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Consumer's Right to Privacy and Competition Law: A Deeper Connect in the World of Data

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ABSTRACT

Right to privacy is a fundamental right enshrined under the Constitution of India and Competition Act 2002 seeks to ensure the welfare of consumers by maintaining healthy competition in the market. Both the rights/laws seem to be poles apart and unrelated to each other. With the emerging trend of data-driven economy that relies on collection of big-data from wide range of platforms accessible to the consumers, the two concepts of privacy and healthy competition in the market do not remain un-related. Right to privacy of a consumer needs to be ensured when his data is being collected by the technology companies every second that he uses the internet. These data collection practices of online platforms can have a significant impact on consumers' privacy. The collection and use of personal data can be a form of market power, and the lack of privacy can make it difficult for consumers to make informed choices. The present paper seeks to explores the various connections between privacy and competition law and how the same can be placed in the present as well as evolving framework of Competition regime in India. Such an enquiry becomes necessary in the ever evolving age of information technology for the law to keep its pace with it.

Keywords: *Privacy, Competition law, Big Data, Competition Act 2002*

I. INTRODUCTION

The right to privacy is the individuals' right to keep the personal data and information about oneself private including the control on its usage and a choice on whether to share it with someone except him including individuals, enterprises and governments. It is part of his right to life that extends beyond just being alive making him feel dignified, safe, secure and protected from discrimination of any kind. It gives one free will to make own choices about ones' lives without interference from anyone.

The right to privacy is a fundamental human right that is enshrined in many international treaties.[3] It is also protected by the constitutions of many countries, including India. In India,

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[3] Universal Declaration on Human Rights, art. 12; International Covenant on Civil and Political Rights, art. 17.

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the right to privacy was declared a fundamental right by the Supreme Court in 2017.[4] This means that the government cannot infringe on the right to privacy without a valid reason. Right to Privacy is a Fundamental Right of all the persons in India in terms of Right to Life enshrined in the Article 21 of the Constitution of India.[5] The judgment says:

"Life and personal liberty are inalienable rights… These rights are recognised by the constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within."

Tracing the evolution of privacy in various cases and writings, the judgment concludes that:

"Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. ***Privacy also connotes a right to be left alone.*** *…**privacy is not lost or surrendered merely because the individual is in a public place."***[6]

This right is equally applicable to individuals acting as consumers and in times of data-driven technologies and multi-sided platforms. To say precisely, in the age of big data this right gets tied to complex and evolving issues. This is so because while on one hand consumers are increasingly unaware of the consequences of sharing their data with tech based platformswhile on the other hand businesses are highly reliant on and desperate to collect data to drive innovation and growth.

The set right is faced with numerous challenges. Major challenge is the sheer volume of data that is being collected. Before the advent of new technology, businesses used to collect data on their customers and potential customers through direct interactions such as surveys, loyalty programs, etc. In present age, the collection has become indirect in the sense through social networking sites, through internet-based devices like watches, through web browsing and so on. Given that they have modern tools to filter the big data being collected continuously into useful data, businesses barely care to keep a check on whether the right to privacy is being honored.

Next major threat to protection of consumer privacy is the lack of transparency in business guidelines on collection and usage of data such as that many businesses do not shy away to collect data of their customers without their consent. And even when there is consent, the same is not informed and knowledge on how their data will or can be used is not provided. Enterprises

[4] K.S. Puttaswamy v. Union of India (2017) 10 SCC 1, (Puttaswamy I).
[5] *Ibid.*
[6] *Id* at 94.

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often do not provide clear and concise information about how the data will be used or most times, consumers do not even know what they are consenting to. The terms and conditions provided are technical and lengthy. Such lack of transparency, knowledge and informed consent hampers not only the right of privacy but also of free choice.

