

This Is Not a Sponsored Post: Misuse of Data and Its Role in Creating Internet Hegemonies

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I. GOOGLE AND FACEBOOK BOTH PLAY A SIGNIFICANT ROLE IN THIRD-PARTY ADVERTISING

[I]mpartiality of search results will become all the more important in the years to come given that screen sizes on smartphones and tablets are smaller than on traditional PCs. Smaller screens mean there is even less room for competing services to appear in Google's mobile search results.

— Susan Athey¹

A. *We Are All Victims of Targeted Advertising*

The experience of getting an inexplicably accurate targeted post on social media is a familiar one. These advertisements are often so reflective of the habits and preferences of an individual that they have become a source of ridicule on the internet, providing fodder for numerous jokes, rumors, and memes circulating on the spying tactics of social media websites.²

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1. Jeff Meisner, *The Importance of Search Result Location*, available at <https://blogs.microsoft.com/on-the-issues/2013/03/26/the-importance-of-search-result-location> (last accessed Jan. 31, 2023) [<https://perma.cc/3XLH-FGWZ>]. Susan Athey is a Professor of Economics at the Stanford Graduate School of Business and a Senior Fellow at the Stanford Institute for Economic Policy Research. Stanford Graduate School of Business, Susan Athey, available at <https://gsb-faculty.stanford.edu/susan-athey> (last accessed Jan. 31, 2023) [<https://perma.cc/9S2J-42R2>].
 2. Tanya Kant, *A History of the Data-Tracked User*, available at <https://thereader.mitpress.mit.edu/a-history-of-the-data-tracked-user> (last accessed Jan. 31, 2023) [<https://perma.cc/3NBU-WHKX>].

This level of accuracy comes at a steep cost — advertisers mine the data of individuals who access various websites, specifically ones that employ social media and e-commerce.³ Data is collected by websites tracking user activities on their platforms.⁴ These practices are illustrated as “the unseen and unauthori[z]ed extraction, storage, analy[z]ing, selling, buying[,] and auctioning of personal online data appropriated by one or more remote online corporate actors.”⁵

Particularly, Google and Facebook, through its parent company, Meta, track the personal and purchasing history and behavior of users.⁶ The positions of these websites as leading social media conglomerates give them unchecked access to this data.⁷

Such a position is undeniable. Data consultants have found that Google stores a substantial amount of data collected from user accounts and devices, including their location, applications used, emails sent, photos taken, and search history.⁸ Facebook, in the same vein, mines the following data: location, webcam and microphone access, purchasing, and search history.⁹

B. Targeted Third-Party Advertising Has Progressed Exponentially in the Past Few Decades and Will Continue to Be a Mainstay in the Years to Come

Online advertising has existed since 1994, when the first-ever clickable advertisement for a telecommunications company appeared on a website called

3. *Id.*

4. Sylvia Peacock, *How Web Tracking Changes User Agency in the Age of Big Data: The Used User*, 1 *BIG DATA & SOC.* 1, 1 (2014).

5. *Id.*

6. Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, *GUARDIAN*, Mar. 30, 2018, available at <https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy> (last accessed Jan. 31, 2023) [<https://perma.cc/GC7F-6HMB>].

7. *Id.* & Alex Hern, *Meta Injecting Code into Websites to Track Its Users, Research Says*, *GUARDIAN*, Aug. 11, 2022, available at <https://www.theguardian.com/technology/2022/aug/11/meta-injecting-code-into-websites-visited-by-its-users-to-track-them-research-says> (last accessed Jan. 31, 2023) [<https://perma.cc/77N5-HEGJ>].

8. Curran, *supra* note 6.

9. *Id.*

HotWired.com.¹⁰ The first iteration of targeted advertising began in 1999, when GoTo.com introduced the concept of *pay-for-placement*, in which advertisers bid for top search engine results on particular keywords.¹¹ This has evolved into the concept of payment on a pay-per-click basis, where the search engine is paid a certain amount for every click on a specific advertisement.¹²

During this time Google also introduced AdWords, which allows advertisers to identify keywords they want to bid on and how much they want to spend, and matches a user with the most relevant result based on personal data.¹³ In the mid-2000s, Facebook became one of the pioneers of targeted advertising, with advertisements geared towards the demographics and interests of its users.¹⁴

These early models of targeted advertising relied on matching users with advertisers based simply on demographics provided on their user profiles, which are forms of information that are publicly available.¹⁵ While the current version of targeted advertising is based on this 1990s model, the way advertisements are targeted today is radically different because of existing website methods of data acquisition and sharing.¹⁶

