A FRAMEWORK TO EVALUATE NON-PRICE FACTORS IN COMPETITION REGULATION

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Participants for the one and a half hour long session included (in alphabetical order): Dinoo Muthappa, Managing Associate; Gregor Langus, Director, E. Ca Economics GmbH; TT&A; Mansi Kedia, Fellow, Indian Council for Research on International Economic Relations; and Rahul Rai, Competition Lawyer.

All views expressed here, as well as errors therein are the author's alone.

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CONTENTS

I. INTRODUCTION

Technological developments have enabled product and service delivery to consumers efficiently and seamlessly. Online retail for instance offers a larger selection of goods from more sellers at competitive prices. Digital markets share some characteristics – like network effects,[i] multi-sidedness[ii] and economies of scale[iii] – that let companies charge lower or even zero prices for their goods and services. The graph below shows how declining prices of technology goods and services over the last 20 years have resulted in firms charging lower prices from consumers. This price reduction also reduces the room for price-related competition between firms.

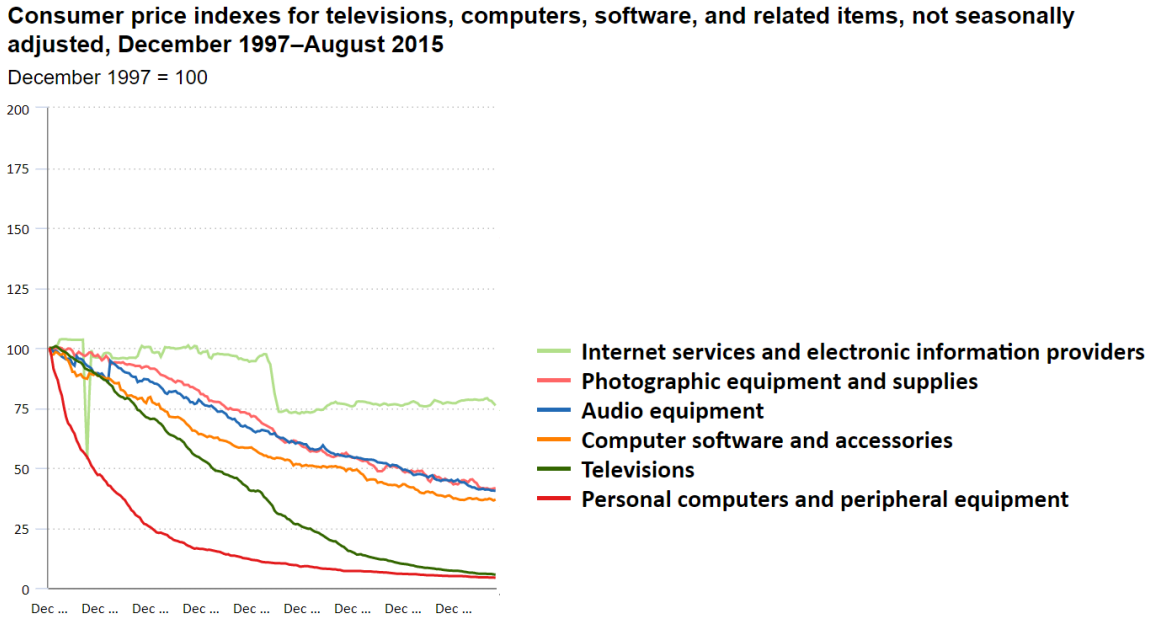

Figure 1: Historical prices for computer software and related items.

(Source: US Bureau of Labor Statistics)

i Network effects refer to a situation where the value a consumer derives from using a product depends on the other consumers of that product. Network effects can be direct, where the value derived by a user increases as the number of users increases. They can also be indirect, where the value a user derives is dependent on the presence/number of another user group.

ii Multi-sided markets occur when a firm or platform provides goods or services to distinct but interrelated consumer groups. The different consumer groups are usually linked by indirect network effects, i.e an increase in prices on one side of the market can affect demand on the other side. Where indirect network effects are strong and skewed, firms can subsidise one side of the market while levying a charge on the other. For example, a search engine serves users as well as advertisers. Advertisers gain from the presence of a large number of users, but users may not gain from a large number of advertisers. Here the indirect network effects between both sides are skewed, allowing the search engine to charge zero price from users while levying a charge on advertisers.

iii Digital firms usually face high up-front costs but little to no incremental costs. Once established, digital firms can grow rapidly by expanding to new customers at minimum additional cost.

REDUCED PRICE-RELATED COMPETITION, COUPLED WITH GROWING INNOVATIVENESS, HAS MADE PRICING A LESS IMPORTANT DETERMINANT OF COMPETITION.

Besides price reduction, digital markets share characteristics of dynamism and rapid innovation. Here firms constantly innovate new features and functionalities to improve their products and offer users better value.[1] Reduced price-related competition, coupled with growing innovativeness, has made pricing a less important determinant of competition. Instead, qualitative factors such as new features or improved service quality are being increasingly used to distinguish between competing products and services.[2] A consumer survey conducted as part of the Competition Commission of India's Market Study on the Telecom Sector confirms the increased importance of qualitative parameters over prices.[3] Survey respondents ranked network coverage and customer service – both qualitative factors – as the most important factors in choosing between telecom service providers.

