

# Big Data-Competition & Consumer Protection Issues, Falling between Regulatory Stools?

## **FORUM ON CHALLENGES OF COMPETITION IN THE DIGITAL ENVIRONMENT 2018**

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Archana G. Gulati  
ag.gulati@gov.in  
Senior Deputy Director General  
Department of Telecommunications, India

Archana G. Gulati, Telecom Policy Expert

# Outline

- Why Care about Big Data?
- Market Power & Privacy
- Market Power & Price
- Jurisdiction?
- Way Forward



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# Understanding Big Data

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Large Volumes of a Variety of data collected at high Velocity, processed by computing software to produce unique data sets with significant commercial Value

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Personal data is a subset of big data and its use is increasingly a matter of concern in the digital age

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*When large sets of data are fused and then mined, they bring together new information that may enable a seller, or a competitor, to better understand and exploit the market.*

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OECD

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# Why Should We Care?

- *Collecting, processing and exploiting personal data appears to be subject matter of consumer protection rather than one of competition law enforcement*
- *However off late there is an interest in the -  
'possible **competition impact** of bringing together and gaining control over large data sets, as well as a desire to better understand the possible implications for **consumers** and **markets**'*

-OECD

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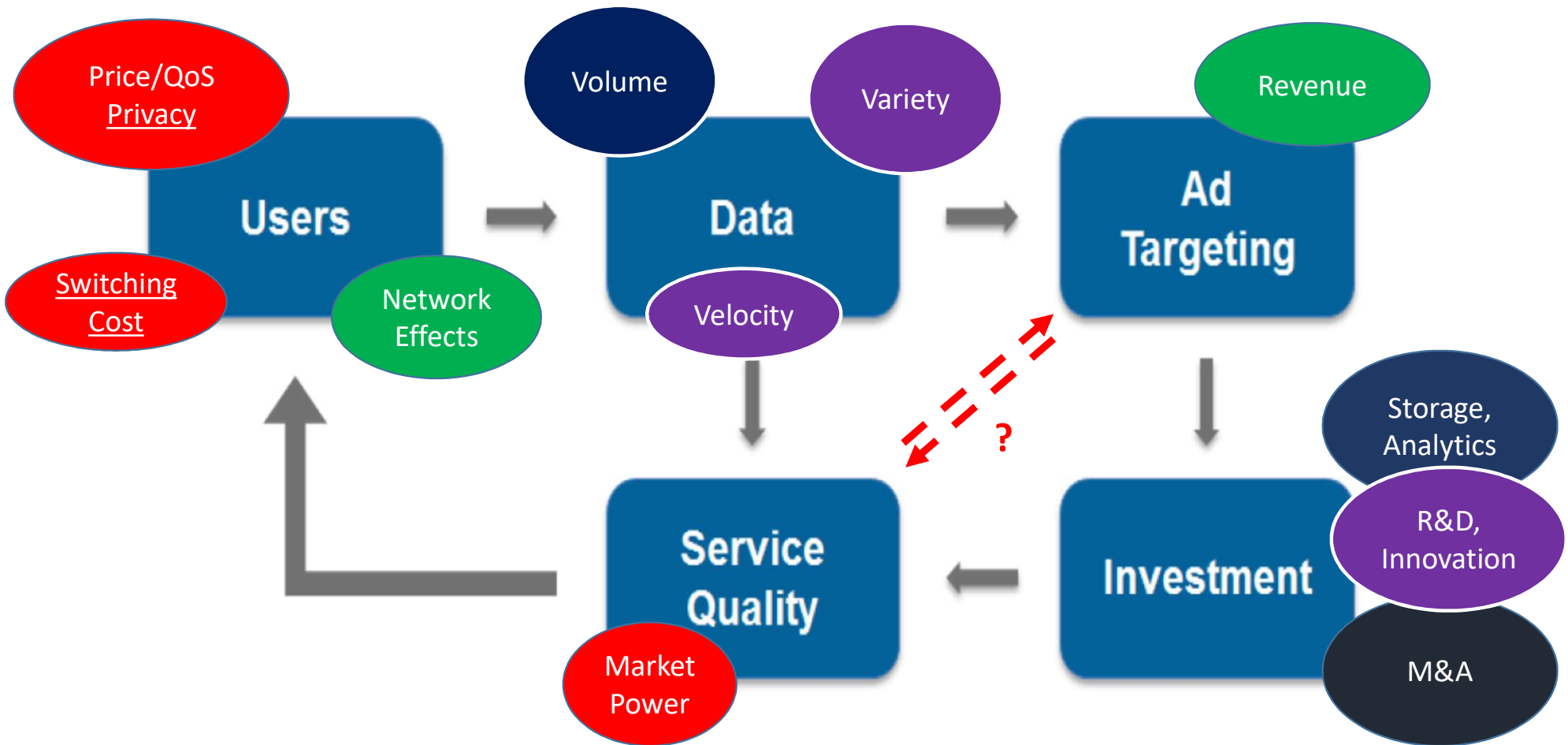
# Competition Issues