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10. Damien Geradin & Dimitrios Katsifis, *An EU Competition Law Analysis of Online Display Advertising in the Programmatic Age*, 15 EUR. COMPETITIONJ. 55, 55 (2019) (citing Welcome the The “First” Banner Ad, available at <http://thefirstbannerad.com> (last accessed Jan. 31, 2023) [<https://perma.cc/NZ3J-VBUC>]).
 11. Karla Hesterberg, A Brief History of Online Advertising, available at <https://blog.hubspot.com/marketing/history-of-online-advertising> (last accessed Jan. 31, 2023) [[https://perma.cc/MT7\]-63VU](https://perma.cc/MT7]-63VU)].
 12. *Id.*
 13. Wordstream, What Is Google Ads? How the Google Ads Auction Works, available at <https://www.wordstream.com/articles/what-is-google-adwords> (last accessed Jan. 31, 2023) [<https://perma.cc/D3K2-TZ4D>].
 14. Hesterberg, *supra* note 11.
 15. *Id.*
 16. Stuart Thomson, *These Ads Think They Know You*, N.Y. TIMES, Apr. 30, 2019, available at <https://www.nytimes.com/interactive/2019/04/30/opinion/privacy-targeted-advertising.html> (last accessed Jan. 31, 2023) [<https://perma.cc/L3FE-REPN>].

It has been observed that “[t]he use of the internet and social media have changed consumer behavior and the ways in which companies conduct their business.”¹⁷ Consistent use of social media websites by consumers means that third-party advertisers have shifted their focus towards selling space on these platforms.¹⁸ Advertising on social media websites provides an opportunity for more consumer engagement and easier access to consumer choices. Targeted advertising has thus become increasingly reliant on social media websites, giving Google and Facebook the advantage of having readily available information.¹⁹

C. Targeted Third-Party Advertising Relies Heavily on Digital Surveillance

These consumer choices are modeled using digital surveillance.²⁰ Websites create models which predict the future decisions of users based on existing data acquired from unscrupulous means to the exclusion of others.²¹ The data gathered is extensive, considering that Facebook and Google are involved in the minutiae of our everyday lives.²² No longer do websites merely rely on user profile data; they have access to a wealth of information on their users that makes advertising decisions more convenient.²³

17. Yogesh Kumar Dwivedi, et. al., *Setting the Future of Digital and Social Media Marketing Research: Perspectives and Research Propositions*, 59 INT’L. J. INFO. MGMT. 1, 1 (2021).

18. Hesterberg, *supra* note 11.

19. *Id.*

20. United Kingdom Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Final Report*, ¶ 2.18, *available at* https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/53K7-V5KF>].

21. *Id.*

22. Curran, *supra* note 6.

23. Organisation for Economic Co-operation and Development Competition Division, *Digital Advertising Markets – Background Note by the Secretariat*, ¶ 35, *available at* [https://one.oecd.org/document/DAF/COMP/WP2\(2020\)3/En/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2020)3/En/pdf) (last accessed Jan. 31, 2023) [<https://perma.cc/8VY8-9E7L>] [hereinafter OECD].

While the content of personal messages, calls, and teleconferences are protected, the metadata surrounding the same are not.²⁴ *Metadata* refers to the persons involved in the communication, the time of messaging, and their interests.²⁵ Information such as stores and routes frequented, events one is interested in, and media consumed are made available to these advertisers because these websites can easily access them.²⁶ Even details such as our search history, calendar information, and the interests of those we communicate with, are processed to help facilitate various advertising decisions.²⁷ Data can then be divided into two categories: purchasing information and personal information; the former referring to our shopping habits and history, and the latter referring to every other detail that these websites have access to.²⁸

Imagine that you are searching for restaurants that deliver past eight in the evening. Google and Facebook automatically inform advertisers, specifically restaurants which fit the criteria, via their bidding platform,²⁹ letting them know there is space for an advertisement because someone had just searched for late-night restaurants. Advertisers then bid for the sponsored advertisement space that comes at the top of the search engine list.³⁰ All these are done in a matter of milliseconds.³¹ Each transaction provides an opportunity for data

24. Knowledge at Wharton Staff, *Your Data is Being Shared and Sold: What's Being Done About It?*, available at <https://knowledge.wharton.upenn.edu/article/data-shared-sold-whats-done> (last accessed Jan. 31, 2023) [<https://perma.cc/B23Z-S67B>].

25. *Id.*

26. *Id.*

27. Nicole Martin, *How Much Does Google Know About You? A Lot*, FORBES, Mar. 11, 2019, available at <https://www.forbes.com/sites/nicolemartin1/2019/03/11/how-much-does-google-really-know-about-you-a-lot/?sh=1b1586bc7f5d> (last accessed Jan. 31, 2023) [<https://perma.cc/5K4D-4TU3>].