Rank	Factor
1.	Network coverage (qualitative)
2.	Customer service (qualitative)
3.	Tariff packaging (price)
4.	Lower tariffs (price)

Table 1: Factors considered important by consumers in choosing between telecom providers

(Source: CCI Market Study on Telecom Sector)

A similar consumer survey in the United States revealed that 53% of adults rate quality as the most important factor in shopping online. Only 38% rated price as more important.[4]

Several non-price factors determine competition in digital markets. In data-driven markets, the level of privacy and security afforded to consumers is important in choosing between competing services.[5] Another US survey found that over 75% of adults are concerned about the data collection practices of digital companies.[6] In India, the spurt in privacy-focused messaging platforms like Signal shows privacy's growing importance for consumers.[7] There is greater recognition that companies can compete on the level of data protection they offer, as an aspect of service quality. Privacy has become increasingly important in antitrust determinations as a result, and it is one of the non-price factors studied in this paper. At this point however, privacy, unlike the other non-price factors mentioned above, is difficult to quantify and measure.

Innovativeness is the other non-price factor assuming importance in competition cases. It refers to the unique functions or features used to distinguish between digital products and services. Competition authorities (CAs) have been willing to rely on the unique features of a product or service to determine its relevant markets, to assess the impact of combinations or mergers on competition in those markets. Hence, innovativeness is the second non-price factor discussed in this paper.

Section two outlines the emerging jurisprudence on non-price factors as determinants of competition in digital markets. It covers recent cases in India,

the EU and USA where regulators used non-price factors to assess competition in digital markets.

Although non-price factors are vital for accurate competition assessments in digital markets, their use in actual cases by CAs hasn't been straightforward. This is because non-price factors, unlike prices, are difficult to measure objectively. Further, CAs may not always have the requisite expertise to correctly identify or evaluate the relevant non-price factors. And in some cases, the use of non-price factors may invoke the jurisdiction of other sectoral regulators, such as privacy regulators, leading to jurisdictional overlap. Finally, non-price factors such as privacy may not always align with the objectives of competition policy, leading to a doctrinal conflict. The third section elaborates on the complications arising from the growing use of non-price factors in competition law.

The final section explores the solutions policymakers and regulators can adopt to resolve these complications. These include creating an institutional framework to streamline compliance between sectoral regulators and the Competition Commission, and using consumer-facing surveys to assess non-price factors objectively.

II. EMERGING TRENDS IN COMPETITION ENFORCEMENT

Digital markets raise a variety of competition concerns. For instance, they are prone to tipping in favour of dominant entities due to characteristic network effects, economies of scale and high switching costs.[8] Another concern has been the creation of data-based entry barriers and aggressive acquisitions by large companies, which can stall innovation and market competition.

These concerns are the basis of intervention by competition authorities, in a spike of antitrust enforcement against digital firms in recent years, particularly 'big tech' companies. Here determinations of market power, abuse of dominance, and anticompetitive effects increasingly relied on the non-price factors described above. We analyse notable cases from some jurisdictions to better understand the use of non-price factors by competition authorities.

1. India

The Competition Commission of India is mandated with sustaining market competition and protecting consumer interest. This dual mandate has prompted the Commission to expand its oversight of digital markets in online retail, search, travel and cab aggregators, and social media platforms.[9] Most cases heard by the Commission involve abuse-of-dominance allegations under s.4 of the Competition Act. Specifically, the CCI has sought to assess whether firm behaviour on non-price factors amounts to imposing unfair and discriminatory conditions on the sale and purchase of goods. In a suo moto case on WhatsApp's updated terms of service and user privacy policy, the CCI stated that *"Today's consumers value non-price parameters of services viz. quality, customer service, innovation, etc. as equally if not more important as price. The competitors in the market also compete on the basis of such non-price parameters."*[10]

SPECIFICALLY, THE CCI HAS SOUGHT TO ASSESS WHETHER FIRM BEHAVIOUR ON NON-PRICE FACTORS AMOUNTS TO IMPOSING UNFAIR AND DISCRIMINATORY CONDITIONS ON THE SALE AND PURCHASE OF GOODS

The Commission's order directing further investigation contains an extensive discussion of the relevance of privacy as a competition factor. It states that in competitive market conditions, users would have sovereign control over decisions about their personalised data[11] – thus, the alleged absence of user control over data signifies a lack of competition in the market for over-the-top communication apps. The CCI further notes that data sharing between WhatsApp and Facebook *prima facie* amounts to quality degradation resulting in lower consumer welfare.[12] These findings lay the basis for future intervention by the Commission in cases involving degradation of privacy, at least until an independent data regulator is established in India.

The unique features and functionalities of digital goods and services also feature heavily in the CCI's recent jurisprudence. The Commission has relied on differences in features to assess which products are substitutable in determining relevant

markets. In fact the CCI relied on distinguishing features and characteristics in 9 out of 13 cases against digital platforms between 2017 and 2021.[13] Table 2 lists some notable cases.

Case name	CCI's assessment of features and functionality
Shri Vinod Kumar Gupta vs. WhatsApp (2017)	Instant messaging communication apps are different from traditional messaging and call services as they provide additional functionalities to the user, such as checking message delivery status, viewing when contacts are online, sharing location etc.
Harshita Chawla vs. WhatsApp and XYZ vs. Alphabet Inc. (2020)	UPI enabled digital payment apps offer several value-added features, such as integrating payments for mobile bills, utilities, purchasing tickets etc. Hence they are distinct from any other form of digital payments.
Baglekar Ashok Kumar vs Google LLC (2021)	Email services and direct messaging services are different as they exhibit different features and are used for different purposes. For example, direct communication services have built-in features like the ability to record audio/video messages while email services do not.

Table 2: The CCI's recent jurisprudence on features and functionality as a dimension of competition in digital markets

(Source: Author's compilation)

The CCI is not alone in using non-price factors in such cases. Regulators elsewhere have also relied on non-price factors in their determinations. We discuss some important recent cases in the US and EU.

