
NON-PRICE PARAMETERS OF COMPETITION AND THEIR INFLUENCE IN ZERO-PRICE DIGITAL MARKETS

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ABSTRACT

The competition law paradigm has hitherto centered on price and output. The maxim *pretium non est solum criterium* reminds us that price is not the only measure of competition. Current digital economies illustrate that consumer damage frequently results from non-price aspects like data exploitation, degradation of privacy, informational asymmetry, and limitation of innovation. In zero-price economies, data have come to be used as the currency of exchange. Leading companies exploit control over user data, generating informational asymmetries that constrain choice and exclude competition. Denying access is antithetic to transparency, it blocks market entry, and it entrenches monopoly. In acknowledging data as a critical innovation input, competition law gives a basis to overcome these structural hurdles. Consumer well-being, the telos of the Competition Act, goes beyond pecuniary interests to include autonomy, dignity, and safety from exploitative behaviour. The doctrine *salus populi suprema lex*, i.e., the well-being of the people is the supreme law, applies equally to this broad interpretation. Comparative jurisprudence, the direction of competition jurisprudence in the future is through express acknowledgement of non-price determinants like privacy, transparency, innovation, and consumer sovereignty as part of market integrity. Concerted action between competition and data protection regulators can provide comprehensive cures, as long as dominance doesn't mean systemic consumer exposure. By integrating privacy into the consumer welfare standard, India is poised to set the world standard in regulating digital monopolies. The final goal of competition law, then, is not limited to defending consumers' wallets, but is instead aimed at protecting their dignity, autonomy, and freedom in the digital marketplace.

Keywords: Competition Law, Privacy, Consumer Welfare, Data Protection, Digital Markets

Introduction

The maxim of *pretium non est solum criterium*, enumerates that, price is not the sole determinant of competition. The analytical framework of the Competition Act, 2002¹ embraces not only price but also quality, transparency, innovation, consumer welfare² and privacy³. It is well established that exploiting user data without consent is abusive⁴, where personal data⁵ has consistently⁶ proven to be a decisive axis of competition.

The pillars of competition law are changing and no longer reduced to the sphere of price and output, contemporary markets, especially online platforms, illustrate that consumer injury typically occurs in non-price modes. Degradation of privacy, data exploitations, and informational imbalances now define the competitive sphere as surely as classical price parameters. Understanding data as the real currency of the digital economy, regulators and courts are coming to view privacy as a facet of service quality and consumer well-being.

Non-Price Dimensions of Competition

Competition jurisprudence recognizes that quality is a dimension of competition⁷ and the degradation of privacy protections and confidentiality shall therefore result in a reduction in the quality parameter and compromise our fundamental rights⁸, in turn harming not only competition in the market but also consumer welfare.

Hence, it is clear that abuse of competition is no longer confined to price alone⁹; non-price parameters such as data privacy, consumer protection and innovation also carry weight in determining market power¹⁰. Thus, privacy is an integral part of service quality due to its dual

¹ Competition Act, No. 12 of 2002 (India).

² Competition Act, No. 12 of 2002, § 18 (India).

³ Competition Commission of India, Market Study on the Telecom Sector in India (Jan. 22, 2021), ¶70.

⁴ Bundeskartellamt v. Facebook Inc., B6-22/16, Decision of the Bundeskartellamt (Feb. 6, 2019).

⁵ Case C-252/21, Meta Platforms Ireland Ltd. v. Bundeskartellamt, ¶51 (CJEU July 4, 2023) (ECLI:EU:C:2023:537).

⁶ Case COMP/M.4854 TomTom/Tele Atlas, Commission decision (2008).

⁷ Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions, (2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284 (Last visited August 27, 2025).

⁸ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

⁹ Mergers: Mergers: Commission clears Apple's acquisition of Shazam, (2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662 (Last visited August 27, 2025).

¹⁰ Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors., Case No. C-03/2011, Competition Comm'n of India (Main Order), Aug. 25, 2014.

status as a fundamental right and as a quality parameter, and its erosion by a dominant firm is an exploitative abuse.