28. *Id.*

29. Wordstream, *supra* note 13.

30. *Id.*

31. Liberty Marketing, *The Millisecond Movements of a Programmatic Ad*, available at <https://www.libertymarketing.co.uk/blog/millisecond-movements-programmatic-ad> (last accessed Jan. 31, 2023) [<https://perma.cc/6D2F-GX6Y>].

acquisition.³² Every single activity performed on these websites is linked to a certain space that is bid upon and sold on this digital platform.³³

Once you have purchased, for instance, Jollibee's Chickenjoy from your list of late-night restaurants, both Google and Facebook store this data in their caches to track behavior more accurately.³⁴ These websites will compare how often you purchase Jollibee's Chickenjoy as compared to chicken from McDonald's or KFC, and what sidings and dessert you purchase with these meals. This data is invaluable to them as they are able to provide these restaurant advertisers with information which will guide their advertisement space bids.³⁵

D. Google and Facebook Dominate the Targeted Third-Party Advertising Industry in Terms of Revenue and Ownership of Intermediary Websites

Both Google and Facebook dominate the online advertising market.³⁶ In 2022, these companies reported revenues of \$168.40 billion and \$112.68 billion respectively, occupying the top two places on the online advertising list.³⁷ While in recent years, companies such as Amazon and TikTok have been inching towards prominent positions in the market, this merely serves as an incentive for companies such as Google and Facebook to revitalize their efforts.³⁸ Meta, Facebook's parent company, has already begun testing new

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. CHRISTIAN FUCHS, *THE ONLINE ADVERTISING TAX AS THE FOUNDATION OF A PUBLIC SERVICE INTERNET* 3 (2018).

37. Ronan Shields, *Here Are the 2022 Global Media Rankings by Ad Spend: Google, Facebook Remain Dominant – Alibaba, Bytedance in the Mix*, available at <https://digiday.com/media/the-rundown-here-are-the-2022-global-media-rankings-by-ad-spend-google-facebook-remain-dominant-alibaba-bytedance-in-the-mix> (last accessed Jan. 31, 2023) [<https://perma.cc/LXD2-MAHC>].

38. Nicole Perrin, *Facebook-Google Duopoly Won't Crack This Year*, available at <https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year> (last accessed Jan. 31, 2023) [<https://perma.cc/2TMS-KLXT>].

advertisement methods in order to cement its position.³⁹ It is also worth noting that these two companies have a sizable share in the proverbial pie, namely, 48%.⁴⁰

This strong position is owed to the fact that both websites are simultaneously intermediaries and platforms.⁴¹ As intermediaries, they advertise their own digital platforms.⁴² In essence, both websites sell advertising spaces but also make use of these same spaces.⁴³ It was reported in 2019 that “Google and Facebook own [10] third-party domains that appear on the million most-visited sites.”⁴⁴ Google sells both advertising space belonging to third-party websites and spaces appearing on its own websites, Google Search and YouTube.⁴⁵ Facebook has been referred to as a “walled garden” that sells advertising space to advertisers, both on its own platforms, such as Facebook and Instagram, as well as on third-party websites and applications.⁴⁶ This position leads to a wealth of transactions — Google and Facebook’s advertising exchange processes billions of these targeted advertisement spaces daily,⁴⁷ to the detriment of their competitors.⁴⁸

Any functional website or application which generates user activity and content is a competitor of these companies.⁴⁹ All websites and applications

39. James Rogers, Google and Facebook’s Dominance in Digital Ads Challenged by Rapid Ascent of Amazon and Tiktok, *available at* <https://www.marketwatch.com/story/google-and-facebooks-digital-ad-dominance-challenged-by-rapid-ascent-of-amazon-and-tiktok-11672852915> (last accessed Jan. 31, 2023) [<https://perma.cc/2TMS-KLXT>].

40. *Id.*

41. Charis Papaevangelou, *Funding Intermediaries: Google and Facebook’s Strategy to Capture Journalism*, 11 DIGITAL JOURNALISM 1, 15 (2023).

42. OECD, *supra* note 23, at 15.

43. *Id.*

44. Jullanar Alwazir, Google and Facebook, the Data Collecting Companies, *available at* <https://medium.com/jullanar-alwazir/google-and-facebook-the-data-collecting-companies-42dd5cboe016> (last accessed Jan. 31, 2023) [<https://perma.cc/4QZ5-DLHH>].

45. OECD, *supra* note 23, at 15.

46. *Id.* at 27.

47. *Id.* at 17-18.

48. *Id.* at 32.

49. *See id.* at 32. These, for example, are Yahoo and Bing.

possess potential advertisement space, i.e., portions of their interface upon which advertisements appear.⁵⁰ This functions as the main source of revenue for many online spaces.⁵¹ A few of the competitors of Google and Facebook, which are also used in the country, are as follows: Microsoft, Amazon, TikTok, Pinterest, and LinkedIn.⁵² There are also other online advertising intermediaries such as AdRoll and Quantcast.⁵³

E. In the Philippines, Targeted Third-Party Advertising and Consequently, Google and Facebook Are Now Considered Integral Parts of Our Daily Lives

In the Philippines, targeted advertising is a growing industry, which is unsurprising for a country that is labeled as the social media capital of the world.⁵⁴ E-commerce shopping and social media use have become a mainstay in the Philippine setting.⁵⁵ In March 2022, digital media spending in the Philippines reportedly reached ₱10 billion.⁵⁶ In 2023, spending in the digital advertising market in the country is projected to grow to U.S. \$1.608 billion.⁵⁷

This exponential growth is largely due to the social media habits of Philippine internet users. Statistics show that 82.4% of the total population in

50. Wordstream, *supra* note 13.

51. OECD, *supra* note 23, at 6.

52. *Id.*

53. PPC Hero, 10 Alternatives to Google and Facebook Ads, *available at* <https://www.ppchero.com/10-alternatives-to-google-and-facebook-ads> (last accessed Jan. 31, 2023) [<https://perma.cc/WR82-T3H8>].