2. European Union

By adopting the General Data Protection Regulation, the EU has emerged as one of the leading jurisdictions in data privacy. The GDPR gives EU residents a range of rights and controls over how their data is collected, stored, processed and shared.[14] Most member states have also set up Data Protection Authorities to enforce these rights and exercise oversight over the actions of data processors.

These developments have not prevented CAs from using privacy to assess competition in digital markets. CAs have been willing to consider privacy a qualitative factor in competition in recent cases. For instance, the European Commission weighed aspects of privacy and data protection while considering the Facebook-WhatsApp, Microsoft-LinkedIn and Apple-Shazam mergers.[15] In its analysis of the Microsoft-LinkedIn merger, the Commission raised concerns about the possible foreclosure of privacy-friendly competitors to LinkedIn, such as XING, due to the integration of LinkedIn with the Microsoft ecosystem.[16] The Commission stated, *"to the effect that these foreclosure effects could lead to the marginalisation of an existing competitor which offers a greater degree of privacy protection to users than LinkedIn, the transaction would also limit consumer choice in relation to this important parameter of competition when choosing a professional social network."* While it eventually approved the merger, it is notable that the EC acknowledged

privacy as an important factor in competition. It brought out an important aspect of the interface between privacy and dominance: a dominant entity that relies on harvesting data and exploiting personal data for its business has an incentive to reduce privacy protections below competition levels, and exploit personal data above competitive levels. But despite the reference to privacy as a potential parameter of competition, the Commission and other European CAs have largely refrained from determining a firm's conduct as anticompetitive because of its impact on privacy. This is because privacy, unlike other non-price factors, remains difficult to quantify and measure. The difficulties in quantifying privacy are elaborated in the next section.

BUT DESPITE THE REFERENCE TO PRIVACY AS A POTENTIAL PARAMETER OF COMPETITION, THE COMMISSION AND OTHER EUROPEAN CAS HAVE LARGELY REFRAINED FROM DETERMINING A FIRM'S CONDUCT AS ANTICOMPETITIVE BECAUSE OF ITS IMPACT ON PRIVACY

CAs have also used rights violations under the GDPR as proof of quality reduction and harm to consumers in abuse-of-dominance cases and mergers. For instance, the German CA used the GDPR as a norm to assess Facebook's data collection and processing practices in its *Facebook* decision.[17] Facebook had mandated that users of its other apps, like Oculus, Instagram and WhatsApp, agree to data sharing with Facebook before they could use these other applications. The German CA argued that Facebook's dominant market position put consumers in a "take-it-or-leave-it" situation, further entrenching Facebook's position in the national social network market. It held that this amounted to an abuse of dominant position by Facebook. The German CA's decision follows a line of reasoning similar to the CCI's preliminary order in the WhatsApp privacy policy case. The *Facebook* decision is also one of a few instances where a digital entity was penalised by a CA for conduct detrimental to user privacy.

3. United States

The US Federal Trade Commission (FTC) has recently taken a more proactive approach to addressing digital market competition concerns, notably by ramping up enforcement activities against big tech platforms like Facebook and Google.[18] In these cases the FTC too incorporated non-price factors in its determinations. The revised suit it filed against Facebook in August 2021, against the Instagram and WhatsApp mergers, shows evidence of this approach.

In its revised suit the FTC argues that Facebook failed to develop innovative features for its mobile applications, and as a result it "unlawfully" acquired innovative competitors with popular mobile features with which its own products could not compete. These acquisitions amounted to "illegal buy-or-bury" schemes. The acting director of the FTC's Competition Bureau stated, *"Facebook's actions have suppressed innovation and product quality improvements. And they have degraded the social network experience, subjecting users to lower levels of privacy and data protections and more intrusive ads."*[19] Clearly the FTC's case relies primarily on non-price factors, namely innovativeness in feature design, and degraded user experience due to reduced privacy. The FTC's renewed focus on protecting privacy was echoed by Chair

Lina Khan's recent statements to the US Congress, where she noted that regulating data privacy and security had become a mainstay of the Commission's work.[20]

The last few years have also seen a rise in the number of privacy and security related cases filed by the FTC (Figure 2).

