeply interrelated, markets”.⁴² This has been described as the multiple-markets approach and contrasts with the single-market approach which counts both sides of the platform as one market.⁴³ For instance, a newspaper can be considered to operate in the two related but distinct markets of acquiring readers and selling print advertising to those seeking access to a captive audience of readers. Alternatively, the newspaper can be considered to operate in a single product market of matching news readers with advertisers.

As shown previously, in a multi-sided market there are costs and benefits on all sides. Thus, as Katz and Sallet (2018) point out, we need to separately analyse the antitrust effects of a platform’s conduct towards each distinct user group.⁴⁴ A radio station, for instance, sells advertising spots to monetise listener attention whereas listeners tune in to access free music. These products are closely interlinked as free music cannot be sustainably made available without advertising revenue, but to categorise a radio station as operating in a single product market is flawed.

40 Section 2(t) of the Competition Act.

41 Section 19(7) of the Competition Act.

42 Katz, M and Sallet, J. (2018), *Multisided Platforms and Antitrust Enforcement* [online] Available at: https://www.yalelawjournal.org/pdf/KatzSallet_ieayvf51.pdf [Accessed 30 April 2019]

43 Ibid.

44 Ibid.

Adopting the multiple markets approach ensures that harms to one set of platform users cannot be balanced against the benefits to another set of platform users.⁴⁵ To further the example given above, a monopoly radio station cannot defend attention overcharges from users through excessive advertising by claiming net benefits for the radio broadcasting market. Consequently, we recommend adopting a multiple markets approach to analyse zero-price platforms.

6.3. Assessing Market Power or Dominant Position

Establishing dominance is an essential component of the antitrust scrutiny process and is broadly defined as the ability of a firm to either operate independently of competitive forces in the relevant market or affect its competitors or consumers or the relevant market in its favour.⁴⁶ The CCI is further required to consider aspects such as entry barriers, market structure and size and resources of the enterprise etc. in assessing dominance⁴⁷.

From an operational perspective, assessing dominance of zero-price platforms is difficult due to the absence of monetary prices (which have signalling value) or inapplicability of financial metrics (such as revenue from the user market), which are the conventional metrics of assessment. The CLRC provides guidance⁴⁸ in this regard by clarifying that ‘control over data’ should form one of the factors for determining dominant position. It references the competition law in Germany which was modified to specifically list “access to competitively relevant data” as a factor for determining market power in digital markets (especially multi-sided markets)⁴⁹.

There is however no established consensus on applying data as a metric for establishing dominance in the user-facing market of a zero-price digital platform. In its decision

45 Ibid.

46 Section 4 Explanation (a) of the Competition Act.

47 Section 19(4) of the Competition Act.

48 Paragraph 2.15 of Chapter 8 of the report.

49 Germany adjusts Antitrust Law to Digital Economy and proposes new Regulatory Agency, Available at: https://www.clearyogottlieb.com/~media/organize-archive/cgsh/files/2017/publications/alert-memos/2017_06_28-germany-adjusts-arc.pdf

regarding the merger between Facebook and WhatsApp, the European Commission addressed⁵⁰ such concerns by holding that:

The Commission has analysed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof. Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.

It should be noted that the question of determining dominance is an important issue to safeguard against bias or selective enforcement concerns with regard to the antitrust authority and provide regulatory perspective to zero-price platforms.

6.4. Intervention Criteria for Regulating Abuse of Dominance

The final step of the antitrust scrutiny consists of determining if there is an abuse of dominant position. This has components such as imposing an unfair price or condition as part of a transaction, either directly or indirectly.⁵¹

As discussed in the earlier sections of this paper, relying on the traditional standard of consumer welfare loss does not apply in the case of zero-price platforms. As an alternative, we propose that CCI considers 'loss of control over data' by users when dealing with dominant zero-price platforms as an unfair condition and regulate such conduct to curb abuse of dominance.

This recommendation builds on the understanding that the scale of control over data is a factor for determining dominance and recognises the critical role of data in zero-price platforms. The issue of loss of control over personal data has

⁵⁰ European Commission decision M.7217. Available at: https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

⁵¹ Section 4(1) and 4(2) of the Competition Act.

been widely discussed as a central concern for the Internet, as pointed out by Tim Berners-Lee⁵²:

The current business model for many websites offers free content in exchange for personal data. Many of us agree to this – albeit often by accepting long and confusing terms and conditions documents – but fundamentally we do not mind some information being collected in exchange for free services. But, we’re missing a trick. As our data is then held in proprietary silos, out of sight to us, we lose out on the benefits we could realise if we had direct control over this data and chose when and with whom to share it. What’s more, we often do not have any way of feeding back to companies what data we’d rather not share – especially with third parties – the T&Cs are all or nothing.

It is noteworthy that the CCI has relied on subjective standards of enforcement for abuse of dominance as demonstrated in *National Stock Exchange v. MCX Stock Exchange*⁵³. The case centred around NSE’s decision to provide currency derivatives trading for zero price which was held to be “unfair” vis-a-vis its competitors due to NSE’s overall dominance in the market for stock exchange services. The CCI held:

The term “unfair” mentioned in section 4(2) of the Act has to be examined either in the context of unfairness in relation to customer or in relation to a competitor. For unfairness of any act to be judged, all the surrounding facts have to be considered. It cannot be judged on the basis of some formula or accounting process.

Parsheera, Shah and Bose (2017) have however cautioned against relying on the “subjective ‘competitive fairness’ standard” as they disregard the unique features of network industries or the need for rigorous economic analysis to establish unfair / predatory pricing.

