

# Drafting a pro-antitrust and data protection regulatory framework

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## Abstract

The Digital Personal Data Protection (DPDP) Act 2023 has significant implications for antitrust issues in digital markets. A consensus has emerged among competition regulators across jurisdictions that in markets underpinned by data-driven business models, antitrust concerns intersect with data protection regulatory issues. With the recent enactment of the law, the landscape in India is now ripe to ensure that the two regulatory tools of data protection and competition work in tandem. The paper provides an overview of why a new approach to antitrust law is required in the realm of data-driven digital platforms, and delves into the evolving antitrust cases in India with respect to digital platforms to lay out the jurisprudence on data-related anti-competitive practices. The main objective of this paper is to map the Digital Personal Data Protection Act in the context of India's jurisprudence to theoretically illustrate how regulation of personal data could impact antitrust enforcement. Finally, the paper outlines how the CCI needs to assess digital antitrust cases and how the personal data legislation will need to evolve to achieve the twin goals of data protection and fair competition.

**Keywords:** Data protection, Antitrust, Digital platforms, Competition

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## 1. Introduction

The defining feature of market economies in the 21st century is the global dominance of technology firms and digital platforms. The market value of Google, Apple, and Amazon is more than a trillion dollars each – sizeable enough to warrant the attention of consumers, competitors, and regulators. These firms have brought numerous benefits to consumers and businesses alike by enabling instant communication, selling products and merchandise online, and providing useful information at the click of a button. However, they have also raised major antitrust concerns through distorting markets, foreclosing competition through skilful acquisition of start-ups, and imposing hidden data (non-price) costs on consumers (Khan, 2017).

These antitrust abuses primarily stem from the role data plays in these companies' business models. The platforms in digital markets are stickier than firms in a non-digital sector for a number of reasons, a phenomenon exacerbated by the role of data (Jenny, 2021). There is a tendency towards these markets becoming monopolistic due to specific characteristics: One, these digital platforms have increasing returns to scale (DeLong and Froomkin, 2000; Varian *et al.*, 2004), that is, a high amount of fixed investment but marginal costs that keep decreasing as the user base rises. Two, network effects, together with increasing returns to scale, ensure that the structure of the market will always be dominated by a few firms. Finally, the tendency towards monopolisation of the market is exacerbated by 'data network effects',<sup>1</sup> given the sheer volume, variety and velocity of the data collected by the dominant technology platform (Turck, 2016). This data collection enables them to produce more innovative products, resulting in a positive feedback loop where more users join the platform, contributing to more data and thereby, more personable products. The lack of access to such a network, and thereby data, erects powerful market barriers for new start-ups in this space. This 'winner-take-all' phenomenon means that regulators will have to scrutinise the conduct of winners more closely for anti-competitive conduct.

However, competition regulators can no longer look at their traditional toolkit to regulate these complex firms. This is primarily due to the way data, regulated by data protection laws, and market competition considerations intersect in these markets. Such firms can use data to foreclose competition in myriad ways. Market regulators have traditionally focused on price to capture anti-competitive conduct. Digital platforms can manipulate competition in subtle ways not captured by price but by data. For example, Amazon, through access to third-party seller data on its e-marketplace and information regarding what users buy, can potentially use that data to build and promote its own brand, to the detriment of others. These data-driven practices can impact both competition as well as data protection of users simultaneously.<sup>2</sup>

Thus, many of these new challenges of regulating Big Tech firms lie at the intersection of two regulatory spheres – competition regulation and data protection. Data protection and competition in the digital marketplace can intersect through various avenues, producing divergent outcomes. Abusive practices by dominant digital platforms can stem from excessive data collection from users, as well as coercing players to share third-party data by leveraging one's position in the market.

Perversely, a data protection law that restricts the sharing of third-party data in order to protect users, can also be used by a dominant player to cement its market position. The Apple iOS 14 update<sup>3</sup> in 2020 stands out as a primary example of this case. The update by Apple ensured that third-party apps in the Apple ecosystem could not collect data without explicit consent, while not applying the same filter to its own apps on this ecosystem. This policy enabled Apple to further entrench its dominance in the Apple ecosystem in the name of protecting user consent and privacy.

The landscape in India is now ripe to ensure that the two regulatory tools of data protection and competition work in tandem. This is primarily because the country has a new data protection law and a new digital competition act is set to be legislated soon. On the data protection front, India enacted the Digital Personal Data Protection Act<sup>4</sup> (DPDP) in August of this year, with the drafting of the law having been in the works for the last four years. On the digital competition front too, Parliament is looking to legislate a new Digital Competition Act, with specific clauses exclusively addressing digital markets (Srivats, 2023). While amendments to the Competition Act were proposed last year, a committee was set by the Ministry of Corporate Affairs to draft the new bill in February 2023. The CCI too is becoming more cognisant of data-related abuse of dominance practices. In October 2022, it fined Alphabet for abusive practices stemming from data-related market issues (Mint, 2022).

As India refines its regulatory landscape, particularly through the DPDP Act, this paper outlines the many strands of the law that will have to be refined to strengthen not just the regulation of data protection concerns, but also the spill over effects on competition policy. The divergent outcomes between the DPDP law and competition regulation can be kept to a minimum if the law amends multiple clauses in order to enhance both competition and data protection outcomes. This calls for a more coordinated between what seems to be two apparently divergent regulatory goals of antitrust and data protection.