- Today free services are used to acquire valuable personal data which is used for behavioural advertising
- As long as market competitive can yield innovations that benefit consumers and the company
- However, network effects and economies of scale/scope driven by Big Data can also confer market power and a durable competitive advantage

*Source: OECD*

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# Source & Use of Market Power



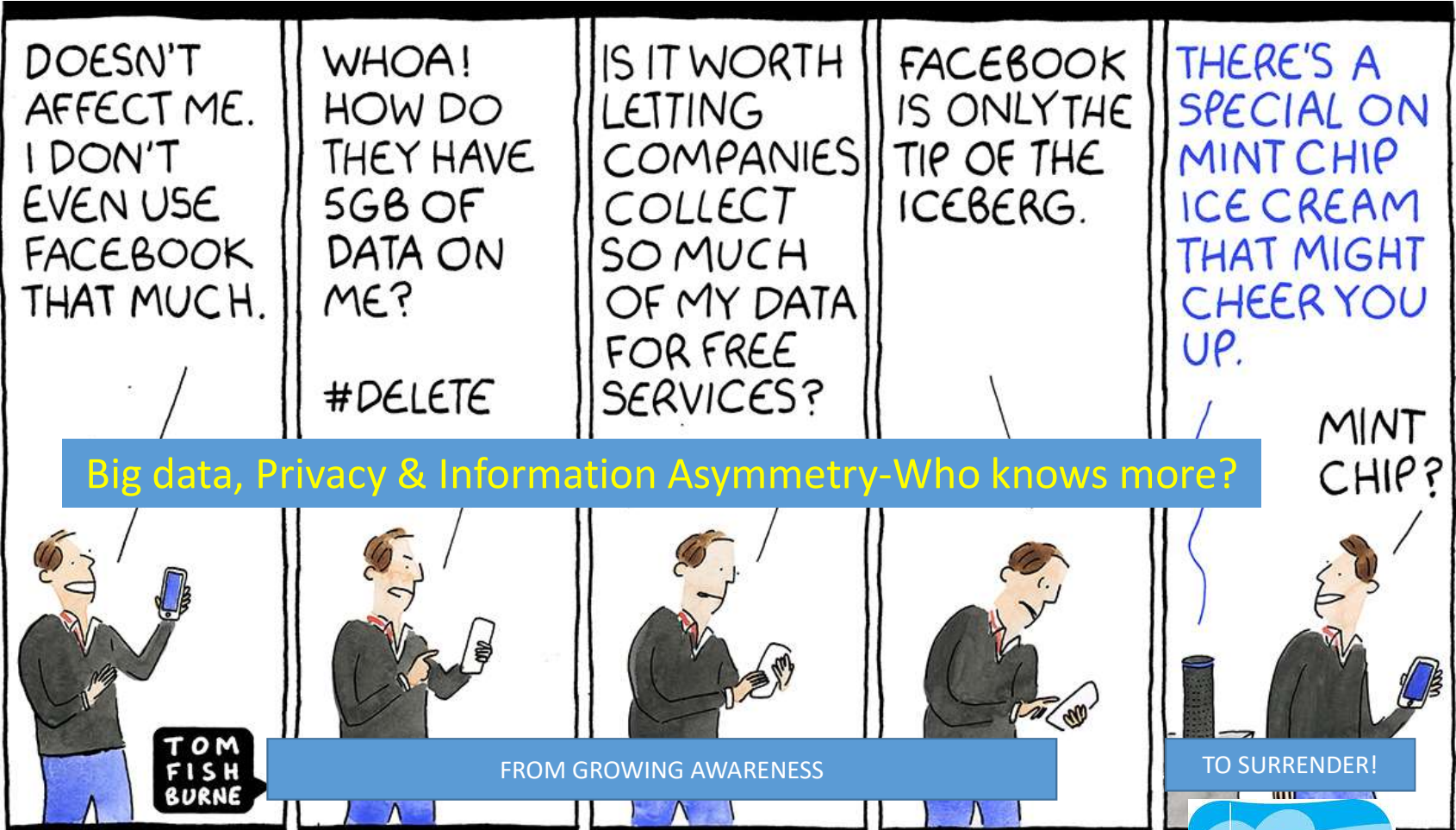
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Adapted from OECD Paper