54. Gab Ocampo, What Are the Most Used Social Media Platforms in Philippines?, *available at* <http://metronewscentral.net/metro-tech/what-are-the-most-used-social-media-platforms-in-philippines> (last accessed Jan. 31, 2023) [<https://perma.cc/G58N-XVEZ>].

55. *Id.*

56. Cai U. Ordinario, *Digital Media Spend Reaches ₱10B*, BUSINESSMIRROR, Apr. 4, 2022, *available at* <https://businessmirror.com.ph/2022/04/04/digital-media-spend-reaches-Pts10b> (last accessed Jan. 31, 2023) [<https://perma.cc/96WH-DUJX>].

57. Statista, Digital Advertising - Philippines, *available at* <https://www.statista.com/outlook/dmo/digital-advertising/philippines> (last accessed Jan. 31, 2023) [<https://perma.cc/J8SQ-7P6A>].

the Philippines have a social media account.⁵⁸ The average social media user in the Philippines spends four hours on these websites.⁵⁹ In a survey conducted by Pulse Asia in the last quarter of 2021, Facebook was found to be the most popular application, with a whopping 99% of Philippine internet users owning an account; followed by YouTube with 57%; TikTok with 17%; Instagram with 14%; and Twitter with 8%.⁶⁰ Instagram is a subsidiary of Meta, while YouTube is a subsidiary of Google,⁶¹ thus evincing that Google and Facebook are driving forces behind online advertising in the country.

II. GOOGLE AND FACEBOOK EMPLOY DATA PRACTICES WHICH COLLIDE WITH CONSUMER WELFARE

A. Google and Facebook Obtain Exclusive Ownership of Data

Google and Facebook practically have a monopoly of data.⁶² This data is crucial to the decision-making process of advertising companies and, consequently, the access to options of consumers.⁶³ This data is procured by Google and Facebook for free due to their knowledge of the purchasing information of users.⁶⁴ Facebook and Google are not only the most prolific in terms of data collection from their own user-facing services and products, but these websites collect even more data from third-party platforms that users connect to from their own platforms.⁶⁵

B. Facebook Employs Methods That Render Its Terms and Agreements Impossible to Refuse

Facebook imposes unfair terms of use upon its consumers — they are made to choose the option allowing for extensive use of data in order for users to

58. Sue Amurthalingam, Social Media Statistics in the Philippines [Updated 2023], available at <https://www.meltwater.com/en/blog/social-media-statistics-philippines> (last accessed Jan. 31, 2023) [<https://perma.cc/VD8J-MBTV>].

59. *Id.*

60. Ocampo, *supra* note 54.

61. Gennaro Cuofano, What Are Facebook Subsidiaries, available at <https://fourweekmba.com/facebook-subsidiaries> (last accessed Jan. 31, 2023) [<https://perma.cc/9AGX-R7KP>].

62. United Kingdom Competition and Markets Authority, *supra* note 20, ¶¶ 18–19.

63. *Id.* ¶¶ 5–6.

64. *Id.* ¶ 2.18.

65. *Id.* ¶ 2.20.

avail of Facebook's digital services.⁶⁶ This essentially functions as a contract of adhesion⁶⁷ because Facebook unilaterally dictates the terms of use.⁶⁸ Facebook is deemed so necessary to the social and work lives of a significant number of individuals that users have no recourse but to agree to its terms.⁶⁹ Notably, Facebook remains the most popular social media platform in the country.⁷⁰

Facebook renders its service conditional on its terms of use, specifically, the user agreements that individuals are asked to assent to prior to joining the website.⁷¹ This allows for the accumulation of user information from browsing activity done outside of Facebook, a feature known as "off-Facebook data."⁷² While the same can be disabled subsequently by the user, the imposition of this in the user agreement is an unnecessary transaction that constitutes an abuse of dominant position.⁷³

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66. Press Release by Bundeskartellamt, *Preliminary Assessment in Facebook Proceeding: Facebook's Collection and Use of Data from Third-Party Sources Is Abusive* (Dec. 19, 2017), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?__blob=publicationFile&v=3 (last accessed Jan. 31, 2023) [<https://perma.cc/TF3U-TF68>].
67. *Cabanting v. BPI Family Savings Bank, Inc.*, G.R. No. 201927, 784 SCRA 251, 254 (2016) (citing *Dio v. St. Ferdinand Memorial Park, Inc.*, 538 Phil. 944 (2006)).
68. Bundeskartellamt, *supra* note 66, at 1-2.
69. *Id.*
70. Ocampo, *supra* note 54.
71. Bundeskartellamt, *supra* note 66, at 1-2.
72. Organisation for Economic Co-operation and Development, Digital Advertising Markets, Competition Enforcement and Regulatory Alternatives, at 37, available at <https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/T2VS-RFGY>] (citing Rachel Scheele, *Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice*, 12 J. EUR. COMPETITION L. & PRAC. 34 (2021)).
73. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667, § 2 (b) (2015) & Philippine Competition Commission, Primer: An Overview of the Philippine Competition Act, at 22, available at <https://www.phcc.gov.ph/wp-content/uploads/2017/03/Primer-on-the-Philippine-Competition-Act.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/678T-Q6X3>].