Further, Competition Law like any other law also derives its existence from the law of the land i.e. the Constitution of India. The main object of the Competition Act is to safeguard the consumers' interest and free choice. The Act also ensures that all the enterprises are given fair and equal chance to perform in the market and one business should not be allowed to create barriers for entry to other new businesses.[7]

It becomes important to note that we are in a world which is advancing technologically not just every day but almost every second. A very big part of this technological advancement goes to data or to say the buzz word, 'big data'. Data has always been important for businesses/ enterprises to take business decisions such as deciding the consumer base, deciding which products should be made in more quantity and which one in lesser and so on. With the advent of big data and softwares to analyse large amount of data sets in a matter of seconds, the businesses have got a new oil to run their businesses.

However, the law has not kept pace with the rapid development of big data. In this context, it is important to note that inside every technological advancement lies the process of 'data collection'. Many consumers especially in a country like India are not aware that their data is being collected. Even if those who know that it is being collected, barely know the perils and consequences of such humongous data collection from them. This problem of privacy violation has traditionally been treated as a separate issue from that of Competition Laws. In response to these concerns, governments around the world have enacted laws to protect consumer privacy. The European Union's General Data Protection Regulation (GDPR) is one of the most comprehensive privacy laws in the world giving consumers a number of rights, including the right to access their personal data, the right to have their personal data erased, and the right to object to the processing of their personal data.[8]

Privacy and competition law are two distinct areas of law, but they can intersect in a number of ways. This is due in part to the increasing amount of data that is being collected about consumers, the growing sophistication of data analytics, and the increasing number of data breaches. For example, the collection and use of personal data can be a form of market power,

[7] The Competition Act, 2002 (Act 12 OF 2003).
[8] General Data Protection Regulation, 2016, Europe, *available at* https://gdpr.eu/ (last visited on May 21, 2023).

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and the lack of privacy can make it difficult for consumers to make informed choices; a company that has a monopoly on data about consumers may be able to use that data to price its products or services higher than they would be if there were more competition.

The compromise on privacy often makes it difficult for consumers to make wise and informed choices. For instance, if a person knows that his privacy is being infringed on one platform, he would be likely to switch to another one that provides better protection. The clear path interconnecting privacy and competition is still not explored fully. Nevertheless, it is clear that these two areas of law definitely share a deeper connect than envisaged till now. This is mainly so because the amount of data being collected about consumers grows every second. The present paer seeks to contribute to clearing this un-explored path, specifically from Indian point of view.

II. ESTABLISHING CONNECTION BETWEEN CONSUMER PRIVACY AND COMPETITION LAWS

(A) How data collection impacts Consumer Privacy

Collecting data by the online platforms affects consumers' right to privacy in many ways such as through tracking, monitoring and targeting of customers for relevant and suitable advertisements based on location, browsing history, health trackers and so on. The same is used to persuade to buy the products and services. Besides, selling the personal information to third parties is also a common place for many companies. This also gives access to businesses to use discriminatory practices against consumers, which ofcourse is in violation of Competition laws.

(B) Theories establishing relationship between Consumer Privacy and Competition law

There are a number of theories/viewpoints that try to establish/un-establish connection between privacy and competition law. These theories can be divided into different categories. The first category of theories argues that privacy and competition law are complementary, both concerned with protecting consumers from harm. For example, privacy law can be used to prevent businesses from collecting or using personal data in a way that is harmful to consumers, and competition law can be used to prevent businesses from using their market power to harm consumers.

The second category of theories argues that privacy and competition law are conflicting. For example, privacy law may prohibit businesses from collecting or using personal data in a way that gives them a competitive advantage, even though this may benefit consumers by leading to lower prices or better products and services.