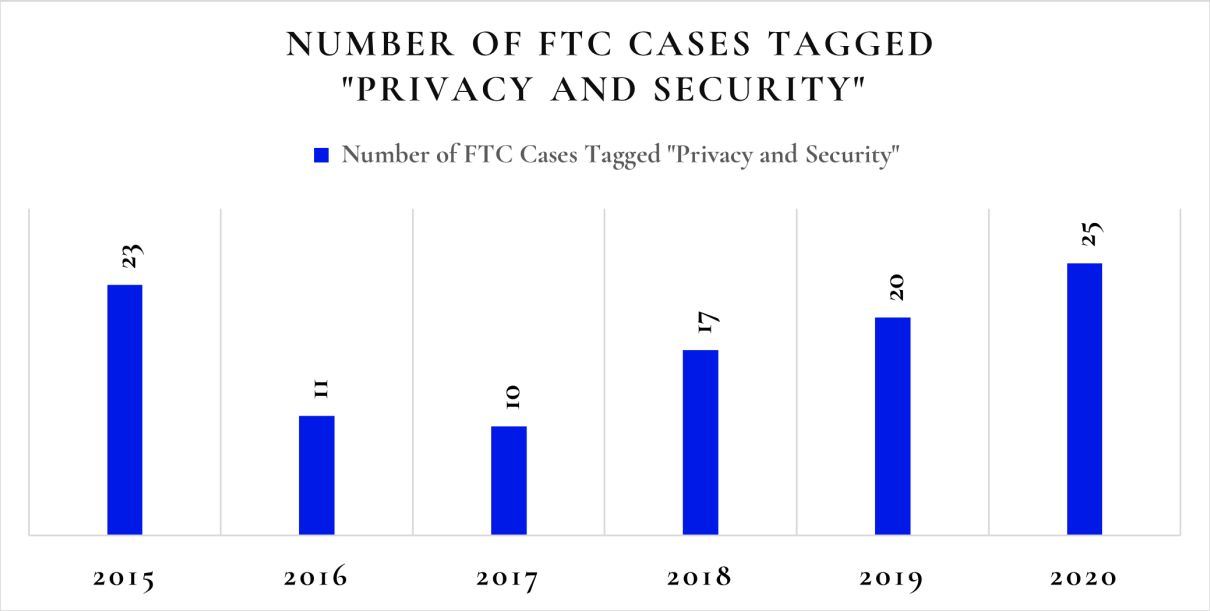

Figure 2: Rise in number of FTC cases tagged privacy and security

(Source: FTC website)

Even before the recent upsurge in privacy-related enforcement, the FTC had considered privacy as an aspect of competition. Commissioner Pamela Jones Harbour's dissent in the Google-DoubleClick merger approval was based on a possible depletion of meaningful privacy choice for consumers in the market for online advertisements.[21] Scholars such as Peter Swire and Robert Lande have also argued that privacy is an aspect of quality, and that any reduction or deprivation of privacy should logically be treated as a reduction in quality by antitrust authorities.[22]

The security offered by digital enterprises is another important non-price factor in the recent antitrust jurisprudence. Security is one of the key points of contention in the debate over the effects of app stores on competition.

Developers such as Epic Games have challenged the app store policies of digital giants like Apple and Google on the grounds that they negatively impact competition by preventing the use of alternative payment systems for apps and by levying a 30% fee on all purchases made through their stores. Governments in South Korea and the United States have sought to 'open up' app stores through laws requiring that alternate payment modes for apps and side-loading of apps be permitted on all operating systems. Apple and Google have opposed this on the ground that opening up app stores would reduce end-user security. They argue that allowing users to sideload apps from any website on the internet, as proposed by the US Open App Markets Act, raises the risk of device infection with malicious elements.[23] The importance of security as

a non-price factor will only increase in coming years due to the spate of regulatory and legislative action meant to boost competition in the app store market.[iv]

It is clear from these cases that regulators are more willing to incorporate non-price factors into their assessments of competition in digital markets. The use of non-price factors gives rise to a new set of complications that CAs must consider to arrive at accurate and efficient outcomes. These complications are explored in the section below.

iv These include proposed legislative reform in South Korea and investigations by antitrust authorities in India, Australia and the UK among others.

III. COMPLICATIONS IN USING NON-PRICE FACTORS

How to use non-price factors to determine anticompetitive effects remains far from straightforward. Unlike traditionally quantified entities like price or market share, non-price factors are difficult to measure through statistical methods. This poses complications for CAs, which have typically relied on quantitative analyses in their assessments. There are also concerns that bringing concepts such as privacy into competition enforcement would lead to overlap and conflict between regulatory authorities. These implications are explored in greater detail below.

1. Objectivity and discretion

Unlike tariffs or prices, CAs cannot use existing quantitative tools (like the SSNIP test) to objectively measure the impact of qualitative changes. It is equally difficult to measure consumer preference and switching behaviour, as these require well formulated surveys that are often time-consuming to conduct and can delay adjudication.[24] And where consumer-facing surveys are conducted it may be difficult to gain objective understanding of user behaviour, due to the gap between reported preferences and actual behaviour.[25] The difficulties faced by CAs in putting together cogent data on consumer harm in digital markets were evident in the FTC's first attempt to unbundle Facebook, WhatsApp and Instagram through a lawsuit filed before a US federal court.[26] The judge dismissed the FTC's complaint against Facebook's alleged monopoly in the market for personal social networking services, saying that it had failed to provide adequate data and facts on consumer switching preferences.[v] The revised lawsuit with more facts and evidence filed by the FTC is yet to be decided.

Without objective analysis, there is a risk that CA determinations will be discretionary and unrelated to consumer preference. Discretion may involve CAs substituting their own convictions and preferences for those of consumers. For instance, the European Commission's sustained intervention against Google's dominance in the search engine market has yielded little change in Google's market share. This indicates that consumers value the service provided by the search engine, and do not use it solely because it is pre-installed on Android devices.[27]

Increased discretion by incorporating non-price factors would mark a return to the 'command-and-control' ethos that informed the competition regime under the Monopolies and Restrictive Trade Practices Act.[28] It would militate against

v Federal Trade Commission vs. Facebook Inc., United States District Court for the District of Columbia, *"Although the Court, as just explained, finds the contours of the asserted product market plausible, the Complaint is undoubtedly light on specific factual allegations regarding consumer-switching preferences. Given that thin showing, and the fact that the PSN-services product market is somewhat 'idiosyncratically drawn' to begin with, the Court must demand something more robust from Plaintiff's market-share allegations."*

the CCI's own efforts to create an objective and predictable regime.