C. Google and Facebook Stifle Smaller Players by Refusing Them Access to Data

It is not enough that Facebook and Google use a confluence of strategies that leaves the user no choice but to agree to the standard terms of use. Facebook and Google also prevent other advertising services from using this data, giving these websites an undue advantage and limiting the options available to consumers.⁷⁴ While data flows freely in its web of related websites, the same is limited only to Facebook affiliates.⁷⁵ This data was exclusively used to support Facebook's online advertising services, which contributed to 98% of Facebook's revenue, as reported in the third quarter of 2022.⁷⁶

In January 2020, independent advertising firms were cut off by Google from analyzing certain advertising data.⁷⁷ These companies were told to use their own data analytics.⁷⁸ Google also prevented advertisers in Europe from pulling data on who clicks on their web banner and video advertisements out of Google's system.⁷⁹

Google's internet browser, Chrome, likewise announced that it would block the technology of third-party cookies altogether within two years.⁸⁰ Only Google will have access to the user data collected.⁸¹ Google has also started obtaining access to the information of users on third-party websites and

74. Bundeskartellamt, *supra* note 66, at 2.

75. *See id.*

76. Matthew Johnston, How Does Facebook (Meta) Make Money?, *available at* <https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp> (last accessed Jan. 31, 2023) [<https://perma.cc/EPQ5-93QT>].

77. Gerrit de Vynck & Mark Bergen, *Google Stuck Between Privacy and Antitrust with Ad Data Limits*, BLOOMBERG, Feb. 3, 2020, *available at* <https://www.bloomberg.com/news/articles/2020-02-03/google-gets-stuck-between-privacy-antitrust-with-ad-data-limits> (last accessed Jan. 31, 2023) [<https://perma.cc/RA8T-6627>].

78. *Id.*

79. *Id.*

80. Justin Schuh, Building a More Private Web: A Path Towards Making Third Party Cookies Obsolete, *available at* <https://blog.chromium.org/2020/01/building-more-private-web-path-towards.html> (last accessed Jan. 31, 2023) [<https://perma.cc/7R8R-J2Z8>].

81. *Id.*

applications directly from the Chrome browser,⁸² thus eliminating the need to acquire them from these third-party websites.

Data analytics is not a function of most online advertising companies because they do not have access to the aforementioned data that Facebook possesses.⁸³ They additionally do not possess the computational power that these website giants have.⁸⁴ Given that both Google and Facebook function as platforms and advertisers, it is difficult for third-party advertisers to streamline their processes to the degree which the former have.⁸⁵

III. ABUSE OF DOMINANT POSITION UNDER SECTION 15 OF THE PHILIPPINE COMPETITION ACT ALLOWS FOR AN EXPANDED INTERPRETATION OF ANTI-COMPETITIVE ACTS

A. Competition Is Protected Under the 1987 Constitution

The State recognizes the vital role of competition in serving public interests.⁸⁶ No less than Section 19, Article XII, of the 1987 Constitution dictates this principle, viz., “[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.”⁸⁷

The provision expressly allows for the regulation and, on occasion, prohibition of monopolies, and specifically prohibits combinations in restraint of trade and unfair competition.⁸⁸ The fact that these precepts are enshrined in the Constitution highlights the significance of competition in matters of public policy.⁸⁹

82. Matthew Green, *Why I’m Done with Chrome*, available at <https://blog.cryptographyengineering.com/2018/09/23/why-im-leaving-chrome> (last accessed Jan. 31, 2023) [<https://perma.cc/HEN9-JWQE>].

83. United Kingdom Competition and Markets Authority, *supra* note 20, ¶¶ 21 & 43.

84. *Id.*

85. *Id.*

86. Philippine Competition Act, § 2.

87. PHIL. CONST. art. XII, § 19.

88. PHIL. CONST. art. XII, § 19.

89. *See* PHIL. CONST. art. XII, § 19.

B. The Philippine Competition Act Is Designed to Address the Role of Government in Ensuring Fairness and Efficiency in the Market

The Philippine Competition Act (PCA)⁹⁰ is the first successful attempt at creating a unified national competition policy. The law states in its declaration of policy that it wishes to achieve “a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced ... ; and an expanding productivity to raise the quality of life for all[.]”⁹¹ Pursuant to this declaration of policy is the objective of the PCA to prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate, or constrict the discipline of free markets.⁹² The intent of the PCA is clear — to give the government a greater role in ensuring fairness and efficiency in the market.