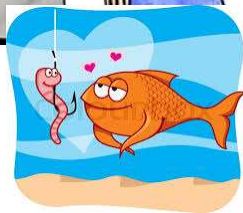
# Market Power & Privacy

- Market Power: use of Big Data leads to
  - better **service quality**
  - **enhanced network effects** and much **larger economies of scale and scope**
  - **barriers to entry**
- Market power can also lead to **switching costs**-customers may be **compelled to use** the / few dominant service provider(s) despite **privacy concerns (or advertisements)**
- Is this a competition(market power) issue or is it a data protection/consumer protection/QoS issue?

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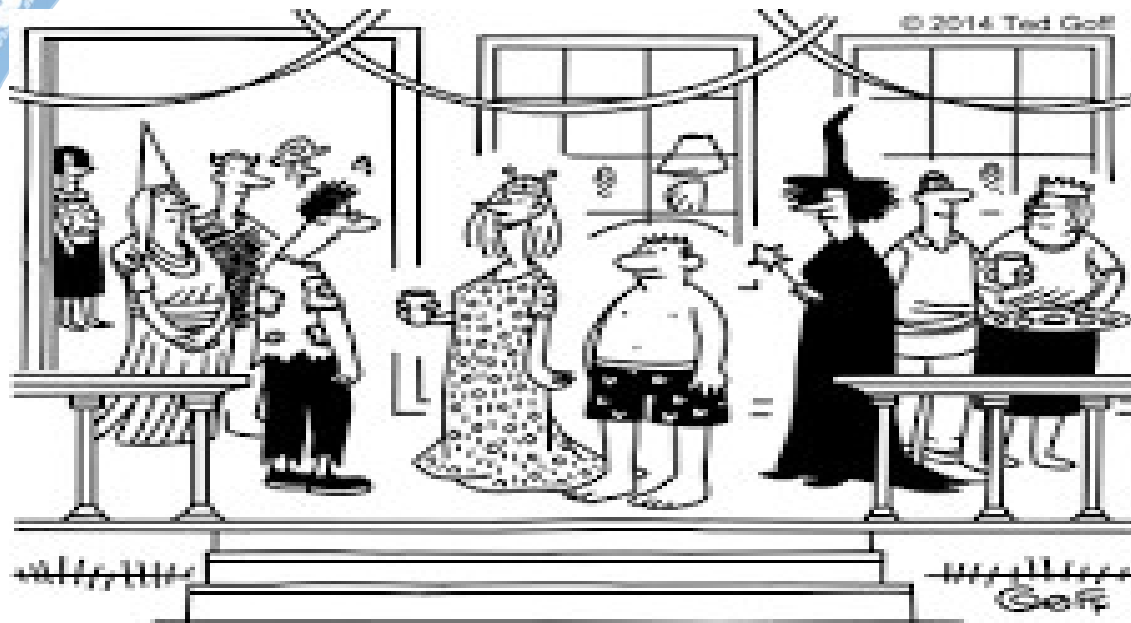


