

# Regulating Data Monopolies in Free-to-use Online Platforms

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## 1. INTRODUCTION

Oil was the resource of the 20th century. Industrialization, powered by oil, increased productivity across many industries. Due to the hefty initial investment required to extract and refine oil, larger companies enjoyed economies of scale over their competitors<sup>1</sup>. This encouraged consolidation and mergers<sup>2</sup>. Thus, the oil industry is an example of a natural monopoly. As we move into the 21st century, data is the resource of this century. Today, free-to-use online platforms are powered by data. Companies process huge troves of data, deriving insights which drive advertising and drive users to spend more time on their platform<sup>3</sup>. When Bartlett submitted a list of 200 of his Facebook Likes into Kosinski's algorithm trained on millions of Facebook users, the algorithm was able to predict his traits, his religiosity, his job and even his interest in history<sup>4</sup>. Companies with huge data lakes will be able to better understand their customer's traits and interests, deliver more targeted advertising and

content, and edge out their competitors, making it a natural monopoly as well. These data monopolies, as Bartlett has summarized, are then able to "wield this power over a growing number of economic activities"<sup>5</sup>. Hence, it is imperative that competition regulators step in to prevent erosion of consumer choice and welfare. In this essay, I am going to explore how competition regulators can use data privacy regulations, data portability regulations, regulations on interoperability, regulations on recommender systems and harmonization across jurisdictions to address the formation of data monopolies in free-to-use online platforms.

## 2. LEVERAGING DATA PRIVACY TO REGULATE DATA MONOPOLIES

Various academics have explored how data privacy could be leveraged to prevent anticompetitive behaviour on online platforms. Lynskey proposed 2 different mechanisms, data privacy could function as an "internal constraint" or

<sup>1</sup> James Hibdon and Michael Mueller, 'Economies of Scale in Petroleum Refining, 1947–1984: A Survivor Principle – Time Series Analysis' [1990] 5(3) *Review of Industrial Organization* 25 <<https://www.jstor.org/stable/41798314>>, pp. 40

<sup>2</sup> Hibdon and Mueller (n 1), pp. 40

<sup>3</sup> Nisha Talagala, 'Data as The New Oil Is Not Enough: Four Principles For Avoiding Data Fires' (22 March 2022) <<https://www.forbes.com/sites/nishatalagala/2022/03/02/data-as-the-new-oil-is-not-enough-four-principles-for-avoiding-data-fires/?sh=5530d466c208>> accessed 2 March 2024

<sup>4</sup> Jamie Bartlett, *The People vs Tech: How the Internet is Killing Democracy (And How We Save It)* (Penguin Random House 2018), pp. 20-23

<sup>5</sup> Bartlett (n 4), pp. 144

<sup>6</sup> Francisco Costa-Cabral and Orla Lynskey, 'The Internal and External Constraints of Data Protection on Competition Law in the EU' [2015] 25 *LSE Law, Society and Economy Working Papers*. <[https://eprints.lse.ac.uk/64887/1/Lynskey\\_Internal%20and%20External%20Constraints%20of%20Data%20Protection%20\\_Author\\_2015.pdf](https://eprints.lse.ac.uk/64887/1/Lynskey_Internal%20and%20External%20Constraints%20of%20Data%20Protection%20_Author_2015.pdf)>, pp. 3-4

an “external constraint” on competition law<sup>6</sup>. Competition can exist between undertakings over parameters such as *inter alia*, price, choice and quality<sup>7</sup>. However, since free-to-use online platforms do not charge any fee, competition is limited to the other non-price factors. Assuming that the market currently has multiple products with varying data collection and processing policies, a merger might result in harmonization of these policies that would lead to a reduction in choice. The competition courts have acknowledged the importance of having varying data privacy options in the Facebook/WhatsApp merger<sup>8</sup>. Furthermore, if the undertaking with the stricter policy adopted a more relaxed policy as part of that harmonization, it would lead to a reduction in quality as well. Therefore, since competition law aims to “promote consumer welfare” through these parameters, data privacy can be an “internal constraint” that competition regulators consider as part of their evaluation. This position is supported by the court’s decision in *Meta v Bundeskartellamt*. The court emphasized the importance of personal data processing in ensuring fair competition, hence instructed competition regulators to refer to judgments made by General Data Protection Regulation<sup>9</sup> (GDPR) supervisory authorities and to consult them if necessary<sup>10</sup>.