C. The PCA Has Set Parameters for Abuse of Dominant Position

The PCA defines a dominant position as follows — “a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers.”⁹³

In prohibiting one or more entities from abusing their position, the PCA has defined the term *abuse of dominant position* as “engaging in conduct that would substantially prevent, restrict[,] or lessen competition.”⁹⁴

The provision expounds on this concept by enumerating nine acts which constitute abuse of dominant position.⁹⁵ The online advertising practices of

90. Philippine Competition Act.

91. *Id.* § 2, para. 2.

92. *Id.* § 2 (b).

93. *Id.* § 4 (g).

94. *Id.* § 15.

95. The acts constituting abuse of dominant position include (1) Selling goods or services below cost with the object of driving competition out of the relevant market; (2) Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner; (3) Making a transaction subject to acceptance by the other parties of other obligations which ... have no connection with the transaction; (4) Setting prices or other terms or conditions that discriminate unreasonably between customers

Google and Facebook fall under the following acts: *firstly*, imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner;⁹⁶ and *secondly*, making a transaction subject to acceptance by the other parties of other obligations, which, by their nature or according to commercial usage, have no connection with the transaction.⁹⁷

The fact that the list details these various offenses with specificity highlights the intent of the PCA to place consumer protection at the forefront and to preserve the efficiency of competition in various industries.⁹⁸

In *Competition Enforcement Office of the Philippine Competition Commission v. Urban Deco Homes Manila Condominium Corporation*,⁹⁹ the Philippine Competition Commission (PCC) declared that a deal forged by a

or sellers of the same goods or services; (5) Imposing restrictions on the lease or contract for sale or trade of goods or services; (6) Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied; (7) Directly or indirectly imposing unfairly low purchase prices for the goods or services of marginalized service providers and producers; (8) Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers, or consumers; and (9) Limiting production, markets or technical development to the prejudice of consumers.

Philippine Competition Act, § 15.

96. *Id.* § 15 (b).

97. *Id.* § 15 (c).

98. This intent can also be seen on the PCC's official website, where they declare the PCA as reflecting the following beliefs about competition: that it (1) "promotes entrepreneurial spirit; (2) encourages private investments; (3) facilitates technology development and transfer; and (4) enhances resource productivity." Philippine Competition Commission, Philippine Competition Law (R.A. 106667), available at <https://www.phcc.gov.ph/philippine-competition-law-r-106667/#:~:text=1066720istheprimarycompetition,inCongressfor24years> (last accessed Jan. 31, 2023) [<https://perma.cc/UVX5-4859>].

99. *Competition Enforcement Office of the Philippine Competition Commission vs. Urban Deca Homes Manila Condominium Corporation and 8990 Holdings, Inc.*, PCC Case No. E-2019-001, ¶ 20.2, available at <https://www.phcc.gov.ph/commdecisionno-01e0012019-enforcement-vs-urbandecahomes-8990holdings-30sept2019> (last accessed Jan. 31, 2023) (citing *United Brands Company and United Brands Continental v. Commission of the European Commission*, Case C-27/76, 1978 ECR I-207 at 277).

condominium corporation brokering exclusivity for an internet service provider is considered an abuse of dominant position,¹⁰⁰ quoting the Court of Justice of the European Union (EU) in *United Brands v. Commission*,¹⁰¹ as, “[the dominant position] ‘relates to a position of economic strength enjoyed by an undertaking [entity] which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers[,] and ultimately of its consumers.’”¹⁰²

The PCC likewise quotes a number of other decisions of the Court of Justice of the EU, emphasizing that a market dominant entity bears a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition in the relevant market.¹⁰³ Some of these discussions are quoted below —

In *Sealink/B&I – Holyhead*[,]

[t]he owner ... which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitor access to that related market on less favorable terms than those of its own services, infringes Article [102] when a competitive disadvantage is imposed upon its competitor without objective justification.

...

In *Microsoft Corp. v. Commission*,

the [c]ourt upheld the European Commission’s findings that Microsoft was engaged in abuse of dominant position by limiting technical development to the prejudice of consumers.¹⁰⁴

Such power is undeniably in the hands of Google and Facebook — because of their unique position as purveyors of data, they are able to create conditions that allow them to profit, at the cost of their competitors and

100. *Id.*

101. *United Brands Continental*, 1978 ECR I-207.

102. *Urban Deca Homes*, PCC Case No. E-2019-001, ¶ 20.2.

103. *Id.* at 3 n. 16 (citing Interim Measures, June 11, 1992, ¶ 41 (on file with the European Commission) in *Sea Containers v. Stena Sealink*, No. IV/34.689, 1992 O.J. L 15/8 & *Microsoft v. Commission*, Case T-201/04, ECLI:EU:T:2007:289, ¶ 643 (CJEU Sept. 17, 2007)).