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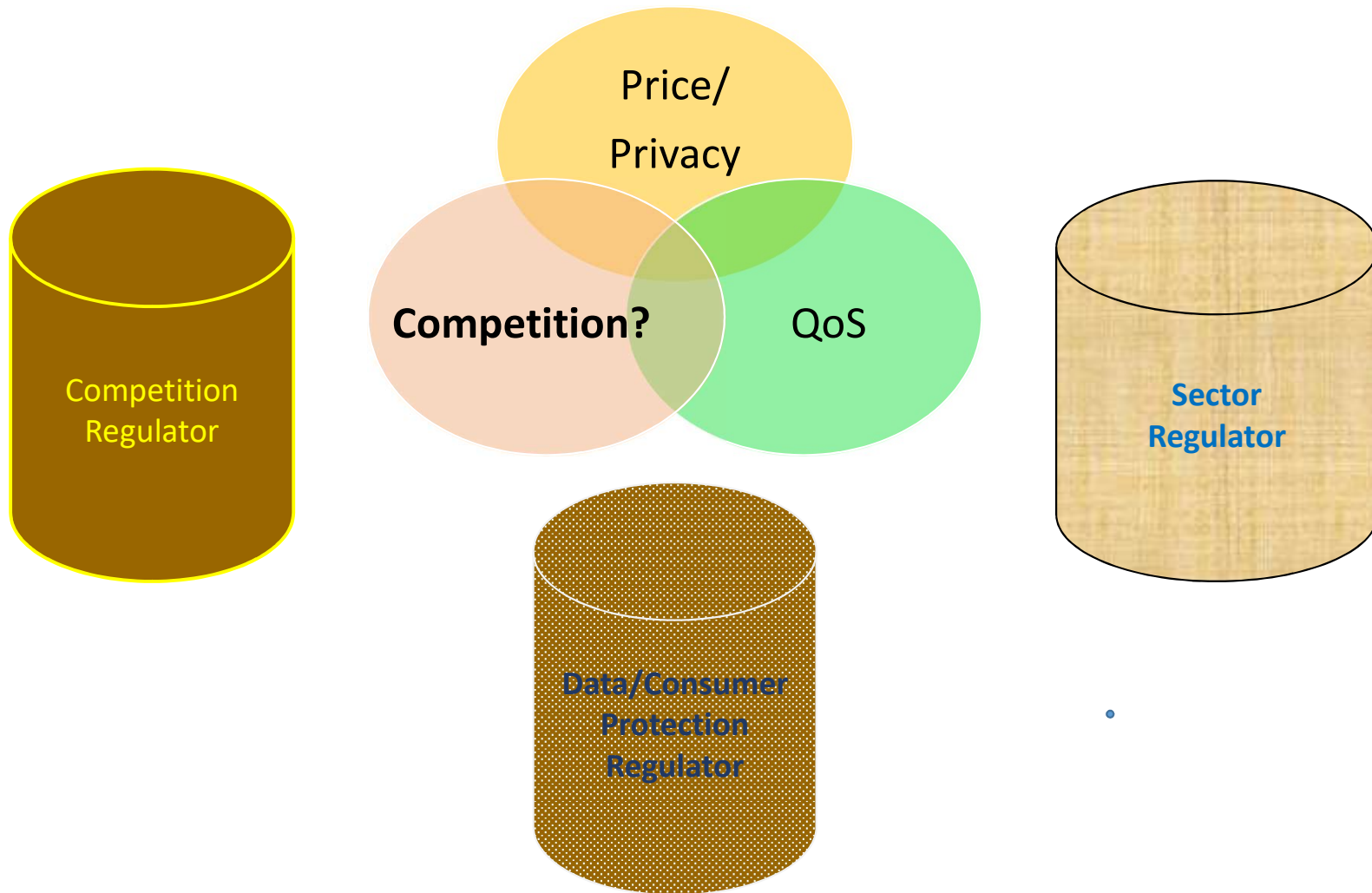