In the context of the European Union (EU), protection of personal data has been enshrined as a fundamental right under the Charter of Fundamental Rights (CFR) alongside other rights such as the prohibition of slavery<sup>11</sup>. All courts, including the competition courts will need to ensure that their judgments do not infringe on any

of these rights. Just as it is inappropriate for a competition court judgment to sanction slavery, it is also inappropriate for a competition court to allow companies to take away an individual’s right to data privacy. In this manner, data privacy can also function as an “external constraint” on competition law.

At this juncture, it is poignant to note that data privacy regulations only apply to personal data. Consumers may anonymously search for medical conditions on free-to-use search engines, giving these search engines valuable insights into public health statistics. Since the consumer is not identifiable, such data will likely not be considered personal data. Hence, online platforms will still be able to amass statistical data and use it as an advantage over competitors. Competition regulators should also look beyond superficial differences in privacy policy and attempt to discern if consumers have true choice. Farrell argued that the industry may be in a “dysfunctional equilibrium” due to consumers behaving for their own short term benefit and not for the greater common good<sup>12</sup>. Consumers may feel that their lone refusal to consent does not make a dent in the huge amount of data already collected by these platforms. This is a challenging problem to tackle as competition regulators must elicit the underlying reason behind every individual’s consent.

Lianos takes a more traditional competition law viewpoint, arguing that the increasing “data power” of online platforms is due to market failure. Since consumers are largely unaware of how much profit online platform can make from their data, and there is no “functioning market for

<sup>7</sup> Costa-Cabral and Lynskey (n 6), pp. 16

<sup>8</sup> Case COMP/M.7217 *Commission Decision of 03/10/2014 declaring a concentration to be compatible with the common market (Case No COMP/M7217 - FACEBOOK / WHATSAPP)* according to Council Regulation (EC) No 139/2004 (ECJ), para. 87

<sup>9</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1

<sup>10</sup> Case C-252/21 *Meta Platforms Inc v Bundeskartellamt* ECLI:EU:C:2023:537, para. 56-57

<sup>11</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art. 8

<sup>12</sup> Joseph Farrell, ‘Can privacy be just another good?’ (2012) 10 *Journal on Telecommunications and High Technology Law*, pp. 259

the sale of personal information”<sup>13</sup>, consumers end up consenting and giving away their data for free. Lianos theorizes that the market failure can be addressed by mandating that companies give users the choice to either receive monetary compensation for providing their data or pay for the use of these online platforms with the caveat that their data will not be processed beyond what is required to provide the service<sup>14</sup>.

Bartlett urged us to evaluate modern monopolies using non-price metrics<sup>15</sup>. His viewpoint aligns most with Lynskey’s concept of treating data privacy as an “internal constraint”. However, Lynskey has pointed out that it may not be necessary to do so since data privacy is a fundamental right that implicitly has to be considered. Meanwhile, Lianos proposes using price metrics instead of non-price metrics by regulating the creation of a functioning personal data market. Thus, I believe that Bartlett’s statement may be slightly narrow in its scope. We should evaluate and subsequently regulate modern monopolies in more ways as well, be it in a welfare system where personal data privacy is protected as a fundamental right or in a capitalist system where citizens can make the choice whether to pay for a service or allow their data to be monetized in lieu of payment.