To broadly summarise some of our recommendations in this paper, we outline a few takeaways. One, a legal right to data portability could enhance user control over data as well as provide an avenue to reduce market entry barriers. The data protection law should actively seek to forbid bundled consent, as this can take the form of a data-related abuse of dominance that harms both competition and data protection. There are numerous clauses that introduce regulatory uncertainty, such as those on the transfer of personal data to other countries and defining significant data fiduciaries for whom additional obligations will apply. This uncertainty will only serve the ends of dominant enterprises that have the capacity and capital to exploit loopholes in the law.

The paper is structured in the following manner. Section II provides an overview of why a new approach to antitrust law is required in the realm of data-driven digital platforms and how regulators across the world are making strides to upgrade their toolkits. Section III delves into the evolving jurisprudence on antitrust cases with respect to digital platforms in India to lay out how the jurisprudence is evolving with respect to data-related anti-competitive issues. Section IV maps the DPDP Act in the context of India's jurisprudence to theoretically illustrate how regulation of personal data could impact antitrust enforcement. Section V will outline broad recommendations on

how the CCI needs to assess digital antitrust cases and the issues that may arise, and how the personal data legislation will need to evolve to achieve the twin goals of data protection and fair competition.

## **2. Overview of the new approach to data-driven digital platforms**

A consensus is emerging among competition regulators across jurisdictions that in markets underpinned by data-driven business models, antitrust concerns intersect with data protection regulatory issues. The role data plays in the revenue models of technology firms contributes to various market competition-related concerns. The anti-competitive practices of a digital platform arise in complex situations that demand that regulators assess and scrutinise these firms in a different fashion from firms in conventional markets (Wu, T., 2018). The laissez-faire approach of past decades is giving way to a more interventionist approach,<sup>5</sup> which is being globally adopted by regulators. The USA, Australia, and South Korea are considering new legislation to reign in potentially exploitative practices by digital platforms. The European Union is at the forefront, having already issued a draft policy termed the Digital Markets Act (DMA), which came into force in the autumn of 2022. India too is fast catching up with the proposed new Digital Competition Act. Broadly for the purpose of this paper, the definition of anti-competitive and abuse of dominance practices under antitrust law would be the ability of a firm to operate independently of prevailing competitive forces to foreclose market access and raise entry barriers (Competition Act, 2002).

Digital platforms often operate in multi-sided markets. Google Search has users on one side of the platform, while its advertising business depends on these users and their data to drive personalised, targeted advertising. Data collected from these users allows for personalised products which in turn attracts more users to the platform (the search engine). Competition is affected in mainly three ways on such platforms. First, compared to traditional firms, these platforms enable 'data network effects' due to the sheer volume, velocity, and variety of data they are able to collect. They use this data to offer personalised products. As these platforms offer data-driven personalised products, more users are attracted to this platform, offering up more data. This could potentially lead to market concentration (Turck, 2016). Firms are also incentivised to collect data through invasive practices, undermining the principles of data protection (Kemp, 2020). The European Union, as far back as 2019, through the Bundeskartellamt, Germany's competition regulator, Facebook ruling gave a preview on how to tackle this concern. The competition regulator, in a famous ruling,<sup>6</sup> prohibited Facebook from collecting data from third-party websites as well as from Facebook-owned WhatsApp and Instagram accounts, without explicit user consent. The ruling deemed that Facebook was abusing its dominant position in the market by mandating that users share data of all Facebook-owned accounts and on third-party websites.

Second, this concentration of data on a single platform could also lead to significant entry barriers for new entrants. New entrants may require access to vast amounts of this data to effectively develop a better product and therefore compete with incumbents, which could prove difficult. The European

Competition Commissioner, Margrethe Vestager, in 2019 signalled that ultimately, “Access to data has to be redesigned so that newcomers can compete with big tech giants” (Prager, 2019).

Third, assessing consumer welfare forms the cornerstone of competition law in many countries (Hovenkamp, 2020). In traditional markets, regulators typically intervene when there is an adverse impact on consumer welfare, usually measured through price, which is an objective parameter. While qualitative metrics to understand the erosion of consumer welfare have always been in play, data and erosion of privacy are yet to be considered actively under consumer welfare. This is compounded by the fact that measuring effects on consumer welfare through price becomes tricky in multi-sided positive-price digital platforms as well as zero-price platforms. In multi-sided positive price markets such as Spotify, which operate through a user-subscription model, both sides of the platform (the advertisers as well as users) will have to account for indirect network and competition effects.

For zero-price platforms such as Facebook and Google Search, data should replace price as the parameter to judge anti-competitive conduct. While these platforms might be ‘free’ on the face of it, most zero-price platforms use data collected from users to exert power on the adjacent positive price advertising market. In ecosystems such as the Google Play store and Apple’s App Store, data collected from third-party apps can be used to further entrench their central position as well as dictate terms – not just to third-party apps but across the whole complementary ecosystem of mobile phone handsets, television, music and reading devices.