2. Predicting Innovativeness

While features and functionality are important differentiating factors between digital products and services, it is not easy for CAs to predict which features are valued by customers and how they will develop. The agile nature of digital products allows them to incorporate new features rapidly and consistently. Their changeful nature makes it difficult to predict how these technologies will evolve. It is even more difficult to predict how existing technologies will combine and which ones will succeed. Even leading technologists and entrepreneurs have been unable to accurately predict the creation of many of the digital goods we use today. For instance, Steve Ballmer, Microsoft's CEO at the time, famously predicted the iPhone would not get any significant market share. Similar predictions have been made about the internet and personal computers.[29]

THE PROBLEM FOR CAS IN SUCH CASES IS HOW TO ANALYSE THE ANTICOMPETITIVE EFFECTS OF CURRENT ACTIONS IN FUTURE MARKETS IN THE ABSENCE OF CONVENTIONAL KINDS OF EVIDENCE OR ANALYSIS

The problem for CAs in such cases is how to analyse the anticompetitive effects of current actions in future markets in the absence of conventional kinds of evidence or analysis. How does a CA determine a relevant market, identify buyers and sellers, or understand product substitutability in situations where it is unclear how the product or service in question will evolve? For example, the EC's approval of the Facebook-WhatsApp merger was based partly on the belief that Facebook and WhatsApp offer considerably different services, and that Facebook would face significant technological hurdles if it were to integrate WhatsApp's services with its own.[30] It stated *"Therefore, given the considerable differences between the functionalities and focus of WhatsApp and Facebook, the Commission concludes that these providers are not close competitors in the potential market for social networking services."* By relying too heavily on existing functionalities and the current state of innovation, the EC failed to consider the overall impact the merger would have on the market for social networking services. Since the merger's approval, Facebook has successfully integrated WhatsApp into a larger suite of offerings and enabled cross-platform messaging between Facebook Messenger, WhatsApp and Instagram. This increased integration is in fact one of the pillars of the FTC's suit, which seeks to undo the mergers between Facebook, WhatsApp and Instagram.

3. Doctrinal Conflict

The emerging jurisprudence considers that non-price factors and competition law have a complementary relationship. It treats non-price factors like privacy as aspects of quality relevant to consumer interest and competition law. Yet this is not always the case: there can be a doctrinal conflict between the objectives of competition law and privacy protections. While competition law is primarily concerned with overall consumer welfare and economic efficiency, privacy interventions primarily seek to redress harm to individual consumers.[31] The objectives

of privacy and competition law are not opposed to each other, but situations may arise where they pull in opposing directions. An example is the impact of the GDPR on competition between data-based businesses in Europe. Scholars argue that some GDPR requirements may limit competition and increase market concentration. For instance, the requirement of user consent before collecting/processing/transferring their data imposes transaction costs most heavily on less diversified or new firms.[32] Organising a GDPR-compliant dataset also entails high cost for firms, making data collection unprofitable for smaller entrants.[33] Both outcomes reduce the number of competitors in the market in the interest of privacy.

IN CASES OF CONFLICT BETWEEN THE TWO DOCTRINES, COMPETITION AUTHORITIES ARE HARD-PRESSED TO ENSURE A BALANCED OUTCOME

In cases of conflict between the two doctrines, competition authorities are hard-pressed to ensure a balanced outcome. The decision of the US Ninth Circuit Court in hiQ vs LinkedIn serves as an instructive illustration. hiQ is a data analytics company that scrapes publicly available data to give employers insights about their employees. It relies heavily on data from LinkedIn to gather these insights. LinkedIn revoked hiQ's access to information about users who had opted to keep their profile data private. hiQ challenged the revocation on privacy grounds, arguing that access to consumer profile data was the only basis of the company's survival and that LinkedIn was favouring its own in-house data analytics product by cutting off access. Hence the US Court in *hiQ Labs vs LinkedIn Corp* was asked to decide whether LinkedIn's revocation of access to user profiles, in keeping with user privacy preferences, amounted to anti-competitive behaviour. Ruling in favour of hiQ, the Court gave primacy to the objectives of competition policy over privacy concerns. This creates a strange situation where LinkedIn is being penalised ostensibly for upholding the privacy preferences of its users.

Google's Privacy Sandbox initiative has also sparked much debate on the interface between privacy and competition.[34] The initiative prevents the use of third-party cookies that track user activity on its platforms. Ad sellers who were targeting individual consumers instead can target larger cohorts grouped by interest. Google argues that the initiative significantly boosts user privacy. But the sandbox has faced opposition from a coalition of US state attorneys-general on the grounds that it is anticompetitive, as it restrains the ability of third parties to target individual users while Google can continue to do so even without the use of cookies. They argue this will further entrench the firm's dominance in the market for online advertisements. The sandbox has also faced scrutiny by the UK's Competition and Markets Authority.[35] The CMA and Google recently entered into a set of commitments to ensure the privacy sandbox does not negatively impact competition in the advertising market.[36] Google committed that with the phasing out of third-party cookies its ad products will not use synced browser histories to track users or target ads. It also agreed to refrain from self-preferencing and to positively engage with the CMA in an ongoing manner. If followed in spirit, the commitments made by the CMA and Google will reflect a balanced outcome, which preserves the privacy-friendly

features of the Sandbox, while addressing potential competition concerns.

Tensions may also exist within qualitative factors. A new product feature may improve the overall consumer experience by collecting more data. Access to consumer data usually enables firms to craft more relevant and personal ads, for instance, which improve an individual's overall browsing experience.[37] Valuing such trade-offs between qualitative factors further complicates the analysis required of CAs.

4. Jurisdictional Overlap

The qualitative dimensions of products and services are subject to multiple existing and proposed regulatory authorities. In India, quality deficiencies are covered by the Consumer Welfare Act, with grievances made to the Central Consumer Protection Authority. Recently proposed amendments to the Consumer Protection Rules extend their jurisdiction further, to cover quality and competition issues arising from the actions of large e-commerce players.[38] Privacy and data protection concerns will be dealt with by a Data Protection Authority to be created as per the Personal Data Protection Bill. Issues arising from encryption and user safety fall in the ambit of the Ministry of Electronics and Information Technology.