### 3. DATA PORTABILITY ALLOWS CONSUMERS TO SWITCH PROVIDERS

Competition Law aims to “promote consumer welfare” by allowing the market to have mul-

iple different product offerings<sup>16</sup>. However, if consumers are locked into a single provider and unable to switch to a more attractive offering, consumers will be unable to realize that benefit. This is not a situation unique to “data power”. In *United States v. American Tel. and Tel. Co (AT&T)*, AT&T was alleged to have *de facto* prevented consumers from attaching telephones manufactured by a competitor to their network<sup>17</sup>. Consumers would thus be subject to unnecessary switching costs should they choose to switch providers. Today, instead of forcing consumers to abandon their old telephones, free-to-use online platforms are making consumers abandon all the data they have uploaded to the old platform should they choose to migrate to a more attractive competitor. Competition Law intervened in AT&T, and Competition Law should intervene once again to ensure that consumers are free to export their data to a competing online platform should they wish to.

There are existing instruments such as the Digital Content Directive (DCD) that apply to undertakings providing digital services even in cases where the consumers did not pay but provided some form of data in exchange for use of the platform<sup>18</sup>. The DCD mandates that the platforms should allow consumers to export their data in a “commonly used machine-readable format” without charge<sup>19</sup>. Unlike a proprietary data format that only works with a single platform, a common format will allow consumers to import the data into a different platform. In the previous section, we have seen how the courts in *Meta v Bundeskartellamt*<sup>20</sup> requested competition regulators to refer to GDPR judgments

<sup>13</sup> Nicholas Economides and Ioannis Lianos, ‘Restrictions On Privacy and Exploitation In The Digital Economy: A Market Failure Perspective’ [2021] 17(4) *Journal of competition law & economics*. 765–847 <<https://www.jstor.org/stable/41798314>>, pp. 6

<sup>14</sup> Economides and Lianos (n 13), pp. 8-9

<sup>15</sup> Bartlett (n 4), pp. 144

<sup>16</sup> Costa-Cabral and Lynskey (n 6), pp. 16

<sup>17</sup> *United States v American Tel and Tel Co* 552 F Supp 131 D.D.C. (1982), part IV(A)(1)

<sup>18</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services) [2019] OJ L136/1, art. 24

<sup>19</sup> Dir 2019/770 (n 18), art. 71

<sup>20</sup> *Meta v Bundeskartellamt* (n 10), para. 56-57

in their evaluation. Hence, *mutatis mutandis*, it would not be far-fetched to suggest that competition regulators refer to future DCD judgments when evaluating if online platforms are engaging in anticompetitive behaviour by holding consumer's data hostage.

However, academics have weighed in on potential challenges faced when introducing data portability to social media platforms. Graef mentions that photos or messages that other users have left on your profile may not be subject to the portability requirement, and removal of your content may leave gaps in other user's profile<sup>21</sup>. Swire has also rightfully pointed out that multiple people may be depicted in a single photo and the unilateral decision to migrate might infringe on the privacy of others in that photo. Furthermore the data might also be subjected to intellectual property rights<sup>22</sup>. These are valid concerns. Due to the variety and complex relationships between data on social networks, data portability may not be feasible in practice. In the next section, I will explore interoperability which will address some of these limitations.

Circling back to Bartlett's statement, it is indeed true that free-to-use online platforms' power extend beyond prices to include "concentration of power, data and control"<sup>23</sup>. Graef and Swire have elucidated the challenges of breaking up that complex web of data, while still respecting the privacy of other individuals and intellectual property rights of content owners. Free to use online platforms have managed to capture consumers' attention and convinced consumers to contribute data to their platforms. As consumers contribute data, they are unwittingly sinking deeper and deeper into the holds of the platform as there is no easy way for them to port their data over to a competitor.

#### 4. INTEROPERABILITY GIVES CONSUMERS CHOICE WHILE STAYING CONNECTED

In the previous section, we discussed the importance of data portability in allowing consumers to migrate to a competing online platform. However, another factor holding consumers back would be the Network Effect. The Network Effect dictates that the usefulness of the platform correlates with the number of users on that platform<sup>24 25</sup>. An upcoming social media site might have attractive features, but if all your friends and contacts are currently on Facebook, migrating would mean lost of contact. Similarly, migrating to a new auction platform where there are few sellers and buyers would likely hamper your attempts at selling your unwanted goods. This is where interoperability comes into play. Interoperability between various platforms will allow users from each platform to interact with users from other platforms. This is certainly not a new concept, emails are an example of a interoperable standard, consumers can choose from any free-to-use online email provider and can freely contact users from a different email provider. Given that interoperability gives consumers true choice instead of the illusion of choice, it aligns with the goals of competition regulators to improve consumer welfare.

