

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

Bhusan Jatania

Digital platforms that provide “free” pose unique challenges to competition regulation due to their scale and unique characteristics. Applying the traditional consumer welfare loss approach to zero-price platforms has limitations. A ‘form-based approach’ is more appropriate than an ‘effects-based approach’ in the Indian competition law context, specifically adopting users’ loss of control over data as a per se standard to limit abuse of market power by zero-price platforms.

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

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.³ India is now Facebook’s largest user-base with over 241 million active users, surpassing the United States.⁴ 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.⁵

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. A key objective of the research 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.

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 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. The importance of expanding the scope of the competition law to cover related data protection issues is increasingly being recognised by prominent competition regulators such as European Union’s competition commissioner Margrethe Vestager and the

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. “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.

4. Fuscaldo, 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/>

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

Director of the US Federal Trade Commission's Office of Policy Planning.

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.

3. Attributes of Digital Markets and Zero-price Platforms

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).⁶ These attributes include:

- (1) Increasing returns to scale
- (2) Economies of scope
- (3) Network effects
- (4) Low marginal and distribution costs

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.”⁷ This is distinct from predatory pricing where firms 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

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 is essential 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. 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.

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).

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.

6. 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.

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

5. Competition Regulation and Jurisprudence in India

In the central planning years, changes in price structure were seen as a policy target to be linked to changes in income levels and distribution⁸, 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 and saw the concentration of market power as the central problem, with monopolistic practices as adjuncts.

The Competition Act, 2002 however delineates the shift towards a competition framework aimed at protecting competitive processes, not structures.

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 efficiency⁹. 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.

The Competition Law Review Committee (CLRC)¹⁰ 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 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.

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.

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

The CCI often undertakes a structured form-based approach in this regard which consists of these steps¹¹:

- (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.

6.1. Understanding Information Costs

As has been pointed out¹², 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 consideration¹³

11. 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]

12. 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]

13. 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.

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

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

10. Paragraph 4 of Chapter 6 of the Report.

and includes “every valuable consideration, whether direct or indirect, or deferred”¹⁴. 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.

The CLRC¹⁵ 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’”.

6.2. Delineating the Relevant Product Market(s)

The Competition Act defines the relevant product markets through the lens of interchangeability or substitutability in the eyes of the consumer.¹⁶ 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 market¹⁷.

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”¹⁸. 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 market¹⁹.

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 users²⁰. For example, a monopoly radio station cannot defend attention overcharges from users through excessive advertising by claiming net benefits for the radio broadcasting market.

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 favour²¹. The CCI is further required to consider aspects such as entry barriers, market structure and size and resources of the enterprise etc. in assessing dominance²².

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 guidance²³ 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)²⁴.

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

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

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

16. Section 2(t) of the Competition Act.

17. Section 19(7) of the Competition Act.

18. 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]

19. Ibid.

20. Ibid.

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

22. Section 19(4) of the Competition Act.

23. Paragraph 2.15 of Chapter 8 of the report.

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

position. This has components such as imposing an unfair price or condition as part of a transaction, either directly or indirectly²⁵.

As discussed earlier, 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.

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*²⁶. 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.

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 itself by default²⁷. 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"²⁸.

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 notes²⁹:

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 Dusseldorf³⁰. 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 abuse of superior bargaining position. As regards enforcement, the JFTC considers that the guidelines can be

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

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

27. 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]

28. Ibid.

29 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]

30. 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/>

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.

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,

(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 as:

(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.

Data Governance Network

The Data Governance Network is developing a multi-disciplinary community of researchers tackling India's next policy frontiers: data-enabled policymaking and the digital economy. At DGN, we work to cultivate and communicate research stemming from diverse viewpoints on market regulation, information privacy and digital rights. Our hope is to generate balanced and networked perspectives on data governance — thereby helping governments make smart policy choices which advance the empowerment and protection of individuals in today's data-rich environment.

About Us

IDFC Institute has been set up as a research-focused think/do tank to investigate the political, economic and spatial dimensions of India's ongoing transition from a low-income, state-led country to a prosperous market-based economy. We provide in-depth, actionable research and recommendations that are grounded in a contextual understanding of the political economy of execution. Our work rests on three pillars – 'State and the Citizen', 'Strengthening Institutions', and 'Urbanisation'. The State and the Citizen pillar covers the design and delivery of public goods, ranging from healthcare and infrastructure to a robust data protection regime. The Strengthening Institutions pillar focuses on improving the functioning and responsiveness of institutions. Finally, the Urbanisation pillar focuses on the historic transformation of India from a primarily rural to largely urban country. All our research, papers, databases, and recommendations are in the public domain and freely accessible through www.idfcinstitute.org.

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.

Acknowledgements

The author would like to thank Dr. Niranjana Rajadhyaksha, Venkatesh Hariharan, Vikram Sinha, Prakhar Misra, Reva Abrol, Harsh Vardhan Pachisia and the anonymous peer reviewer for valuable inputs and comments. He would also like to thank the participants at the first and the second research seminar of the Data Governance Network held at Indian Institute of Technology, Bombay and National Institute of Public Finance and Policy on 7 June, 2019 and 4 September, 2019 respectively. The author expresses special appreciation and thanks to Professor Shishir K. Jha, Head of Department, Centre for Policy Studies at IIT Bombay and Dr. Geeta Gouri, former member of the Competition Commission of India for serving as discussants for the paper at the first and the second Data Governance Network research seminars respectively.

Disclaimer

The analysis in this brief is based on research by IDFC Institute (a division of IDFC Foundation). The views expressed in this paper are not that of IDFC Limited or any of its affiliates.

IDFC Institute
3rd Floor, Makhija Chambers, 196 Turner Road,
Bandra(W), Mumbai 400050



[/idfcinstitute](https://www.facebook.com/idfcinstitute) [@idfcinstitute](https://twitter.com/idfcinstitute) [/IDFCInstitute](https://www.youtube.com/channel/UCQm3v3p0K8v0K8v0K8v0K8v0)