SUCH OVERLAPS WILL LEAD TO CONFLICT BETWEEN SECTORAL REGULATORS, LINE MINISTRIES AND THE CCI, IN THE ABSENCE OF A COORDINATING FRAMEWORK

Such overlaps will lead to conflict between sectoral regulators, line ministries and the CCI, in the absence of a coordinating framework. The tussle between the CCI and the Telecom Regulatory Authority of India over competition enforcement in the telecom sector provides an earlier example of regulatory conflict.[39] Similarly the proposed Consumer Protection Rules have become a point of contention between the Ministry of Consumer Affairs and government bodies such as the NITI Aayog.[40]

To avoid similar conflicts in future and ensure streamlined antitrust enforcement, it is important to create institutional frameworks to enable coordination between the competition authority and sectoral regulators. CAs should also consider ways to improve their evidence base on consumer preferences and concerns, to reduce discretion in their determinations. The induction of domain experts such as technologists and privacy experts can also be considered. The following section offers suggestions to help make the CCI's use of non-price factors more certain, predictable and objective.

IV. INCORPORATING NON-PRICE FACTORS: A HOLISTIC APPROACH

It is clear from the previous sections that non-price factors are increasingly important in antitrust cases involving digital business. While there are few findings of anticompetitive conduct based on firms' privacy-related decisions, there is a clear willingness to use these factors to assess the impact of an action such as a proposed merger or privacy policy change. It is equally clear that CAs' use of these factors is not straightforward. Non-price factors are difficult to quantify and measure. They are also subject to the jurisdictions of several existing and proposed regulatory bodies.

Governments and competition authorities worldwide are devising strategies to overcome obstacles in the use of non-price factors. These include new legislation, amendments to existing laws, institutional frameworks for regulatory coordination, and increased stakeholder engagement through market studies and surveys.[41] It is clear from these efforts that there is no quick fix to overcome this complex challenge. Rather a holistic approach is needed to balance the elements outlined above.

The following section proposes such an approach for India and the CCI. It addresses these challenges using a multi-pronged strategy. The key prongs of this strategy are:

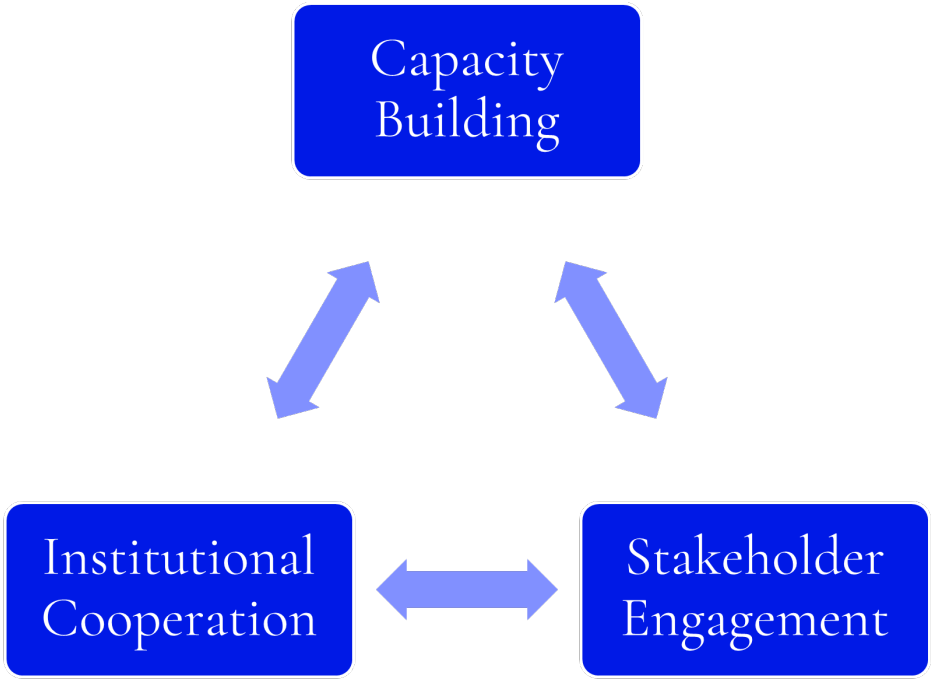

Figure 3: Diagrammatic Representation of the Framework to Address Non-Price Factors

1. Capacity building within the CCI, to improve its ability to objectively weigh factors such as innovativeness and privacy that are new to traditional competition assessments.

2. Stakeholder engagement, to help ensure the CCI is in tune with market realities and with consumer preferences and concerns.

3. An institutional framework for cooperation with other regulators, to preempt and resolve overlaps and disputes in jurisdiction.

Each of these is explored below:

1. Capacity Building

The difficulties of CAs in objectively assessing non-price factors are a key impediment to their use in antitrust analysis. Indeed the CAs of Argentina, Colombia, Pakistan, Turkey and other states emphasise the difficulties of applying conventional competition analysis tools to digital markets in a recent UNCTAD study.[42]

THE FIRST ASPECT OF CAPACITY BUILDING IS TO DEVELOP TECHNIQUES, METHODS AND MODELS FOR ACCURATE AND OBJECTIVE MEASUREMENT OF NON-PRICE FACTORS

The first aspect of capacity building is to develop techniques, methods and models for accurate and objective measurement of non-price factors. This is no easy task. Having recognised the importance of non-price factors in competition assessments, CAs are yet to develop effective means to incorporate quantitative assessments of qualitative aspects systematically in their decisions.[43] This, as discussed, is due to the subjective and multi-dimensional nature of non-price factors, especially privacy.