Fourth, dominant digital platforms can aggregate data across datasets to build detailed user profiles that give them insights unavailable to their competitors. This allows them to entrench their positions not just in relevant markets, but also in adjacent markets (Stucke and Grunes, 2016) and across the whole ecosystem of complementary products (Jacobides *et al.*, 2019). For example, Alphabet with its Google Play app occupies a dominant position within the app store ecosystem and can use its central position to dictate terms when it comes to in-app purchases. Similarly, through the dominance of the Android operating system, it is also able to dictate terms to mobile phone manufacturers on pre-installing products tied to Android (such as Google Search, Gmail etc). The European Union is once again at the forefront, with the DMA. The Act is primarily targeted at regulating such ‘gatekeeper’ platforms that hold undue power in their digital ecosystem to ensure that they do not indulge in anti-competitive practices (Jacobides *et al.* 2019).

Fifth, mergers and acquisitions can help dominant platforms cement their market position and prevent future competition. The merging of complementary datasets that occurs after an acquisition or a merger can also help a dominant platform cement its position. The mergers could also enable more detailed profiling of users, undermining privacy further. While competition regulators are yet to block any mergers on the grounds that the merger could be detrimental to consumer welfare due to deterioration of privacy, the European Commission took the first step in this direction. In the WhatsApp/Facebook merger and the Microsoft/LinkedIn merger, the EC acknowledged that privacy protection needs to be an important parameter in the assessment of digital market mergers (Giannino,

2017). Further, this aspect needs to be further investigated if privacy is a parameter on which these firms were competing.

Sixth, the application of the data protection law by a data protection regulator (such as the envisaged data protection board) across sectors will lead to potential conflicts with another cross-sectoral regulator, the Competition Commission of India (CCI). This could lead to regulatory uncertainty, forum shopping and counterproductive outcomes. While this cannot be completely eliminated, effective regulatory coordination can minimise these conflicts or at least provide an avenue to deliberate these challenges. To expand on one example of a conflict, a data protection regulator could potentially restrict firms from collecting third-party information without user consent. While useful for privacy, this could serve to entrench the dominance of parties that collect first-party information and erect barriers for future potential competitors.

### **3. CCI's approach to antitrust cases in India**

This section details how cases against digital platforms have been looked at by the CCI and how its approach is evolving from a more laissez-faire approach to pursuing data-related antitrust abuses more robustly. By mapping important cases against WhatsApp and the recent Android antitrust fines in 2022, the paper charts out how it is finessing its approach to tackle different issues of defining the relevant market to data-related market power and abuses stemming from the same.

#### **3.1 Defining relevant market and assessing market power:**

The first step in competition policy assessments of abusive anti-competitive practices is defining the relevant market. The Competition Act 2002, in section 2(r) defines the relevant market as either the 'relevant geographic market' in which the conditions of competition for selling and buying goods or services are 'distinctly homogeneous' or as the 'relevant product market' comprising of products which are interchangeable or substitutable in their various characteristics by the consumer. The relevant market could also be a combination of both the relevant product market and geographic market. Defining the contours of the relevant market is an important factor in determining the market power a platform may hold. With respect to defining the relevant market, there are two crucial aspects here where the Commission's viewpoints are evolving. The first is that the CCI initially did not view online marketplaces or platforms as a separate market from offline platforms and the second, it was yet to consider markets such as the Google Play Store or Amazon, as a separate relevant market and as an ecosystem in itself.

On the first issue, prior to 2017, the CCI had taken a more traditional approach towards defining the relevant market with respect to digital platforms, as it combined both offline and online platforms as a single market. In cases involving e-commerce platforms such as Snapdeal in 2014<sup>7</sup>, the Commission primarily assessed the substitutability of products across both online and offline stores to define the relevant market. An online market and an offline retail store were not considered

different markets, as the Commission reasoned that a particular product on the online platform would easily be priced against the same at an offline retail store, by a user before making a decision to purchase (Dir, S., Kulshrestha, A., & Agrawal, A 2022). This line of reasoning tended to dismiss the dominance of an online platform in such a broadly defined relevant market.

However, by 2018, in *All India Online Vendors Association (AIOVA) vs Flipkart* case,<sup>8</sup> the CCI's approach towards defining digital markets had reasonably evolved as it considered Flipkart as a separate online platform. The CCI classified Flipkart's market as "services provided by online marketplaces for selling of goods in India" rather than the broad definition that Flipkart was attempting for of "pan-India market for retail or B2C, including online and offline channels of distribution". In this case, Flipkart was being accused of using its dominant position within the marketplace it runs, to favour its own private labels rather than those of competitive sellers on the same platform. However, this case was dismissed at the threshold level itself, as the CCI ruled that in the presence of a competitor Amazon, Flipkart could not be considered as a dominant platform. The Competition Law Committee Report of 2019 further cemented the direction that the CCI would eventually take. While the Competition Law Committee Report 2019 did not explicitly suggest any changes to how the relevant market needs to be defined in law to capture the differentiating effects of digital platforms, the CCI has operationally noted that it would begin to consider offline and online as separate relevant markets (Abhishek, 2022).

On the second issue of acknowledging app stores and other online marketplaces as the relevant market given that they are fashioned as ecosystems within themselves, both the CCI as well as other competition regulators have been slow to assess them as such. In the US, a similar antitrust battle occurred between Apple and Epic Games in 2022. Apple was accused of abusing its dominant position in the app store market, by forcing Epic Games (a video game publisher) to play by its app store policies. Epic Games has introduced a third-party payment method against Apple's app store policy of allowing only in-app payments (that involved paying Apple a 30% cut on subscription charges) and was duly ejected from the app store. Epic Games primarily lost the case as it was unable to prove that the Apple app store was a monopoly and a relevant ecosystem by itself, in the presence of the Google Play Store (Tech Desk, 2022).