In zero price economies, while there is an illusion that services are free, it is widely understood that data is the currency of the digital economy¹¹. Informational asymmetries between dominant firms and users restrict consumer choice and foreclose competition¹². The Essential Facilities Doctrine¹³, laid down in *Oscar Bronner v. Mediaprint*¹⁴, holds that indispensable resources controlled by a dominant firm must be accessible on fair terms.

Section 4(2)(c)¹⁵ of the Competition Act prohibits the abuse of dominant position by refusing access to market to the contenders. Further under Sections 18¹⁶ and 19¹⁷ of the Competition Act, the Commission is required to eliminate the practices which might have adverse impact on the competition. Sections 19(3) and (4), precisely deals with determining the factors that restrict the emergence of competition. Hence the judiciary can invoke this doctrine, when necessary.

In *Attheraces v. British Horseracing Board* (2005)¹⁸, refusal to supply racing data was deemed abusive. Therefore, information asymmetries highlight that competition in online markets is no longer about price strategies but also about the extent of data control and information access. When large firms accumulate personal data, they consolidate their dominance and restrict market access to competitors, actions that squarely fall within the abuse of dominance prohibited under Section 4(2)(c) of the Competition Act¹⁹. These strategies not only decrease transparency and diminish the potential for authentic consumer choice but also chip away at contestability by closing off new entrants. Through recognizing information as a key input to innovation and market entry, competition law introduces a mechanism to tackle these structural hurdles. Guaranteeing equitable access to information and preventing exclusionary behavior is

¹¹ Autorite De La Concurrence and Bundeskartellamt, *Competition Law and Data*, At 11 (2016).

¹² *In Re Matrimony.com v. Google*, 2018 CompLR 101 (CCI).

¹³ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 1985 SCC OnLine US SC 168: 86 L Ed 2d 467: 472 US 585 (1985)

¹⁴ *Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, ECLI:EU:C:1998:569, [1998] E.C.R. I-7791.

¹⁵ Competition Act, No. 12 of 2002, §4(2)(c) (India).

¹⁶ Competition Act, No. 12 of 2002, § 18 (India).

¹⁷ Competition Act, No. 12 of 2002, § 19 (India).

¹⁸ *Attheraces Ltd. v. British Horseracing Bd. Ltd.*, [2005] EWCA Civ 863, [2007] 1 C.M.L.R. 4 (Eng.).

¹⁹ Competition Act, No. 12 of 2002, §4(2)(c) (India).

thus crucial both for protecting consumer autonomy and for allowing competitors to compete on an even footing and to promote dynamic competition.

Consumer Welfare and Privacy as Determinants of Competition

Consumer welfare is the *telos* of the Competition Act²⁰. It includes autonomy and dignity, not just pecuniary interests. Hence, '*ubi jus ibi remedium*', where there is a right, there is a remedy and the competition commission's intervention is justified.

Consumer interests in the knowledge economy need to be interpreted widely to include protection from exploitative uses of data and informational imbalances. Market leaders and dominant players, through their ability to shape the use of personal data, can dictate terms that violate privacy, limit choice, and erode dignity. This is consistent with Sections 18 and 19's mandate for the Competition Commission to curb practices distorting competition and detrimentally affecting consumers beyond financial loss.

Section 4(2)(a)(i) the act prohibits imposing unfair conditions this saw practical applications in the case of WhatsApp Privacy Policy (2021), the CCI held that unilateral, non-negotiable privacy terms constituted coercive obligations²¹. The doctrine *salus populi suprema lex*, that is, the welfare of the people is the supreme law, also supports this reasoning. The Supreme Court in Justice K.S. Puttaswamy v. Union of India recognised privacy as a fundamental right.²² Therefore, degrading privacy standards amounts to abuse of dominance under the Competition Act.