It may be challenging to develop precise metrics to measure quality and innovativeness, but broader metrics are in use. The TRAI uses factors such as cumulative network downtime, share of good-quality calls and call drops, and complaint resolution to measure a telecom service provider's quality of service.[44] Similar metrics, like mortality rate and the number of complications, are used to measure quality of healthcare in some jurisdictions.[45]

In creating new metrics for non-price factors, CAs must combine qualitative with quantitative analysis. Through market studies and consumer surveys, qualitative data will help CAs identify the factors considered important by consumers and assess their relative importance. Once these factors are identified and ranked, CAs can track important metrics affecting these factors. For instance, if surveys and market studies reveal that consumers think privacy is an important aspect of competition in a certain sector, the CA should create metrics to help understand the possible effects of firm behaviour on privacy. These could include the volume of data collected, shared, and processed relative to rival firms offering the same service. Co-joint analysis, which gauges the value of specified product attributes to overall consumer experience, could also be used to determine a customer's 'willingness to pay' for privacy, permitting quantitative analysis.[46]

Non-price factors are inherently difficult to measure, but the challenges faced by CAs in using them are also caused partly by the absence of domain experts. This is

especially true of the CCI, which comprises a chairperson and 2 to 6 whole-time members (WTMs). The WTMs must have special knowledge and professional experience of at least 15 years in international trade, economics, business, commerce, law or competition matters among other domains.[47] This broad list of domains does not cover emerging fields such as digital technologies and privacy.

The need for WTMs with expertise in areas like technology is stated by the Competition Law Review Committee, a high-level committee established to review the Competition Act in India. Among the CLRC's recommendations was to include "administration" and "technology" as areas of knowledge qualifying individuals for appointment as WTMs.[48]

The CLRC also recommended that the CCI's overall capacity be improved by introducing part-time members (PTMs). Sectoral regulators such as the Reserve Bank of India, Securities and Exchange Board of India, and the Insurance Regulatory Development Authority of India all have PTMs and ex-officio members on their board, who provide an external viewpoint and assist with the regulator's advocacy and quasi-legislative mandates. The RBI's current board for instance includes non-official directors like N Chandrasekaran, chairman of Tata Sons, Swaminathan Gurumurthy, an accomplished chartered accountant, and Dr Sachin Chaturvedi, director-general at an autonomous think tank.[49]

The CCI's board can similarly be expanded to include part-time members. PTMs may include entrepreneurs, industrialists, researchers and scholars with expertise in challenging areas of competition policy, such as the governance of digital platforms and artificial intelligence technologies. Indeed the US FTC appoints several advisors on technology to assist the Commission in discharging its duties.[50]

The proposed amendment reflects sound policymaking as it would bolster the CCI's ability to fulfil its quasi-legislative and advocacy mandates. The quasi-legislative mandate refers to the issuance of guidelines and regulations by the CCI. The CLRC notes that PTMs from non-governmental sectors are likely to bring an external perspective to the CCI's decision making, resulting in balanced, objective and transparent regulations. The inclusion of more members, including from the private sector, will also likely help the CCI in its advocacy initiatives, which as discussed below are an increasingly important element of effective antitrust interventions in digital markets.

While including members from the private sector may help the CCI fulfil its mandate, it raises the possibility of conflicts of interest. PTMs may have interests in companies being scrutinised by the CCI. They may also gain access to confidential information and use it to benefit their undertakings reducing fair market competition. Hence it is important to establish practices to mitigate possible conflicts of interest.(Best practices on managing conflict of interest are captured in Box 1.)

a A clear code of ethics that stipulates which matters members can be involved in and ones they should distance themselves from. The FTC's Guidance for New Employees is a good example of such a code. The SEBI also has a similar code which lays down inter alia cases that members may/may not hear, securities that Members may not transact in and provides guidance on acceptance of gifts.
b. A proactive disclosure policy that requires all members to communicate their existing interests in any undertakings. Any change to their interests must also be communicated within a specified period.
c. Creation of institutional firewalls that ensure confidential information is only accessible to members working that are not conflicted. In the CCI's case, this would involve ensuring that none of the information it receives as part of its adjudication mandate is shared with PTMs. They will be responsible only for advocacy and policy formulation. Similar firewalls must be set up in publicly listed companies to prevent insider trading.
d. A procedure for whistle-blowers to bring conflicts of interest to the regulator's notice. For example, SEBI's Code on Conflict of Interests states that any individual who has reason to believe that a member has a conflict of interests can bring it before the Secretary. The Secretary then places the complaint before the Chairman, who is authorised to decide whether or not a conflict exists.

Box 1: Measures to tackle conflicts of interest for part-time members.

2. Stakeholder Engagement

The previous section shows how determinations by CAs affecting the digital economy are sometimes out of sync with consumer preference, leading to erroneous and ineffective decisions. To prevent this CAs are increasingly conducting market studies and publishing reports identifying key issues in digital markets. The Competition Commission of Indonesia has conducted market studies on the digital economy and prepared a policy brief on Indonesian platforms.[51] Other states where CAs have conducted market studies on the digital sector include the United Kingdom, Brazil, Turkey and Kenya.[52] These advocacy efforts help CAs engage stakeholders in the relevant market, including firms and consumers, to understand possible issues and identify remedies

The CCI has also conducted market studies on India's telecom and e-commerce sectors. The telecom market study, as discussed earlier, is significant for it identifies privacy as a non-price parameter of competition based on a consumer survey. The market study on e-commerce helped uncover concerns shared by businesses in that sector (such as self-preferencing and opacity in ranking) which the CCI will now investigate.[53] Hence, market studies have helped the CCI ascertain real consumer preferences and understand the concerns shared by firms participating in a sector. Market studies also raise awareness of competition issues among digital firms, consumers and public bodies. The CCI should increase stakeholder engagement by conducting market studies for more sectors, and updating its market studies frequently. The inclusion of PTMs and ex-officio members would facilitate the conduct of market studies. The CCI could also collaborate with sectoral regulators for market studies to effectively

capture the spectrum of competition concerns in a particular sector.