Another prominent example of a data related ecosystem abuse that has largely gone unnoticed has been the Apple iOS 14 update.<sup>9</sup> The Apple iOS 14 update prohibited non-Apple apps from using a default opt-in for users to allow them to track data while not applying the same to its own apps. Apple apps had a default sign-in for users allowing Apple to collect data easily. While Apple advertised this update as a privacy-preserving policy, in effect it made it harder for third-party apps to compete on an equal footing, within this ecosystem. This approach did not capture the data network effects and the ecosystem dominance that gave these online platforms their market power.

This broad relevant market definition and lack of accounting for data-related market power, led to the CCI to dismiss assertions of these platforms abusing their dominant position. Both the CCI and the US courts have failed to account for the theory of ecosystem dominance (Jacobides and Lianos,

2021), where (here Flipkart and Apple) may not be dominant in the broader digital market but can the relevant market be defined as the ecosystem itself. Digital ecosystems are those that are broadly the central online marketplace for a network of complementary products and services (for example, application stores, operating systems, online e-commerce marketplaces) that can effectively lock in customers and raise switching costs, through leveraging the power in the complementary products (Jacobides and Loanos, 2021). The field of competition or the relevant market to be defined is not just a single product or service, but a whole host of complementary products (for example, app stores and apps provided by developers) that can be defined as the ecosystem. Here, the ecosystem owners can use their dominance and centrality to the system to game buyers and sellers on the platform, use their data to indulge to enter a complementary market, and indulge in abusive practices.

With respect to assessing market power, two main cases stand out in India. These dealt with instant messaging platforms and online marketplaces in the pre-competition law committee report era. This was the *Vinod Kumar Gupta vs WhatsApp*<sup>10</sup> in 2016 and the *AIOVA vs Flipkart* in 2018. In both cases, the CCI failed to account data related network effects and switching costs to assess market power. In general, switching costs refer to those costs incurred by users when switching from one product or service to another similar substitutable platform.

In the WhatsApp case, owing to WhatsApp's nature of being free and the switching costs remaining minimal, the CCI dismissed the prima facie claim of abuse of dominance. An important consideration missing in the order was that of network effects, a situation that adds high switching costs to competing messaging platforms. This was an advantage enjoyed by WhatsApp where network effects raise the barriers to entry, when rivals even if they produced a better product may not be able to entice users, as they may stick to the incumbent product purely for the network effects. These issues are compounded by the fact that rivals would be likely to find it hard to produce a better product given their lack of access to data from users. However, the CCI did not account for these data network effects and concluded that "there are no significant costs preventing the users to switch from one consumer communication app to another."<sup>11</sup>

In *All India Online Vendors Association v Flipkart (2018)*, the CCI, however, did acknowledge the role of network effects in online marketplace platforms. The order acknowledged that "the advantage gained by incumbents due to network effects may be difficult to breach." A large miss in the order was the CCI failing to consider the ways in which a digital platform with greater access to data than a seller can leverage its position to promote its own products and private brands in its own ecosystem.

As early as 2021, the CCI had launched investigations against Apple in India as well for similar policies as those employed by Google on its app store, where the lack of third-party payment options was being scrutinised as a potential abuse of dominance. While Apple's overall market share in the smartphone market in India stood only at 4.5 percent, this investigation indicates that the CCI is slowly leaning towards viewing ecosystems as the relevant market approach (Das, S., & Ahaskar, A, 2023).

Over the years, the CCI has kept in step with how it wants to define digital markets but has yet to explicitly view ecosystems such as iStores, Amazon marketplace as the relevant market by itself. Moreover, post the Competition Law Committee Report of 2019, and the current committee that has been constituted to draft the Digital Competition Act and make necessary changes to the act, the current issues of relevant market and market power stemming from data are being considered actively.

### **3.2 Assessing abuse of dominance:**

Traditionally, to establish 'abuse of dominance', the CCI needs to prove that a dominant firm has limited competition within its relevant market and harmed consumer welfare, which is usually captured through price. The standard test for assessing abuse of dominance has been the Small but Significant Non-Transitory Increase in Price ('SSNIP') test that measures the ability of a dominant player to increase prices without losing revenues. Given the complicated nature of digital platforms, especially zero-price platforms, the need for qualitative approaches is required. In digital platforms, consumer welfare harm cannot be completely captured through the element of price. In these markets, data can serve as the non-price metric, where greater the data collection, lower the privacy protection for consumers. There are different types of data-related abuses the paper accounts for: the first is data replacing price as the metric to assess competition and there is excessive data collection, akin to firms having the ability to charge excessive prices, in the face of a lack of effective competition.

The second is, data as a qualitative non-price metric of competition where a unilateral reduction in privacy by a dominant firm could be viewed as an abuse of dominance practice. The third aspect is when data is used for self-preferencing, such as when Amazon lists its own products in preference results over other third-party products on its platform. Finally, the fourth is related to access to data collected on these platforms -- from Flipkart to the app stores -- where the data of third-party sellers is used to better the platform's own products.