Interoperability also resolves some of the issues with portability discussed in the earlier section. With each user uploading their data into the online platform of their choice, it would remove the issue of infringement of other's privacy or intellectual property rights. However, interoperability is no silver bullet. Swire, citing Fatur, highlighted that mandated interoperabil-

<sup>21</sup> Inge Graef, 'Mandating portability and interoperability in online social networks: Regulatory and competition law issues in the European Union' (2015) 39(6) Telecommunications Policy 502 (Special Issue on ITS 2013 Florence) <<https://www.sciencedirect.com/science/article/pii/S0308596115000579>>, pp. 10

<sup>22</sup> Peter Swire and Yianni Lagos, 'Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique' (2013) 72 Maryland Law Review 335, pp. 348

<sup>23</sup> Bartlett (n 4), pp. 144

<sup>24</sup> Fernando Suarez, 'Network Effects Revisited: The Role of Strong Ties in Technology Selection' [2005] 48(4) The Academy of Management Journal. 710-720 <<https://www.jstor.org/stable/20159688>>, pp. 710

<sup>25</sup> Bartlett (n 4), pp. 133-134

ity might lead to decreased innovation<sup>26</sup>. This is because platforms have to standardize on the features and formats to ensure that the data can be viewed on other platforms. For example, WhatsApp allows users to create and vote on polls, a feature that other messaging platforms may not support. Swire also touches on possible increased barriers to entry caused by mandated interoperability<sup>27</sup>. Building on a previous example, if a new entrant to the messaging platform market had to implement all supported functionalities including nonessential functionalities like polls from the very beginning, it would be harder for new entrants to develop a working product that can be launched. Thus interoperability might even reduce consumer welfare, as alluded to in the title of Swire’s paper. Ezrielev also argues that interoperability might lead to “entrenchment of incumbents” since the dominant firms can craft interoperability standards that discourage “disruptive innovation”<sup>28</sup>.

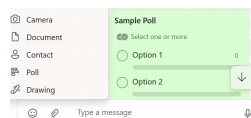


Figure 1: Poll feature on WhatsApp.<sup>29</sup>

Regulators can rely on a number of instruments to enforce interoperability. The Digital Markets Act (DMA) specifically calls out

“Network Effects” as a parameter that may limit contestability and proscribes undertakings from exploiting such behaviour<sup>30</sup>. The DMA also details the importance of interoperability in “number-independent interpersonal communications services” and mandates support for basic communication functionality with “third-party providers”<sup>31</sup>. As a result, free-to-use on-line messaging platforms like Facebook Messenger may be required to make their messaging protocol public so anyone can develop a client. It may eventually operate similarly to Telegram which uses a published protocol to securely exchange messages<sup>32</sup> between users. As such, third party developers are free to develop applications such as Pyrogram, Telethon and GramJS that can exchange messages with consumers using the official Telegram app<sup>33</sup>. The DMA is also particularly shrewd since it only mandates interoperability of “basic communication functionality”, thus sidestepping the issues raised by both Swire and Ezrielev earlier<sup>34</sup><sup>35</sup>. Messaging platforms are free to innovate and introduce added functionality even if they are not supported by competitors. New entrants can also launch a minimum viable product with only basic communication functionality and slowly develop additional functionality over time.