The loss of control standard in antitrust has been used by the German competition authority (Bundeskartellamt) in a decision restricting Facebook from collecting user information from third-party sources and combining it with data collected by Facebook

52 Tim Berners-Lee: I invented the web. Here are three things we need to change to save it, Available at: <https://www.theguardian.com/technology/2017/mar/11/tim-berners-lee-web-inventor-save-internet>

53 Competition Commission of India, Case no. 13 of 2009, Available at: https://www.cci.gov.in/sites/default/files/MCXMainOrder240611_0.pdf

itself by default.⁵⁴ The order points out the extensive nature of such third-party tracking done via Facebook’s Business Tools package such as the “Like” button, “Facebook login” or analytical services such as “Facebook Analytics”.⁵⁵

Bundeskartellamt restricted Facebook from making access to its services conditional on users allowing the company to link non-Facebook data to their Facebook accounts, partly due to it being an unfair contract term. The order specifically notes:⁵⁶

Facebook offers its service free of charge. Its users therefore do not suffer a direct financial loss from the fact that Facebook uses exploitative business terms. The damage for the users lies in a loss of control: They are no longer able to control how their personal data are used. They cannot perceive which data from which sources are combined for which purposes with data from Facebook accounts and used e.g. for creating user profiles (“profiling”).

It should be noted here that Facebook has succeeded in staying the order on appeal in the Higher Regional Court of Dusseldorf.⁵⁷ The jurisprudence has thus yet to be developed fully. That said, it sets a valuable precedent for developing an approach to assessing abuse of dominance in zero-price markets.

The Japan Fair Trade Commission (JFTC) has also considered the impact of business models of digital platforms offering free products in exchange for personal information. It has proposed that any acquisition or use of personal information in unfair manner should be seen as disadvantaging users and released a draft of the “Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information” (JFTC, 2019). The guidelines specify any acquisition or use of personal information against consumers’ intention beyond the scope necessary to achieve the user’s purpose as an

54 Background information on the Bundeskartellamt’s Facebook proceeding [online] Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5 [Accessed 30 April 2019]

55 Ibid.

56 Background information on the Bundeskartellamt’s Facebook proceeding [online] Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5 [Accessed 30 April 2019]

57 Facebook succeeds in blocking German FCO’s privacy-minded order against combining user data, Available at: <https://techcrunch.com/2019/08/26/facebook-succeeds-in-blocking-german-fcos-privacy-minded-order-against-combining-user-data/>

abuse of superior bargaining position. As regards enforcement, the JFTC considers that the guidelines can be applied on a case-to-case basis with reference to the harm to competition or consumers.

7. Limitations and Conclusion

The trajectory thus far of digital platform economies shows that they are likely to play an increasingly important role in catalysing economic activity and sectoral growth. As with all new market phenomena, the attendant economic and structural consequences will play out in the long term. Rushing into regulatory action without a full appreciation of that trajectory and the intended effects — as well as the inevitable unintended ones — is a recipe for regulatory failure. The experience of the MRTTP Act — a Kafkaesque solution of solving for failed central planning interventions with a regulatory framework that relied on more intervention — shows this.

However, neither is taking a hands-off approach to market phenomena that are now globally a matter of concern a viable option. Applying existing market and regulatory logic to platform economies demands care. This is doubly so in the case of zero-price platforms where the economies of the relevant markets function in unique ways. This paper has thus attempted to extend the domain of existing Indian competition law to this specific subset of platform economies. It has done so by examining the economic logic of zero-price platforms, deriving a case for applying a form-based approach to regulating them, and evaluating the Competition Act as it stands today to gauge whether it can provide regulators with the appropriate toolkit to apply such an approach and put zero-price platforms through the steps of antitrust scrutiny.

This paper seeks to outline the roadmap for antitrust enforcement in the user-side of zero-price digital market in India as follows:

- (a) CCI should not exclude zero-price platforms from the purview of competition law on the basis of the fact that they do not charge a monetary price to users,
- (b) Zero-price platforms should be regarded as operating in distinct but companion markets of acquiring users and digital advertising,

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- (c) CCI should assess control over user data exercised by zero-price platforms on a case by case basis as a key component of scrutiny to establish dominance,
 - (d) The loss of control over data is a *per se* standard that the CCI should consider when dealing with zero-price platforms, and
 - (e) The determination that the conduct of a zero-price platform has violated this intrinsic standard creates a presumption of abuse against such platform which should result in a remedial decision by the CCI, unless the platform presents evidence to rebut such presumption.

However, we acknowledge the limitations of the exercise this paper undertakes. The unique nature of zero-price digital platforms means that their economics, market and consumer effects, and appropriate regulatory logic are fiercely contested. Specifically, in the context of this paper:

- (a) The issue of loss of control is not unique to zero-price platforms and can be present in the context of digital platforms generally, and
- (b) Regulation of zero-price platforms presents a significant interface of competition law with the objectives of data protection which may require regulatory cooperation between the CCI and the proposed DPA.

Given the significance of and the pace at which zero-price digital platforms are growing, there is an urgent need for a further evolution of India's competition framework. This paper hopes to expedite research and inform regulatory innovation.

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About the Author

Bhusan Jatania is a Senior Associate at IDFC Institute and keenly interested in technology policy research. He was previously a Research Associate with the Future of Finance Initiative at Dvara Research and used to practice corporate law with a focus on merger & acquisitions and private equity before that.

Bhusan graduated with honours in arts and laws (B.A., LL.B.) from National Law University, Jodhpur and was formerly a Reserve Bank of India Young Scholar.

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