On the first issue, the CCI's view has charted a long path. The CCI initially in 2016, dismissed allegations against WhatsApp, a dominant platform on the issue of excessive data collection. However, in January 2021, it took a more refined approach when the CCI invoked its powers under section 19(1), to launch a suo moto investigation against WhatsApp and Facebook. This was following WhatsApp's 2021 privacy policy update that mandated that users would have to share data with Facebook. The CCI, in contrast to the view it took in 2016, noted that the switching costs were indeed high, and the wording of the policy was quite opaque, thereby it was unclear of the data costs on the consumer. The CCI took the view that WhatsApp's take it or leave it policy made consent controversial as "users were not provided an appropriate granular choice to object or opt-out of specific data sharing terms". In a significant first step, the CCI noted that "the reduction in consumer data protection and loss of control over personalised data can be taken as a reduction in quality under the antitrust law." (Mishra, 2022). This is an important precedent revealing an active regulatory action for how data protection and competition intersect.

On the second issue of privacy as a metric to judge competition, the turning point came post a few important market study reports. Prior to the Competition Law Committee Report of 2019, the CCI had not actively intervened in these digital markets. In 2020, the CCI acknowledged privacy as a non-price metric of competition in a market study report on the telecom sector (Competition Commission of India, 2021).<sup>12</sup> Moreover, through the recent Android case in 2022 and the subsequent re-opening of investigations against WhatsApp, it is clear that the CCI has now started accounting for data-related abuse of dominance practices.

On the issue of self-preferencing, the first significant time that the CCI had intervened in a data-related abuse of dominance practice was the *Matrimony.com vs Google case*,<sup>13</sup> in 2018 where the search giant was fined on two accounts. The first was on using its market dominance to favour its own services such as Google Flights with respect to search rankings and results and the second was for the display of universal search results in fixed positions that were not relevant to the search (Sinha and Srinivasan, 2021). And finally, on access to data, the CCI actively intervened in these markets for the first time last year.

In October 2022 in a major regulatory intervention, the CCI fined Google significantly on two separate counts for abusing its dominant position in the market. The Director General (DG) investigated Google for abuse of dominance<sup>14</sup> in these markets: Licensable mobile OS for smart mobile devices in India, App stores for Android OS in India and Apps facilitating payments through UPI. Particularly, the dimension of 'access to data' in relation to the playstore was scrutinised further to assess Google's dominance. The order concluded that access to data was an important dimension and investigated primarily whether Google had access to data of its downstream players to improve its own services resulting in an undue competitive advantage over other players in the ecosystem without access to this data for their own improvisation and innovation.

Google was found guilty of gatekeeping a high volume of "granular data of the app users including complete personal as well as financial transaction information". This data was not shared with app developers fully, and by controlling the data Google was concluded to be in a position of dominance. Google mandated the use of the Google Play Billing System (GPBS) for all developers, through which it acquired the data and dictated contractual terms to app developers putting them at a disadvantage. The order also helps to clarify how third parties are perceived by CCI. Google claimed that app developers are third parties and users would not expect or consent to their private data being shared by app developers on the platform. CCI ruled out this assertion. It clarified that users had carried out the transaction with app developers, through the GPBS making them direct parties to the transaction. To remedy this breach CCI instructed Google to set out a "clear and transparent policy on data that is collected on its platform and also the potential and actual sharing of such data with app developers, or other entities, including related entities. Subject to adequate safeguards, CCI mandated Google to share the data generated by it through its apps with other app developers to reverse, putting its competitors at a disadvantage.

### 3.3 Mergers and Acquisitions

For digital platforms, the CCI has not intervened to prevent any mergers and acquisitions based on data considerations. Mergers and acquisitions are primarily dealt with under Section 5 of the Competition Act, where deals above a certain revenue and asset threshold are scrutinised for potential anti-competition effects. Many digital start-ups that could serve as long-term competitors fall below these regulatory thresholds as they often are asset-light and prioritise revenues for the long term. In 2019, the Competition Law Review Committee called for a review of the transaction value thresholds and the proposed amendments to the Competition Act have introduced a concept of scrutinising transactions based on 'deal value' rather than on assets and turnover.

## 4. Mapping of the data protection law

This section maps the overlaps that stem from the Digital Personal Data Protection Act 2023 and competition jurisprudence to lay out the points of convergence as well as divergence in pursuing the twin objectives of protecting data as well as maintaining competition in the market. The Digital Personal Data Protection Act 2023 (DPDP) is the fifth and final iteration of the privacy law that India has been attempting to legislate since 2018. The law was passed in August of 2023, and the DPDP Act has many clauses with implications for antitrust issues. We map clause-wise the data-related antitrust consequences that stem from this current version of the law. The broad analysis has been bucketed under 4 brackets depending on whether the consequence for either data protection or competition has been either beneficial or it will have adverse effects. The analysis of the DPDP Act and its competition effects is not just limited to what the proposed legislation contains but also what has been omitted. The caveat here is that we map the theoretical implications of the clauses and not how they would potentially play out in this current market.