Zuboff warns that the data consumers pro-

<sup>26</sup> Swire and Lagos (n 22), pp. 358

<sup>27</sup> Swire and Lagos (n 22), pp. 356

<sup>28</sup> Jay Ezrielev and Genaro Marquez, ‘Interoperability: The Wrong Prescription for Platform Competition’ [2021] CPI Antitrust Chronicle June 2021. pp. 6

<sup>29</sup> Generated using my own WhatsApp account

<sup>30</sup> Directive (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1, art. 32

<sup>31</sup> Dir 2022/1925 (n 30), art. 64

<sup>32</sup> Marino Miculan and Nicola Vitacolonna, ‘Automated verification of Telegram’s MTPROTO 2.0 in the symbolic model’ (2023) 126 Computers & Security 103072 <<https://www.sciencedirect.com/science/article/pii/S0167404822004643>>, pp. 1-2

<sup>33</sup> Theo von Arx and Kenneth Paterson, ‘On the Cryptographic Fragility of the Telegram Ecosystem’ [2023] Proceedings of the 2023 ACM Asia Conference on Computer and Communications Security. 328-341 <<https://dl.acm.org/doi/10.1145/3579856.3582811>>, sect. abstract

<sup>34</sup> Swire and Lagos (n 22), pp. 356-358

<sup>35</sup> Ezrielev and Marquez (n 28). pp. 6

vide to an online platform is only the tip of the iceberg, these platforms collect a trove of behavioural metadata that is used to profile and serve targeted advertising to consumers<sup>36</sup>. In the context of a messaging platform, the location from which messages are sent could indicate travel patterns while the speed at which messages are scrolled through could indicate reading ability. Developers of third party applications could choose not to collect such data, thus drastically reducing the volume of such behavioural metadata that can be collected from consumers. Bartlett suggests that the “concentration of power, data and control” poses a threat to democracies. It might be an understatement since it also poses a threat to the fundamental rights of consumers and strips them of their privacy. Mandating support for interoperability will alleviate the situation by decentralizing that power and data, and thus rightfully reinstate stolen rights to these consumers.

## 5. RECOMMENDER SYSTEMS SHOULD PROMOTE FAIRNESS AND TRANSPARENCY

Competition regulators have always been concerned with prohibiting companies from abusing their market dominance to unfairly disadvantage their competitors. In *Standard Oil Co. of New Jersey v. United States*, Standard Oil was alleged to have “obtained control of (oil) pipelines” and thus unfairly restricted the transportation of oil to refineries owned by competitors<sup>37</sup>. Today, “consumer attention” has taken

the place of oil. Search engines as well as online marketplaces have been accused of abusing their dominance and unfairly promoting the websites or products of preferred companies above their competitors, thus ensuring that these companies obtain the lion’s share of “consumer attention” and potential sales. In *Google v European Commission*, Google was alleged to have unfairly prioritized its own comparison shopping service and placed it at the top of the search results, instead of putting it through the “same ranking mechanisms” which competing shopping services are subjected to<sup>38</sup>. Since Google already occupies a dominant market share in almost all EU countries<sup>39</sup>, such an action is alleged to be an abuse of their dominant position in the search engine industry to benefit their online shopping service. In *Flipkart v Competition Commission of India*, the online marketplace, Flipkart, was alleged to have unfairly labeled certain sellers as “assured sellers”<sup>40</sup>. Such an action would have the effect of increasing consumer trust in these selected sellers, thus giving them an unfair advantage over other competitors.

Apart from *ex post* enforcement of infringing conduct by competition regulators, technology regulators have attempted to formalize acceptable practices and conduct *ex ante*. The Digital Services Act (DSA) acknowledges the importance of ensuring that information is presented to consumers in a transparent unbiased manner for decision making<sup>41</sup>. The platform-to-business relations (P2B Regulation) mandates search engines make known the “main parameters determining ranking”, including whether the search engine accepts payment in exchange for bet-

<sup>36</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (1st, 2018), chpt. 3

<sup>37</sup> *Standard Oil Co of New Jersey v United States* 221 US 1 (1911), pp. 221

<sup>38</sup> Case T-612/17 *Google and Alphabet v European Commission* ECLI:EU:T:2021:763, para. 61

<sup>39</sup> *Google v European Commission* (n 38), para. 54

<sup>40</sup> *Flipkart Internet Pvt Ltd v Competition Commission of India* MANU/KA/3124/2021 (2021), para. 3.10

<sup>41</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, para. 70 and article 27

<sup>42</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, para. 25

ter placement<sup>42</sup>. The P2B Regulation *prima facie* benefits businesses instead of consumers. However, by allowing fairer competition among businesses and ranking products in an unbiased manner, consumers are more likely to end up purchasing a better product that is more value for money compared to an inferior product that was unfairly promoted. Thus, consumer welfare benefits. With the addition of the P2B Regulation, competition regulators can use it as a yardstick in determining unacceptable anticompetitive behaviour. This should lead to greater certainty and less subjectiveness compared to relying on the development of case law.