104. *Id.*

customers.¹⁰⁵ This position allows Google and Facebook to behave independently from its users and competitors.¹⁰⁶

In fact, these websites dictate conditions for both its users and competitors: *firstly*, by barring competitors or giving competitors less advantageous advertisement options;¹⁰⁷ and *secondly*, by creating artificial conditions for its users.¹⁰⁸ There can be no doubt that this behavior impairs the competitive environment of online advertising because every step of the online advertisement process is tied to Google's and Facebook's dictates.

IV. BOTH GOOGLE AND FACEBOOK TRANSGRESS UPON THE LAW ON ABUSE OF DOMINANT POSITION

A. This Behavior Imposes Inequitable Restrictions upon Competitors

Data hoarding from unsavory collection tools should not be considered a legitimate business practice. This only builds upon Google and Facebook's duopoly and the feeling of dependence of both users and third-party advertisers upon these platforms.¹⁰⁹ This constitutes harm to consumers due to the indiscriminate use of their data and constructs a barrier within the competitive environment because of the inability of other intermediaries and websites to take advantage of other alternatives.¹¹⁰

In applying the principle of abuse of dominant position,¹¹¹ one must evaluate whether Google and Facebook are able to behave independently of both their consumers and competitors. Due to their ability to access the personal and purchasing information of their users via their tracking tools and

105. Andrei Hagiu & Julian Wright, *When Data Creates Competitive Advantage and When It Doesn't*, HARV. BUS. REV., Jan.–Feb. 2020, available at <https://hbr.org/2020/01/when-data-creates-competitive-advantage> (last accessed Jan. 31, 2023) [<https://perma.cc/JA26-QXES>].

106. Mathew Broughton, Facebook & Google: The Duopoly's Dominance Increases, available at <https://www.exchangewire.com/blog/2019/03/28/facebook-google-the-duopolys-dominance-increases> (last accessed Jan. 31, 2023) [<https://perma.cc/Q3SZ-J9XL>].

107. OECD, *supra* note 23, at 25.

108. *Id.*

109. Broughton, *supra* note 106.

110. *Id.*

111. Philippine Competition Act, § 2 (b).

user agreements, Google and Facebook are able to behave independently of their users.¹¹² Both Google and Facebook have no need of intermediaries, so they are also able to behave independently of their competitors.¹¹³ While advertising techniques were once used to function without the influence of indiscriminately mined data, now they are dependent on information controlled mainly by two global players.¹¹⁴

B. Restriction of Access to Data Is a Barrier to Entry of Other Players in the Market

The restriction of access to data constitutes a barrier to entry that limits competition.¹¹⁵ Due to these practices, Google and Facebook are able to limit the access to data of third parties.¹¹⁶ In addition to acting independently from their competitors, Google and Facebook are also able to dictate the behavior of their competitors: *firstly*, by limiting their access to user data;¹¹⁷ and *secondly*, by dictating what advertising spaces can be sold to third-party websites.¹¹⁸

Google and Facebook allegedly restrict access to advertisement space, usually by giving priority to Google affiliates.¹¹⁹ These facets of the industry drive decision-making in the advertising industry.¹²⁰ As Big Data analysts and consultants of Deloitte LPP have observed, “relying solely on internally

112. Broughton, *supra* note 106.

113. *Id.*

114. *Id.*

115. OECD, *supra* note 23, at 25.

116. Broughton, *supra* note 106.

117. OECD, *supra* note 23, at 25.

118. *Id.*

119. Natasha Lomas, ‘Jedi Blue’ Ad Deal Between Google and Facebook Sparks New Antitrust Probes in EU and UK, *available at* <https://techcrunch.com/2022/03/11/google-meta-jedi-blue-eu-uk-antitrust-probes> (last accessed Jan. 31, 2023) [<https://perma.cc/HX6K-K58P>].

The U.S. lawsuit is ongoing, but the EU said today it’s similarly concerned that the Jedi Blue agreement ‘may form part of efforts to exclude adtech services competing with Google’s Open Bidding program[], and therefore restrict or distort competition in markets for online display advertising, to the detriment of publishers, and ultimately consumers.’

Id.

120. *Id.*

generated information can leave gaps.”¹²¹ These gaps impair decision making in the targeted advertisement industry. Companies grow increasingly reliant on third-party data sources in order to innovate.¹²²

In requiring their users to share certain data, most often without their knowledge, Google and Facebook are able to monetize existing data pools that should not be accessible to them.¹²³ Google and Facebook are able to impose obligations which have no connection with the original transaction of account creation, thus monetizing a transaction that should not have been monetized in the first place.¹²⁴ This access to data is crucial not only to third-party advertisers, but also to the businesses which rely on these pieces of information to make sound marketing decisions.¹²⁵ Restriction of this access to data ensures the dominance of Google and Facebook in the market because other players have no recourse but to make use of Google and Facebook as intermediaries.¹²⁶

C. The User Agreements of Google and Facebook Are Transactions Subject to Acceptance Which Are Not Related to the Original Transaction

The surrender of personal data as a precondition to the use of the digital services of Facebook does not serve any purpose to the original commercial transaction. This surrender of data functions as a transaction because the

121. David Schatsky, et al., *How Third Party Data Can Enhance Analytics*, WALL ST. J., May 23, 2019, available at <https://deloitte.wsj.com/cio/2019/05/23/how-third-party-data-can-enhance-analytics> (last accessed Jan. 31, 2023) [<https://perma.cc/JV9C-E4XS>].