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Third viewpoint argues that privacy can have a negative impact on competition. For example, a business that collects and uses large amounts of personal data about consumers could have a competitive advantage over businesses that do not collect or use as much data. This is because the business with the data could use it to target consumers with advertising, to build profiles of consumers, or to discriminate against consumers. Also, a business that is competing with another business for consumers' business may be tempted to collect and use personal data about consumers in a way that is harmful to consumers. This could include collecting data without consumers' consent, using data for purposes that consumers did not authorize, or selling data to third-party companies. The academic research acknowledges two different points of view on how privacy and competition law interact:

- **Separatist view:** According to this viewpoint, data protection law and competition law should be examined independently. This separatist perspective may have its roots in the Asnef-Equifax[9] decision, where the court dismissed the relationship between privacy and competition law. In essence, the separatist thesis sees privacy and competition law as complimentary, but distinct. ***The fundamental contention is still that adding privacy issues to the evaluation of competition law would be confusing, particularly when applied to the consumer welfare standard.***

- **Integrationist view:** Another approach demands that both concepts be integrated and inter-twined in as much as that provision of privacy be considered as both price as well as non-price factor in order to enhance consumer welfare. In 2014, European Data Protection Supervisor (EDPS) suggested 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."[10] The EDPS further went on to accept that consumers are data-points or data subjects and their welfare might be at risk when their freedom of choice and ability to control usage of their own personal data is at peril and is capable of being restricted by an enterprise.[11] In light of this, the EDPS claimed that it was essential to create concepts of consumer harm, which could be used to describe how data protection rights were being violated. *In essence, the integrationist approach evaluates whether*

[9] Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios Case C-235/08, ECR I-11125 [2006].
[10] European Data Protection Supervisor, Preliminary Opinion of the 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 (March, 2014).
[11] *Ibid.*

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privacy-based competition might be damaged when there is evidence that businesses compete to supply privacy protection to consumers.

In this context, The German Facebook case[12] is extremely important. It is the most recent and even the best example of Competition Authorities taking up integrationist view by trying to dilute the thin line of boundary between data protection and Competition law. After all, the major objective of both the laws is consumer welfare. Because of its distinct viewpoint, it has offered the most creative way to incorporate privacy issues into the law against unfair competition.

• **Adverset view:** An *adverset view* was also taken by Delhi High Court[13] and the Supreme Court[14] in Whatsapp change in privacy policy case.[15] In its order dated March 24, 2021, the CCI noted that the 2021 policy required users to give their approval before utilising WhatsApp's services, including the exchange and integration of user data with other Meta group firms. It was noted that customers were not given the option to "opt-out" of the integration of their data across all of the companies in the Meta group. The CCI first asserted that the 'take-it-or-leave-it' character of WhatsApp's privacy policy and terms of service, as well as the information sharing requirements outlined therein, demand a thorough review, especially in light of the company's dominant position in the market. On 14 October 2022, the Apex Court dismissed appeals filed by WhatsApp LLC (WhatsApp) and Facebook Inc (now Meta) challenging the jurisdiction of the CCI to investigate WhatsApp's 2021 Terms of Service and Privacy Policy. This probe marked the first time that ***non-price competition-related criteria*** (such as data collection and sharing procedures) would be evaluated as potential contributors to a breach of Indian competition law. Competition regulators in other countries, including the European Union, the United Kingdom, Germany, Italy, Australia, and Turkey, have all noted antitrust issues with regard to how digital platforms use and gather data. CCI also noted that this policy does not appear to allow users "a granular choice" and appears "prima facie unjust to users," and the users must have sovereign rights over their personal data. This policy also seems to reflect worries about consumer protection.[16]

[12] Case B6-22/16 *available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=* (last visited on May 15, 2023).
[13] Whatsapp Llc vs Competition Commission of India MANU/DE/3093/2022.
[14] *Meta Platforms Inc v Competition Commission of India* SLP (C) No. 17121/2022.
[15] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* CCI Suo Moto Case No. 01 of 2021
[16] *IBID.*

III. CONSUMER PRIVACY AND COMPETITION LAW INTERFACE: APPROPRIATE PLACEMENT IN THE PRESENT FRAMEWORK

(A) Journey since Early 90s

The interface between privacy and competition law has its origin in the early days of the digital age. In the 1990s, as businesses began to collect and use large amounts of personal data about consumers, privacy advocates began to raise concerns about the potential for this data to be used to harm consumers.