3. Institutional Cooperation

The need for cooperation between the CCI and sectoral regulators is recognised in the Competition Act. S.21 asks statutory authorities to seek the CCI's opinion in any case involving issues governed by the Competition Act. The CCI is similarly empowered to refer matters to another statutory authority in cases where the authority shares jurisdiction. Nevertheless, the CCI has found itself embroiled in conflicts with other regulators over jurisdiction. For example, the TRAI and CCI were locked in a dispute over jurisdiction of competition issues in the telecom sector. In *Bharti Airtel v. CCI*, the Supreme Court held that for competition issues in the telecom sector TRAI has jurisdiction to analyse the facts and *prima facie* determine the existence of anticompetitive conduct. The CCI can only be involved after the initial determination has been made. The Court stated *"TRAI being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues".*[54]

It is an open question whether the Court's suggestion applies to other existing and proposed regulators as well, all of which may not possess the domain expertise required to assess competition concerns. The Data Protection Bill 2021 proposes a Data Protection Authority that is unlikely to include any whole-time members with expertise in competition law or economics.[vi] Such an arrangement also would not apply to situations where sectoral regulators and the CCI are required to deal with a case concurrently. Nor does it provide an institutional framework for regulators to deliberate together on cross-cutting issues such as privacy and innovativeness, and share important information and data.

THE NEED FOR SUCH A COOPERATIVE FRAMEWORK HAS ONLY INCREASED OVER THE PAST DECADE, DUE TO THE GROWING IMPORTANCE OF CROSS-SECTORAL AND MULTIFACETED ASPECTS OF COMPETITION SUCH AS PRIVACY AND INNOVATION

The National Competition Policy 2011 strongly advocates for creating a cooperative framework such as this.[55] The Policy states *"CCI and the sectoral regulators need to cooperate and establish a forum for regular exchange of ideas. In accordance with the resolution of the NDC in the XI-Plan document, a formal mechanism for coordination between the Competition Commission and the sectoral regulators is, therefore, of key importance. Coordination between sectoral regulators and Competition Commission should be made mandatory through suitable provisions in the Competition Act, 2002 and relevant sectoral laws."* The need for such a cooperative framework has only increased over the past decade, due to the growing importance of cross-sectoral and multifaceted aspects of competition such as privacy and innovation.

vi Domains such as competition law and economics are not among the listed domains in which whole-time members of the DPA should possess expertise u/s 42. https://www.medianama.com/wp-content/uploads/2021/12/17_Joint_Committee_on_the_Personal_Data_Protection_Bill_2019_1.pdf

While the NCP 2011 recommends that relevant laws be amended to mandate coordination between the CCI and other regulators, the Government should also explore other avenues of cooperation between sectoral regulators, such as high-level forums and MoUs. The South African Competition Commission, for instance, has entered into MoUs with sectoral regulators that govern the exercise of their respective mandate on overlapping issues.[56] In South Korea, sectoral regulators must consult the Fair Trade Commission before proceeding with amendments or legislation that potentially impacts competition.[57]

The United Kingdom has created a Digital Cooperation Forum, which brings together its competition, privacy and financial regulators to coordinate on issues relating to the digital economy. As discussed in the last section, the UK CMA's approach to handling the Privacy Sandbox initiative resulted in a balanced outcome, that compromises neither privacy nor competition. A key aspect of its approach was to include the UK's privacy regulator, the Information Commissioner's Office, in its deliberations and consultations with Google.[58]

The Government therefore should consider creating a forum or council of regulators to ensure systematic and holistic regulation of the cross-cutting problems posed by the digital economy.

The Financial Stability and Development Council (FSDC) established in 2010 by the Ministry of Finance provides the blueprint for a high-level inter-regulatory forum such as this. Created to help maintain financial stability, enhance inter-regulatory coordination and promote financial sector development, the FSDC is chaired by the Minister of Finance and comprises the heads of sectoral regulators including the RBI, SEBI, IRDA and the Pension Fund of India, and officials from the Ministry of Finance. The Council is tasked with monitoring the country's economy and addressing issues of regulatory coordination.[59] Council members are further split into subcommittees and working groups that deal with specific issues of the financial sector and the economy. A panel to deal specifically with the regulatory challenges posed by innovation in financial technology has recently been set up under the FSDC.[60]

A similar council would promote a coherent approach to competition enforcement in digital markets. Like the FSDC, the Council may be chaired by the Minister for Electronics and Information Technology, and its members could include representatives from key regulators, such as the CCI, the proposed Data Protection Authority, and the CCPA. It would provide the institutional framework facilitating information exchange between regulators, capacity building of staff, and resolution of jurisdictional overlaps without prolonged court proceedings. Members of the Council may also choose to work together on issues with significant overlaps in jurisdiction. For instance, the CCI and DPA could jointly frame rules clarifying the role of data and privacy in proposed mergers and combinations.

Given the inevitability of the use of non-price factors in digital markets, policymakers and regulators must consider creating such a framework. It is no panacea and will require buy-in from the Government and regulatory agencies. Yet if implemented in the right spirit, it will help the existing regulatory framework adapt to fast emerging challenges. It may

also establish India as a leading jurisdiction in matters of antitrust enforcement in digital markets, improving the country's competitiveness and ease of doing business.

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