Ezrachi outlined what fairness would look like in the digital economy, supporting “intervention in view of unfair market practices” and “intervention when misleading information” distorts competition<sup>43</sup>. Doctorow has also called out “Deception” as one of the three factors Big Tech use to maintain their power<sup>44</sup>. Recommender systems are avenues where online platforms sneak in misleading information and engage in deception to influence consumer decision making and purchasing in their interest. Cobbe supports this by stating that “[r]ecommending contributes to the increasingly monopolistic nature of dominant platforms”<sup>45</sup>. Bartlett is right to say that online platforms are “wield[ing] this power over a growing number of economic activities”. Online platforms are indeed wielding recommender systems and using it to influence activities such as consumer purchasing decisions. While not wholly applicable, the paragraphs in the DSA and P2B Regulation pertaining to recommender systems does have some overlap with the goals of competition law. Competition regulators should familiarize with these new mechanisms so that online platforms are not given a free pass just because they did

not abuse their market dominance through traditional methods such as predatory pricing.

## 6. HARMONIZATION AND EXTRATERRITORIALITY OF COMPETITION LAW

In the previous section, we determined that regulations will lead to greater certainty and predictability when evaluating if a certain behaviour is anticompetitive. However, another important aspect to consider is consistency across jurisdictions. Due to the global nature of the internet, online platforms do not need to have a physical presence to serve consumers from a certain country. Thus, without harmonization or extraterritoriality, free to use online platforms could choose to domicile their headquarters in countries with more relaxed regulations, opting to favour these countries as *forum conveniens*. This would undo all the efforts highlighted in the previous sections and relegate the state of competition law to the lowest common denominator.

Fortunately, most of the regulations we have previously explored has extraterritorial scope. Article 3(2) of the GDPR states that the regulation applies even to a controller outside the EU as long as the goods or services are provided to an individual within the EU or it involves monitoring of behaviour which took place in the EU<sup>46</sup>. As for the P2B Regulation, paragraph 9 explicitly calls out that the regulation applies to online intermediaries and search engines outside the EU as long as they offer these services to users in the EU<sup>47</sup>. Paragraph 8 of the DSA states if the services are targeted at the EU, either based on language or currency, or if there are a significant number of users based in the EU, the service provider will be deemed to have

<sup>43</sup> Ariel Ezrachi, ‘EU Competition Law Goals and the Digital Economy’ [2018] Oxford Legal Studies Research Paper No. 17/2018, sect. 2, subsection 4: Fairness

<sup>44</sup> Cory Doctorow, *How to Destroy Surveillance Capitalism* (1st, 2021), pp. 15-16

<sup>45</sup> Jennifer Cobbe and Jatinder Singh, ‘Regulating Recommending: Motivations, Considerations, and Principles’ [2019] 10(3) European journal of law and technology, pp. 14

<sup>46</sup> reg 2016/679 (n 9), art. 3(2)

<sup>47</sup> reg 2019/1150 (n 42), para. 9

a “substantial connection” to the EU and the regulations would apply<sup>48</sup>. While data regulators can now go after errant companies, the same cannot be assumed of competition regulators.

Competition regulators make use of instruments such as Article 102 of the Treaty on the Functioning of the European Union (TFEU)<sup>49</sup>, formerly Article 82 of the Treaty Establishing the European Community (TEC). Thus we have to examine if these instruments have extraterritorial scope. In *Microsoft vs European Commission*, the judgment acknowledged that Microsoft was established in the United States (US) and attempted to apply Article 82 TEC on Microsoft<sup>50</sup>. In *Google v European Commission*, Google, a company based in US, was also subjected to proceedings under Article 102 of the TFEU<sup>51</sup>. Hence, we can conclude that Article 102 of the Treaty does have extraterritorial scope. When considered in conjunction with the extraterritorial scope of the GDPR, P2B Regulation and DSA, the long arm of EU competition regulators can now comfortably reach beyond the shores of the EU.