**TRICK OR  
TREAT ?**



**"I'm Big Data, and this is  
my friend No Privacy."**

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# Market Power & Privacy

- Who should be concerned?
- Data protection regulator - but consent given voluntarily? (Does the consumer have a choice?)
- Sector Regulator - Is there a price/QoS/consumer protection issue?
- Competition regulator may not intervene (multiple players) - unless there are M&As

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# Market Power & Privacy

- Even in the case of M&A many such mergers may fall below turnover threshold
- Are data protection issues to be looked at by Competition Regulators?
  - EC decision in Facebook/WhatsApp
  - Possibility of data (mis)use not a competition issue?
- Does WhatsApp qualify as a service where users will accept privacy loss?
- Is loss of 'meaningful privacy choices' a competition issue?

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# Market Power & Privacy-Competition Regulator

- *If privacy violations occurs through use of market power, is it an antitrust concern?*
  - *If Data: 'new currency of the internet' then, is increased private data collection a price increase?*
  - *Or, if privacy is 'a desirable characteristic', is 'a reduction in privacy' a decrease in quality of the service*
  - *Lack of competition can lead to lack of incentive to improve quality (in terms privacy)*

Source: OECD

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## Market Power & Privacy

- ***Antitrust is actually about consumer choice, and price is only one type of choice. The ultimate purpose of the antitrust laws is to help ensure that the free market will bring to consumers everything they want from competition. This starts with competitive prices, of course, but consumers also want an optimal level of variety, innovation, quality, and other forms of non-price competition. Including privacy protection.***

-OECD paper

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# Big Data, Algorithms & Price

- *'...advanced methods of data analysis, programming tools and artificial intelligence, added to the greater transparency and ability to compare prices provided by the Internet, are likely to greatly facilitate market coordination.'* - OECD Paper
- Hard to prove especially in case of algorithms designed by third parties
- If these undetectable cartels harms consumers, sector regulators may have to step in- e.g. airlines

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# Big Data & Price Discrimination

- *Sellers can use Big Data to target consumers with the right “emotional pitch” to increase overall consumption*
- *As more online retailers personalise pricing and product offerings, it will be **harder for consumers to discover a general market price** and to assess their outside options, thus implying that behavioural discrimination becomes more durable*

Source: Stucke & Ezrachi

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# Big Data & Price Discrimination

- *Once consumers accept that prices change rapidly (such as airfare, hotels, etc.), they have lower expectations of price uniformity among competitors. One hotel may be charging a higher price because of its supply of rooms (rather than discriminating against that particular user). (...) Thus, **we may not know when pricing is dynamic, discriminatory, or both.***