### I Negative Data Protection-- Negative Competition

There are specific clauses in the DPDP Act that lead to a negative outcome on both data protection as well as antitrust in the market. The first issue is the lack of specificity regarding taking consent from the user on third-party data sharing by the primary platform that collects data. Here, section 6 of the DPDP Act details the notice that a data principal must receive and consent to for the purpose of collection and processing of personal data. While the law mandates that the notice provided must include details in clear language on the personal data that is sought to be collected and the purpose of processing, it does not explicitly mandate any details on data sharing with third parties. The details of data sharing will only be made available when requested by a data principal. The lack of oversight on third-party data sharing is a clear negative for the data rights of a user as data can be shared without explicit consent. Moreover, this could detrimentally impact competition in the market - as the primary platform that collects data from the user holds control over which third parties they can share this user

data with. The incentive for this platform would be to share data with those parties that can help target their users better through advertising or to better customise their products - potentially further entrenching their power in the market and raising market entry costs. The lack of access to such data could prove to be an important barrier to entry that could prevent a rival from offering a better product.

The second issue is the broad cover provided to the state. In particular, section 7. (c)&(d) provides cover for the state or 'any instrumentality of the State' (MeitY, 2023); where any data collected from a user for issuing a licence to any service provided by the state, consent need not be actively taken from the user. This does not bode well for data protection as the rights-based approach to privacy is diluted in these situations. Competition in the market could suffer as well, due to the fact that state agencies from public sector banks to regulators such as RBI and SEBI could fall under the definition of the instrumentality of the state. This clause could give state-owned agencies an undue advantage compared to their private sector peers, especially in sectors where the state-owned agency is the dominant monopoly.

The third pertains to the vast ambiguity around the transfer of personal data to other countries. Section 16.1 pertains to the transfer of personal data which the Central Government will notify based on factors not specified in this version, on the basis of which data fiduciaries *cannot* transfer personal data to the prescribed countries. This in essence would be a negative list. This clause as it stands now provides a generous amount of discretion to the executive, in selecting countries to which personal data *cannot* be transferred. Selective and arbitrary restrictions on the transfer of personal data can inhibit entering new markets, and innovation on new products --- making effective competition in the market more difficult. The bigger technology firms that already possess market power could influence which countries are on the 'green list', making navigating this regulation easier for them compared to smaller firms. In the absence of clear metrics, the ambit of discretionary power could prove detrimental to both data protection as well as competition. Laying down general objective principles that allow for easy classification of countries 'as safe to either transfer data to' or 'as unsafe and requires additional protocols', would reduce the wide ambit given to the Central Government in this section.

The fourth issue that has negative implications for both market competition and data protection would be the clauses pertaining to withdrawing consent. The law provides an ambit for consent to be withdrawn under section 6.4 where 'Data Principal shall have the right to withdraw her consent at any time, with the ease of doing so being comparable to the ease with which such consent was given.' However, in the next clause (section 6.5), the law makes it clear that the burden of withdrawing consent falls on the data principal and not on the data fiduciary. Since the consequences of withdrawing consent fall on the data fiduciary, it is a loophole that firms can exploit to their advantage. While this clause reduces the scope for processing of data once consent is withdrawn, it does not completely eliminate the issue. The law also clearly states that withdrawal of consent will not affect the processing of data previously shared. In the WhatsApp privacy policy update case, defendants could potentially argue using that users consented to third-party data sharing at the time

of signing up for WhatsApp's services for the first time and hence continue to process information previously shared.

Finally, the last and main issue is the lack of a right to data portability. European jurisdictions have defined this right where data portability as enshrined under Article 20 in GDPR to mean that users or data principals have a right to access data they may have parted with on a platform in 'a structured, commonly used and machine-readable format'<sup>15</sup>, so data can easily be shared or transferred to another data fiduciary of the user's choosing (GDPR-info, n.d.).

Data portability in general, can lead to positive ramifications for competition. The right to data portability allows users to have more agency with regard to their data, allowing them the right to port their data to another platform from which they may wish to avail service. The availability of data portability could reduce user lock-in<sup>16</sup>, as users may be reluctant to move to a new digital platform service if they are unable to transfer all their user history on the previous platform (OECD, 2021). A user of the Google search engine may be reluctant to move to another search engine if he is unable to port his search history (Regan-Stansfield, J., & Duckworth, M, n.d.).<sup>17</sup> If switching proves costly, user lock-in may proportionately increase (Vanberg, Ünver, 2017 & Shapiro & Varian, 1999). Reducing switching costs could incentivise competitors and new entrants and lower barriers to entry, proving beneficial for competition in the market.

However, this relationship is nearly not as straightforward in all contexts and there are instances when data portability can effectively reduce competition in the market as well. Data portability may not serve to reduce entry barriers for new entrants. Data portability mandated for all companies may adversely affect new entrants rather than the incumbent. The compliance burden of portability could be higher on a new smaller firm rather than the dominant firm, leading to an increase in entry barriers.

## **II Positive Data Protection and Negative Competition**

In a few instances, positive data protection aspects can lead to negative competition outcomes., section 10.1 empowers the state to deem any data fiduciary as a significant one based on a host of factors such as volume and sensitivity of personal data processed, risk of harm to the data principle as well as to electoral democracy and security of the state. A data fiduciary deemed significant will have to abide by additional provisions such as the appointment of a data protection officer and an independent data auditor to conduct periodic audits and data protection impact assessments. These compliance requirements, if implemented well by the significant data fiduciary, can translate to better data protection.

However, this clause lacks detail and clarity due to the subjectivity of the factors and is not being properly defined. This provides ample leeway to the state to notify any data fiduciary as significant at any given point in time. This could lead to bad competition outcomes for these reasons: Firstly, uniform compliance burdens across a range of firms (big or small) can disproportionately favour dominant firms and raise entry costs for start-ups. Additionally, the uncertainty of when a firm can be deemed 'significant' could add another layer of uncertainty to operating costs for the new entrants.