Harmonization of competition law across various jurisdictions is also a crucial aspect given the borderless nature of the Internet. Facebook has been allowed to grow unchecked for many years, achieving a dominant position in Germany

<sup>52</sup>. The extraterritorial effect can be exercised only after it has expanded and achieved dominance in the EU. Thus, such regulations do not prevent monopolistic buildup of “data power” in friendly countries or those with weaker regulations. Harmonization of competition law imposes these strict regulations across multiple jurisdictions globally, thus protects individuals everywhere while also nipping the problem in the bud before it has the chance to grow.

However, this is not an easy endeavour. Countries would want their domestic industries to thrive and bring profits back into their economy. This has resulted in what can be considered adversarial conduct where China banned Facebook<sup>53</sup>, the EU levied a fine on Google<sup>54</sup>, India banned Tiktok<sup>55</sup>, and the US considering a similar Tiktok ban<sup>56</sup>. Such adversarial conduct was previously observed in the field of Intellectual Property (IP) law with all countries clamouring to protect their own IP while seeking to exploit those of other countries. In response to that, the World Trade Organization (WTO) stepped in to harmonize IP regulations under the TRIPS agreement<sup>57</sup>. The WTO has also previously facilitated other anti-competition frameworks such as the Agreement on Subsidies and Countervailing Measures<sup>58</sup> and thus may be rightly placed to spearhead efforts to harmonize regulations on online platforms so as to avoid a

<sup>48</sup> reg 2022/2065 (n 41), para. 7-8

<sup>49</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art. 102

<sup>50</sup> Case T-201/04 *Microsoft Corp v European Commission* ECLI:EU:T:2007:289, para. 1 and 21

<sup>51</sup> *Google v European Commission* (n 38), para. 22

<sup>52</sup> *Meta v Bundeskartellamt* (n 10), para. 30

<sup>53</sup> Eloise Barry, ‘These Are the Countries Where Twitter, Facebook and TikTok Are Banned’ (18 January 2022) <<https://time.com/6139988/countries-where-twitter-facebook-tiktok-banned/>> accessed 25 March 2024

<sup>54</sup> *Google v European Commission* (n 38)

<sup>55</sup> Vibhuti Agarwal, ‘India’s TikTok Ban Is a Cautionary Tale for the U.S.’ (23 March 2024) <<https://www.wsj.com/world/india/india-tiktok-ban-cautionary-tale-us-congress-e014fc28>> accessed 23 March 2024

<sup>56</sup> Agarwal (n 55)

<sup>57</sup> World Trade Organization, ‘Overview: the TRIPS Agreement’ <[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 25 March 2024

<sup>58</sup> World Trade Organization, ‘Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)’ <[https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm)> accessed 15 March 2024



future fragmented Internet.

## 7. CONCLUSION

Bartlett's statement is a timely reminder that data is the new currency in the digital age. With the exception of the threat to democracies, which is *ultra vires* of competition regulator's scope, we have proved his statements to be largely accurate. Online platforms can be completely free to use, yet wield immense "data power" over economic activities. We have explored how users could be held hostage to a messaging app or a social network and deceived into purchasing products recommended by these platforms. Hope is not lost. Competition regu-

lators can use data privacy regulations to reduce the volume of data processed, hence reduce "data power". Competition regulators can also make use of data portability and interoperability requirements to ensure that new market entrants can compete fairly, fragmenting the infrastructure across multiple market players. Regulations on recommender systems can also help competition regulators ensure consumers are not unfairly deceived. Free to use online platforms already have a head start in amassing immense amount of "data power" globally. It is important for competition regulators to fully utilize the extraterritorial scope of existing regulations and work with their counterparts to harmonize existing regulations and develop a global solution to this global problem.

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