These concerns led to a number of initiatives to address the interface between privacy and competition law. In 1998, the United States Federal Trade Commission (FTC) issued a report on the privacy of personal information collected and used on the Internet. The report concluded that the collection and use of personal information on the Internet could have both privacy and competition implications.[17]

In 2000, the European Union adopted the Directive on Privacy and Electronic Communications (Directive 2002/58/EC). The Directive was designed to protect the privacy of individuals with regard to the processing of personal data and the free movement of such data. The Directive also included provisions on the use of personal data for marketing purposes.[18]

In 2018, the EU adopted the GDPR- one of the most comprehensive privacy laws in the world that gives individuals a number of rights, including the right to access their personal data, the right to have their data erased, and the right to object to the processing of their data. The GDPR also includes provisions on the use of personal data for marketing purposes. The GDPR requires businesses to obtain consent from individuals before they can collect or use their personal data for marketing purposes.[19]

The German case of privacy and competition law is a landmark case that has had a significant impact on the way that competition law is used to protect privacy. In February 2019, the German Federal Cartel Office (FCO) prohibited Facebook from requiring users to agree to the merging

[17] Federal Trade Commission, Consumers' Online Privacy (June, 1998) *available at* https://www.ftc.gov/news-events/news/press-releases/1998/06/ftc-releases-report-consumers-online-privacy (last visited on May 01, 2023).
[18] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), available at https://edps.europa.eu/sites/edp/files/publication/dir_2002_58_en.pdf (last visited on 12 May 2023)
[19] GDPR summary *available at* https://www.gdprsummary.com/ (last visited on 29 April 2023)

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of personal data that Facebook collects inside and outside of its social media platform.[20] The FCO found that this practice was an abuse of dominance by Facebook.

The FCO's decision was based on the following findings:

- Facebook has a dominant position in the market for social networks for private users in Germany.
- Facebook's terms of use require users to agree to the merging of personal data that Facebook collects inside and outside of its social media platform.
- This practice gives Facebook a competitive advantage over its rivals and is not necessary for Facebook to provide its services.

The FCO's decision was a landmark decision that recognized the potential for privacy concerns to be considered under competition law. The decision (later overturned) also sent a strong message to other dominant companies that they cannot use their market power to collect and use personal data in a way that harms consumers. The German case of privacy and competition law is a significant development in the field of data protection. It shows that competition law can be used to protect privacy, and it sets a precedent for other competition authorities to follow. The decision is likely to have a lasting impact on the way that companies collect and use personal data.

- In recent years, the EC has taken a number of steps to address the interface between privacy and competition law. In 2017, the EC published a report on the interface between the two areas of law. The report concluded that the collection and use of personal data could have both privacy and competition implications.[21]It further elaborated that the collection and use of personal data can have both privacy and competition implications such as when a company uses its dominant position to collect or use personal data in a way that is harmful to consumers.

The EC has also taken a number of enforcement actions in this area. In 2019, the EC fined Google €4.34 billion for abusing its dominant position in the market for online general search services.[22] It was found that Google abused its dominance by collecting and using personal data

[20] Case B6-22/16 *available at, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=* (last visited on May 15, 2023).

[21] European Commission, Competition Policy for the Digital era- A report by Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer (2019), *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (last visited on 25 April 2023).

22 Antitrust: Commission fines Google €4.34 billion for abuse of dominance regarding Android devices, 18 July 2018, *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (last visited on 17 May 2023).

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from users of its Android operating system and its chrome web browser. Recenty, it also initated an investigation into the use of online behavioral advertising (OBA) by Google and Meta(erstwhile, Facebook) focussing on whether they abused their dominant positions in the online advertising markets by engaging in anti-competitive practices.[23] This investigation is a sign that EC taked privacy concerns seriously.

(B) Privacy: a non-price factor in Competition law analysis?