India's data protection framework, from the Information Technology (SPDI) Rules, 2011²³ to the Digital Personal Data Protection Act, 2023²⁴, shows a clear intent to require consent, limit purpose, and protect sensitive personal data. Further, the General Data Protection Regulation, had been considered alongside competition law in *Bundeskartellamt v. Facebook* to reject abusive privacy terms. Therefore, one-sided privacy violations by a dominant player clearly

²⁰ Competition Act, No. 12 of 2002, § 18 (India).

²¹ In re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Motu Case No. 1 of 2021 (Comp. Comm'n of India Nov. 18, 2024).

²² K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

²³ Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Gazette of India, G.S.R. 313(E) (11 Apr. 2011).

²⁴ Digital Personal Data Protection Act, No. 22 of 2023, Gazette of India, Extraordinary, Part II, § 1 (11 Aug. 2023).

fall under “unfair conditions” according to §4(2)(a)(i) FCA.

The Privacy-Dominance Feedback Loop in Digital Markets

Privacy erosion in today's digital markets is not just a stand-alone consumer harm but the beginning of a self-perpetuating spiral that consolidates market power. When leading companies use user data in a non-substantial manner, they generate serious informational asymmetries. These asymmetries, combined with proprietary leverage over large datasets, allow these companies to enhance their services, strengthen network effects, and bar competition by increasing entry costs.

Monopolistic control of information therefore becomes a strategic asset in the mold of a critical facility. Smaller rivals, without similar access to consumer data, are structurally handicapped, preventing effective contestability. With increasing dominance, companies can exercise unilateral, non-negotiable terms and conditions on consumers. The WhatsApp Privacy Policy case²⁵ (2021) is an example, where non-consensual and coercive privacy conditions were held to amount to exploitative abuse under Section 4²⁶ of the Competition Act, 2002.

Consumers, with few or no alternatives available, are subject to de facto lock-in²⁷. Network effects, switching costs, and non-interoperability restrict user choice, and users are left having no alternative but to accept intrusive practices. Such dependence allows companies to further erode privacy protections, extracting even more personal information. The process continues, entrenching dominance and diminishing consumer well-being.

This feedback mechanism illustrates that privacy is not an incidental issue but a core parameter of competition. Its destruction lowers the quality of services, infringes on fundamental rights, and aggregates structural power. Identifying privacy as both a quality indicator and a fundamental right enables competition law to respond to this vicious circle effectively. Interventions thus need to target not only price-based harm but also to break the privacy-dominance cycle in order to maintain contestability, consumer sovereignty, and innovation in digital markets.

²⁵ In re WhatsApp Inc., Case No. 01 of 2021, Competition Commission of India (2021).

²⁶ Competition Act, No. 12 of 2002, § 4 (India).

²⁷ In Re: Harshita Chawla v. WhatsApp Inc. & Facebook Inc., Case No. 15 of 2020, Competition Commission of India.