Other jurisdictions, especially the European Union have legislated to at least reduce the uncertainty of these regulations. For example, the DMA focuses on additional regulations for significant data fiduciaries of importance termed as 'gatekeeper platforms'. However, the criteria for designating a platform as a gatekeeper is according to well-defined quantitative and qualitative metrics. The quantitative metrics used are annual turnover, number of users, etc to qualitative criteria such as being an 'important gateway for business users to reach end users'.<sup>18</sup> The use of well-defined criteria reduces the arbitrariness of decision-making by the state and provides the pathway for a more stable regulatory environment.

### **III Negative Data Protection- Positive Competition**

There are certain sections in the DPDP that as stated are weak on the protections provided but could possibly have a positive impact on market competition. This particularly relates to the clause on certain legitimate uses --- Section 7 of the Act focuses on processing of personal data points to situations where the user's consent for providing personal data will be presumed. This section encompasses a broad caveat of situations where data can be processed and consent will not be actively sought. In a market, where there is a clear dominant firm -- this clause provides leeway for the dominant firm to collect more data than rivals using its network power effects and the lack of an effective competitor can help the dominant player further entrench its power. This is however a complex situation. Given that this clause lowers the bar for data collection without consent, it can prove to be pro-competitive, as access to user data is made easier for all firms across the board. On the other hand, given the broad leeway to collect data without explicit consent, data protection is definitely lowered for all users.

### **IV Positive Data Protection and Positive Competition**

The DPDP by way of protecting data also results in positive externalities for competition in the market. Section 11 of the DPDP Act grants certain rights to the data principal on processing. While the rights covered may not be as comprehensive as those covered under GDPR law, this section lays out rights such as the right of a consumer to receive a summary of the data that has been processed by the data fiduciary, a confirmation that the data fiduciary is processing or has processed the data collected, the nature of the processing activities undertaken and the identities or parties with which the data has been shared. Here, the mandated level of data protection that all firms need to abide by could potentially result in firms competing to offer privacy-enhancing products to users (Esayas, 2018).

## **5. Policy recommendations**

The CCI in recent months has made great strides towards reigning in anti-competitive practices through its interventions in digital markets. From its rulings on Alphabet and its Android operating system in October 2022 to proposing to set up an in-house Digital Markets Unit (DMU)<sup>19</sup> to

understand and tackle the complex challenges emerging in these unique markets, the CCI is evolving its approach in the right direction. The distinct economics of data-driven platforms has made a case for a more nuanced take on how best abuse of dominance exercises stemming from the role of data and its privacy should be tackled. However, given the numerous implications of the Digital Personal Data Protection Act, which was recently tabled, the paper proposes a few recommendations (or amendments) that will ensure the clashes between data protection and competition are kept to the minimum.

1. The CCI needs to incorporate data protection as a qualitative measure into the consumer welfare standard. While price has served as the primary quantitative barometer to measure consumer welfare loss, other qualitative measures have served as metrics to take into account. The zero-price nature of new technology platforms such as WhatsApp and Facebook necessitates a more nuanced qualitative approach. The Commission has taken note of this and in the CCI's *Market Study on the Telecom Sector in India*<sup>20</sup> acknowledged that data privacy can take the form of non-price competition (Competition Commission of India, 2021). As discussed in section 3 on the different types of data-related abuses, this would pave the way for excessive collection of data, data collected through bundled consent, lack of data portability measures and other privacy-lowering measures to serve as anti-competitive practices by dominant platforms in their relevant markets. Prior to this CCI observation on privacy, other jurisdictions too have adopted this view. The Japanese competition regulator, the Japan Fair Trade Commission has acknowledged privacy as a dimension of product quality. Prior to this, in the Microsoft-LinkedIn acquisition in 2016, the European Commission made a statement stating that in the future privacy would be an important parameter and assessed if a high degree of data concentration in a single firm post the acquisition could harm competition on privacy in the market.

2. Despite the nuances around data portability, the DPDP Act needs to incorporate a provision for the right to data portability as this would be crucial, as discussed in section 4. This would essentially hand over more control to the user on the data that has been shared with a particular digital platform, ensure user consent, and help dictate who they wish to share their data and ultimately, help reduce lock-in effects and switching costs. Introducing data portability will prove to be a positive winning proposition for enhancing both competition as well as data protection.

3. There are significant clauses in the DPDP law that introduce regulatory ambiguity for firms while marginally enhancing data protection. The bill needs to introduce objectivity in decision-making on primarily two clauses. The first is section 10 where the bill introduces a differentiated tier of regulation by classifying certain fiduciaries as significant and imposes additional data protection compliances. The second is the section on transfer of personal data outside of India, with the central government given a wide ambit on which countries can be on an admissible list based on factors that

will be decided by the state. In both these cases, the wide arbitrary power given to the state to decide based on subjective factors, makes way for regulatory uncertainty. In both these instances, GDPR and its corresponding sections would be a better model to look towards. The GDPR law lays down concrete quantitative and qualitative metrics to classify firms as 'gatekeepers' as well as general objective principles on which countries' personal EU data can be transferred to without the explicit permission of the state. Here, it is the model of having a differentiated and a well-calibrated approach towards regulating entities of varying classifications that regulation in India could emulate, fitting it to our context rather than the specific criteria themselves.