Privacy can be an important class of non-price effect involving data. Businesses may compete to provide clients with better privacy conditions than their rivals. Consumers' expectations for the use of their data, however, are remarkably diverse. While some people find behavioural or targeted advertising intrusive, others value the more pertinent advertisements and receive free goods or services in exchange for tailored advertising. Intrusion of privacy can also be a relevant factor to access the quality of services.

Further, for innovation, data sharing is vital that further leads to consumer welfare. But privacy advocates frown upon the same. Therefore, a middle ground has to be found between the two. Market value and competitive advantage are definitely delivered by data. As a result, there will undoubtedly be more data collected and processed as a result of the rising thirst for data. As a result, there would be less online privacy and improved profiling and insight into customer preferences.

The Competition Commission of India (CCI) has taken a number of actions to address the interface between privacy and competition law. In 2018, the CCI issued a report on the interface between privacy and competition law.[24] The report concluded that the collection and use of personal data could have both privacy and competition implications. This issue of privacy in connect with Competition laws was recently opened up in India through *Meta Platforms Inc. v Competition Commission of India & Anr.*[25]. The Competition Commission of India (CCI) in 2021 initiated *suo moto* proceedings and ordered its investigative arm – Office of the Director General (DG) – to investigate into the updated '*Terms of Service and Privacy Policy'* introduced by WhatsApp Inc, when WhatsApp had updated its privacy policy to the detriment of Indian consumers.

23 Antitrust: Commission opens investigation into possible anticompetitive conduct by Google and Meta, in online display advertising, 11 March 2022, *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1703 (last visited on 17 May 2023).

24 Competition Commission of India, Annual Report 2018-19, (March 2019) *available at* https://www.cci.gov.in/public/images/annualreport/en/3-annual-report-2018-191652253330.pdf (last visited on 12 May 2023).

25 Special Leave to Appeal (C) No. 17121/2022.

The CCI has also taken a number of actions to address specific privacy concerns. For example, in 2019, the CCI ordered WhatsApp to stop sharing user data with Facebook. The CCI found that the sharing of user data could have anti-competitive effects. In 2021, the CCI issued an order in the case of In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021. The CCI found that WhatsApp's updated privacy policy was likely to have an adverse effect on competition in the market for instant messaging services in India. The CCI ordered WhatsApp to modify its privacy policy and to take other measures to address the CCI's concerns.

The CCI's actions in the WhatsApp case are significant because they show that the CCI is willing to use its competition law powers to protect privacy. The CCI's actions are also likely to have a chilling effect on the collection and use of personal data by businesses in India. The CCI has had many opportunities to look into the digital sector since its inception but it is only recently that it has realized that data may be an asset in itself for multi-sided/digital platforms. In January 2021, the CCI released a report on the Telecom sector in India[26] wherein it noted down the intersection/interface of data privacy and competition law. It determined the use of data as non-price competitive factor, highlighting that data collected from users by a business may be used for gaining the competitive edge by the enterprise over its competitors. In the same report, the CCI further highlighted that network effects resulting from large amounts of data collected allow companies to compete on a level that does not relate to pricing and creates a system of "'winner takes all".

The CCI Telecom Report examples of abusive conduct, such as:

(a) a low privacy standards denoting compromised consumer welfare;

(b) lower data protection, that may lead to exclusionary behaviour; and

(c) leveraging a data advantage across various services.

The CCI in the WhatsApp Suo Moto Order[27], opined that data-sharing by WhatsApp with Facebook amounts to suppression of non-price parameters and that such a conduct prima facie seems to be an imposition of unfair terms and conditions upon the users of WhatsApp.[28]

In its order, the CCI considered its decisional history regarding WhatsApp[29] to establish its

[26] Competition Commission of India, Market Stusy on the Telecom Sector in India: Key Findings and Observations (January 2021), *available at* https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf (last visited on 25 April 2023).

[27] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users,* Suo Moto Case No. 01 of 2021.