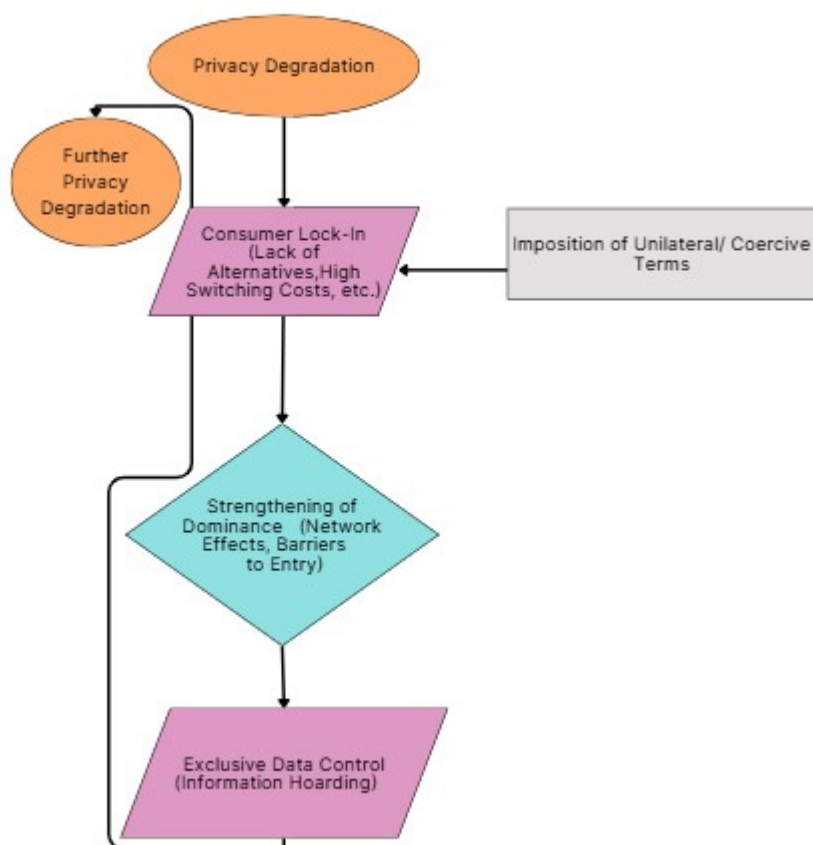


Figure 1: Illustration of the privacy degradation feedback loop

Towards Regulatory Convergence

There is clear indication that competition law and privacy must be integrated.²⁸ In 2014, EDPS argued that-

*“privacy and the protection of personal data should be considered not as peripheral concerns but rather as central factors in the appraisal of companies’ activities and their impact on competitiveness, market efficiency and consumer welfare.”*²⁹

The blending of competition and privacy issues further speaks to more profound questions regarding the development of regulatory philosophy in digital markets. Antitrust traditions were largely founded upon addressing price impacts, output restriction, and exclusionary

²⁸ Facebook Inc. and Others v Bundeskartellamt, (2021/C 320/20).

²⁹ European Data Protection Supervisor, Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy (Issued on Mar 14, 2014).

behavior in goods markets. Yet the emergence of platform economies illustrates that consumer harm can occur in non-price forms, such as extractive data practices and choice diminishment. Identifying this change calls upon regulators to rethink consumer well-being as a multi-dimensional ideal, one that embraces informational autonomy as much as economic efficiency.

Practical implications follow such a reorientation. If privacy erosion or one-sided data exploitation are framed as an "unfair condition" under competition law, enforcement draws nearer to counteracting structural asymmetries in intrinsic digital markets. This does not stretch competition law outside its jurisdiction; instead, it confirms its applicability in markets where dominance is established by control of information. The judiciary and the Commission, through invoking doctrines of essential facilities or unfair terms, can guarantee that entrenched dominance does not become systemic consumer vulnerability.

In addition, the incorporation of privacy into competition analysis enhances the legitimacy of regulatory intervention. As the European Data Protection Supervisor noted, data protection is not a marginal concern but a driver of market efficiency in itself. Where companies compete on privacy levels, innovation is encouraged and consumers enjoy real choice. Where, in contrast, privacy is regarded as discardable, market power is enhanced and welfare is undermined.

The future thus lies in convergence and not siloed regulation. Synergistic enforcement between competition and data protection regulators can provide end-to-end remedies, reconciling incentives for innovation with consumer protection.

The path of competition jurisprudence in India, when taken in conjunction with international trends, suggests one unambiguous lesson, privacy needs to be explicitly placed within the consumer welfare ideal. Large companies that undermine privacy do not just take advantage of people; they distort markets, consolidate power, and stifle innovation. By acknowledging privacy to be both a basic right and a non-price quality parameter, the Competition Commission has at its disposal the means to tackle such harms under current provisions. The challenge in front is to achieve convergence between competition and data protection regimes, in which coherent enforcement, balancing innovation with accountability, can be ensured. India is at the moment of truth today to take the lead internationally by rethinking competition law for the digital world and establishing a regime that safeguards not only the consumer's pocketbook, but also their dignity, autonomy, and freedom of information.