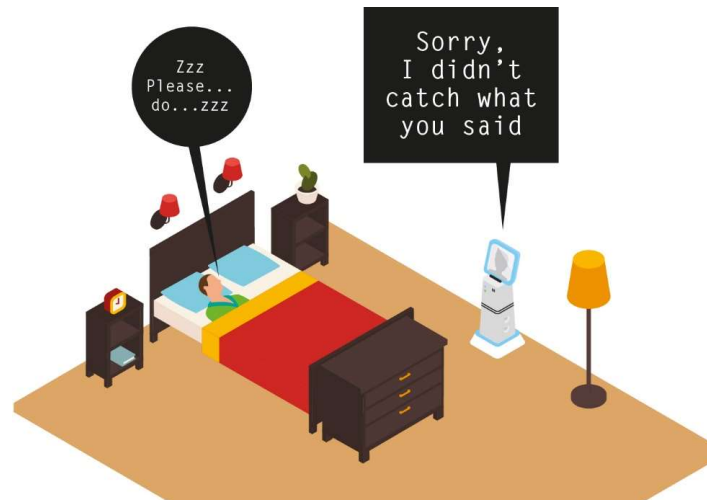
Source: Stucke & Ezechia

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# Big Data & Price Discrimination

- *As more consumers rely (and trust) an intermediary to deliver the best results [search query/goods/services], the less interested they become in multi-homing... And: many users who indicated that when a search result fails to meet their expectations they will “try to change the search query—not the search engine.”*

Source: Stucke & Ezechia



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## Platforms as the New Significant Market Powers

- Ensuring fair and innovation-friendly platform economy :
  - the European Commission studying platform-to-business trading practices.
  - Concerns relate to platforms favouring their own products or services, discriminating between suppliers and sellers and restricting access to, and the use of personal and non-personal data. The absence of transparency and redress mechanisms are additional matters raised by stakeholders.

([https://www.bakermckenzie.com/-media/files/insight/publications/2017/10/ar\\_antitrust\\_digitalage\\_oct17.pdf?la=en](https://www.bakermckenzie.com/-media/files/insight/publications/2017/10/ar_antitrust_digitalage_oct17.pdf?la=en))

# Are Regulatory Assessment Tools Rusty?

- The Competition Commission of India in *Vinod Gupta v. WhatsApp* (Case No.99 of 2016) on allegations of predatory pricing, abuse of dominance & privacy concerns post FB/WhatsApp merger
- In market for instant messaging services using consumer communication apps through smartphones in India, WhatsApp is dominant
- Did not find evidence of predatory pricing or abuse of dominance
  - **Many other free apps in market**
  - **Switching costs are low**
  - **Multi-homing is prevalent**
  - **User has to give consent for data sharing**
  - **Entry barriers are low**

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## Replace/Supplement Competition Regulator's Tool Kit

- Competition law has been excessively narrowed, and excessively influenced by presumptions concerning a competitive market place
- Today, competition and consumer protection law needs to be broadened, to incorporate the realities of the 21st century and the insights of modern economics

-Joseph Stiglitz

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# Solutions/Remedies/Jurisdiction?

- SMP Regulation
  - Mandatory access, data portability, pricing restrictions, QoS?
- Standards, Transparency
- Compliance by design
- Ownership rights to data and trading by individuals
- Anonymised public data sets
- Converged /Cooperating/Coordinating Regulators
- Informed consumers

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# Privacy Standards

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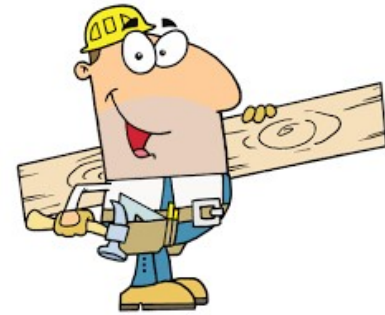
## Terms of Services

- I do not authorise the collection of my personal data.
- I authorise the collection of my personal data for internal purposes that are solely needed and used to provide the particular product or service in question.
- I authorise the collection of my personal data for the creation of aggregate databases that may be shared with third parties.
- I authorise my personal data to be collected and shared with third parties without any restrictions.

Source: OECD paper

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# THANK YOU





# References

- OECD paper: DAF-COMP(2016)14
- OECD, Algorithms and Collusion, Competition policy in the digital age
- Ezrachi A. & Stucke M.E., Virtual Competition, The Promise and Perils of the Algorithm-Driven Economy

Archana G. Gulati, Telecom Policy Expert