[28] *Ibid.*

[29] Harshita Chawla v. WhatsApp Inc. and Facebook Inc., CCI Case No. 15 of 2020 and Shri Vinod Kumar Gupta v. WhatsApp Inc. CCI Case No. 99 of 2016.

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market power and stated that "*given its popularity and wide usage, for one-to-one as well as group communications and its distinct and unique features, WhatsApp seems to be dominant*." This finding is important, since it relies on the number of users on the platform creating a network effect.

In relation to data usage, the CCI has previously observed in many cases that companies such as Facebook and other multi-sided platforms have the "*potential to collect and process significant amounts of customer data"*[30]. In the WhatsApp Suo Moto Order of 2021[31], the CCI states *"in a data driven ecosystem, the competition law needs to examine whether the excessive data collection and the extent to which such collected data is subsequently put to use or otherwise shared, have anti-competitive implications, which require anti-trust scrutiny".*

IV. DOES PRIVACY HAVE A PLACE IN COMPETITION LAW REGIME OF INDIA: CONCLUSION AND SUGGESTIONS

The application of the Competition law has become difficult to execute in "zero-price markets"- which are incongruous with the traditional legal and economic theories relating to competition law assessment. On top of that, such markets have other unique features like complexity in determining market power combined with network effects; and the ability of customers to multi-home yet at the same time be locked-in due to the lack of inter-operability (thereby complicating the analysis with respect to cost of switching).

In light of the analysis undertaken above, it would not be unsafe to state that there is a strong inclination of Competition law authorities of using data as a proxy for assessing market power, and once such is ascertained, the misuse of data can also be considered to cause an "appreciable adverse effect" under Competition law. The CCI Telecom Report identifies data as one of the parameters for non-price competition analysis along with acknowledging that privacy could, be only a consumer protection issue; and not competition law competition law which is aimed at preserving and fostering competition, and not protecting individual market players- enterprise and consumer.

On that account, the CCI should act in conjunction with other agencies (in this case, the proposed Data Protection Agency under Data Protection Bill, 2019) that might be specifically tasked to set standards for data protection in future. Another important suggestion that CCI must incorporate in its analysis of tech. platforms related cases is it should act more liberal during

[30] Facebook / Jio, Combination Registration No. C-2020/06/747, June 24, 2020 and Google/ Jio, Combination Registration No. C-2020/09/775, November 11, 2020.
[31] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users,* Suo Moto Case No. 01 of 2021.

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the preliminary hearings and during the same time, it can understand the underlying technology and business models of the business under question.

The lack of collaboration in the formulation of policies relating to competition, consumer protection, and data protection appears to have the potential to lessen the impact of enforcement. Personal information serves as a valuable intangible asset in the digital economy and is a medium of trade for digital services. This could have significant effects on how important ideas like transparency, market dominance, consumer welfare, and harm are understood.

Yet, there are many questions that arise as anomalies at the intersection of both the concepts. Such as, what, and to what extent, should competition be traded at the margins for data privacy? How will businesses know whether consumers would want more innovation in services or want more privacy at the cost of innovation? Answer to this perhaps lies in consumer awareness which will help them to give express and voluntary consent. Also, the onus of supplying this vital information should be on the businesses that too, in a crisp, concise and readable manner.

An exhaustive response to these challenges will need more time for proper investigation, scrutiny, reflection and discussion. However, on the basis of above enquiry, the response to this challenge should definitely include any or all of the following:

- increased understanding of the consequences of recent and upcoming technology advancements for competition, consumer welfare, consumer choice, and innovation surrounding privacy-enhancing services among customers, service providers, and regulators in relevant marketplaces in the digital economy;
- appropriate guidelines that include the opinions of customers and rivals as well as evidence of customer preferences and concerns when applying privacy, competition, and consumer protection laws to online services, particularly those promoted as “free” services;
- interaction between law enforcement and regulatory agencies in the areas of investigation and enforcement, such as the identification of scenarios and potential metrics for gauging market power in the digital economy and advice on inquiries into specific cases;
- Individual consumer awareness about his data usage and collection.

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