4. The CCI is yet to actively take into account data considerations to inform mergers and acquisitions in digital markets. Section 5 of the Competition Act deals with mergers and acquisitions where traditionally approval for these transactions needs to be sought above a certain threshold based on assets and turnover. The CCI Act before the proposed amendments were inadequate to deal with mergers in digital markets primarily because of two reasons. The asset and turnover threshold would not adequately capture mergers in digital markets (such as of WhatsApp/Facebook) as these platforms were yet to generate substantial revenue in India (Avinash Kotval, A., & Saraswat, I, 2022). the logic of digital markets, where network effects and user data make growing the consumer base the highest priority. But as India grows to be a significant market for Big Tech firms in the future, the CCI toolkit will have to scrutinise these mergers and acquisitions, especially those stemming from the need to access and combine greater volumes of data. The proposed amendments to the CCI Act by the Ministry of Corporate Affairs in 2023 focuses on a new 'Deal Value'<sup>21</sup> threshold for notification and approval. This hopes to capture data-related mergers and work as a useful proxy, but this approach needs refinement.

5. CCI needs to actively consider the issue of ecosystem dominance and define the relevant market taking into account the 'gatekeeper role' of the Play Store apps, and e-commerce marketplaces such as Amazon and Flipkart. Antitrust regulators around the world are unable to capture the exploitative anti-competitive practices of these firms, as regulators are unable to cross the threshold level of establishing these firms as dominant due to the classic relevant market definition. For example, the app developers such as Epic Games could not mount an effective antitrust argument against Apple and its subscription policy, as it was unable to prove Apple to be a monopolist in the market for play stores. However, increasingly the antitrust literature points to the notion that Apple is indeed a monopolist 'in the market for app distribution of iOS' where the iStore is considered as the whole relevant market. Ecosystems have been described as a community of firms producing goods collaboratively (Jacobides, 2021)<sup>22</sup>. In the ecosystem, a particular firm could gain dominance and be termed the gatekeeper - as it controls access for all other firms in the ecosystem to access the customer database. In the Apple ecosystem, apple through control of the operating software as well as the hardware, is essentially the gatekeeper of that ecosystem, controlling access of app developers to the

customer base (Jacobides, 2021). Here, Android's playstore does not serve as an effective competitor as it did not prevent Apple from asserting its market power in its own Apple ecosystem (Geradin & Katsifis, 2021).

6. Despite the best of efforts in drafting and implementing laws, the objectives of data protection and competition in the market will produce inevitable conflicts. However, the scope for synergies is also immense which calls for an institutional coordination mechanism between the regulators. In this case, it would be the Data Protection Board and the Competition Commission of India. This would entail formal and informal mechanisms that bring together the CCI and any data protection regulators created by legislation. This is important not just for more effective regulatory approaches, as we have outlined, but also to prevent forum shopping by firms. Other jurisdictions are heading down this path as well. The European Union's Digital Clearinghouse is a voluntary network of regulators, while the UK government is considering a Digital Markets Taskforce which will gather representatives from the Competition and Markets Authority, the Office of Communications (Ofcom), and the Information Commissioner's Office.

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## Notes

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<sup>1</sup> See [press release](#) by Bundeskartellamt (7 February 2019).

<sup>2</sup> There is extensive literature on how data collected by businesses has an impact on antitrust issues as well as privacy and data protection. Refer to an earlier work on this in Kira, Sinha and Srinivasan (2020)

<sup>3</sup> For more details on Apple's privacy features, refer to this [blog](#)

<sup>4</sup> Digital Data Protection Act, 2023

<sup>5</sup> See the Economic Advisory Group on Competition Policy's discussion [paper](#)

<sup>6</sup> For more details on the ruling, please see [Bundeskartellamt prohibits Facebook from combining user data from different sources](#)

<sup>7</sup> Ashish Ahuja v. Snapdeal, Case No. 17 of 2014

<sup>8</sup> AIOVA vs Flipkart, Case No. 20 of 2018

<sup>9</sup> For more details on the Apple iOS 14 update, read Competition Policy International article [here](#)

<sup>10</sup> Shri Vinod Kumar Gupta v. WhatsApp, CCI Case No. 99 of 2016.

<sup>11</sup> Shri Vinod Kumar Gupta v. WhatsApp, CCI Case No. 99 of 2016.

<sup>12</sup> Refer to CCI Telecom Market Study report (2021)

<sup>13</sup> Read more on Matrimony.com vs Google case [here](#) & Refer to CCI Telecom Market Study report (2021) & Ministry of Corporate Affairs, Report of the Competition Law Review Committee report

<sup>14</sup> Read more on antitrust order details [here](#)

<sup>15</sup> See the format [here](#)

<sup>16</sup> Refer to OECD (2021)

<sup>17</sup> Read Frontier Economics [here](#)

<sup>18</sup> Read more on 'gatekeeper platforms' [here](#)

<sup>19</sup> Read more on Digital Market Units [here](#)

<sup>20</sup> Refer to CCI Telecom Market Study report (2021)

<sup>21</sup> Read more about the proposed amendments to the CCI Act [here](#)

<sup>22</sup> Read more on drivers of digital platform power [here](#)