122. *Id.*

123. Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. TIMES, Apr. 11, 2018, available at <https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html> (last accessed Jan. 31, 2023) [<https://perma.cc/7R5W-M4B6>].

124. *Id.*

125. *Id.*

126. Organisation for Economic Co-operation and Development, *Abuse of Dominance in Digital Markets*, at 53, available at <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/E97Y-MSRJ>] (citing Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1699 (2013)).

exchange of data is one that Google and Facebook use to increase revenues.¹²⁷ Knowing that most individuals consider the use of its platform a necessity, both Google and Facebook take advantage of this scenario by attempting to legitimize its data mining through these user agreements.¹²⁸

Experts call these user agreements an obfuscation because most people believe that in assenting to the same, they are not signing off the use of their data.¹²⁹ Even websites offering methods to opt out of tracking gives users limited protection because other signals, such as how their Google and Facebook accounts interact with third-party websites, give a person's identity away.¹³⁰ Data is unscrupulously gathered and collected from these individuals.

Furthermore, research shows that the tools provided in opting out are not user friendly for the following reasons: users cannot distinguish between trackers, default settings provide for instant tracking, and interfaces for disallowing access are confusing.¹³¹ Information on these settings is inaccessible — instead of proving them from the outset, Google and Facebook hide these options within a plethora of settings in a furtive attempt to dissuade individuals from using the same.¹³²

D. The Influence of Foreign Law on the PCA Further Bolsters the Case for Holding Google and Facebook Liable for Abuse of Dominant Position

The creation of the PCA was strongly influenced by competition laws in both the EU¹³³ and the U.S.¹³⁴ To make sense of the PCA, it is imperative for one

127. *Id.* at 53.

128. *Id.* at 37.

129. Byron Spice & Chriss Swaney, Press Release: Carnegie Mellon University Finds Internet Privacy Tools are Confusing, Ineffective for Most People, *available at* https://www.cmu.edu/news/stories/archives/2011/october/oct31_privacytools.html (last accessed Jan. 31, 2023) [<https://perma.cc/FH3J-TF36>].

130. Martin, *supra* note 27.

131. United Kingdom Competition and Markets Authority, *supra* note 20, at 175–76.

132. *Id.*

133. See Ashurst, Overview of EU Competition Law, *available at* <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---overview-of-eu-competition-law> (last accessed Jan. 31, 2023) [<https://perma.cc/LU72-8GFW>].

134. See An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies [Sherman Act], 15 U.S.C., §§ 1–38 (1890) (U.S.).

to understand European and American competition laws, as interpretation by their competition authorities will serve as a guide for our own national competition commission.¹³⁵ Where a local rule is patterned from that of another country, then the decisions of such country construing the rule are entitled to great weight in interpreting the local rule.¹³⁶

Controversial cases against these technology giants have been filed — competition authorities in these jurisdictions have already begun navigating the digital landscape and the confluence between privacy and competition law in an attempt to find technology giants guilty of abuse of dominant position.¹³⁷ In 2019, the United States Federal Trade Commission filed a complaint on Facebook’s conduct in repeatedly misrepresenting the extent to which its users could control access to their personal data,¹³⁸ to wit —

In particular, to protect its personal social networking monopoly, Facebook adopted conditional dealing policies that limited how third-party apps could use Facebook Platform. ... Facebook punished apps that violated these conditions by cutting off their use of commercially significant APIs, hindering their ability to develop into stronger competitive threats to Facebook Blue.¹³⁹

In December 2017, the German competition authority, or the Bundeskartellamt, likewise issued a preliminary legal assessment finding Facebook guilty of abuse of dominant position in imposing unfair terms of use to its consumers, specifically that the extensive use of data must be agreed to in order for users to avail of these services.¹⁴⁰ The Bundeskartellamt

135. Andre Palacios, *Origins and Outcomes: The Philippine Competition Act of 2015*, 93 PHIL. L.J. 344, 358 (2020).

136. *People v. Pagpaguitan*, G.R. No. 116599, 315 SCRA 226, 241-42 (1999).

137. Kristina Peterson, *The Lawmakers to Watch as Congress Confronts Big Tech*, WALL. ST. J., June 4, 2019, available at <https://www.wsj.com/articles/the-lawmakers-to-watch-as-congress-confronts-big-tech-11559690328> (last accessed Jan. 31, 2023) [<https://perma.cc/YJT2-V2QW>].

138. Complaint for Injunctive and Other Equitable Relief by the Complainant, Dec. 9, 2020, ¶ 136 (on file with the United States District Court for the District of Columbia), in *Federal Trade Commission v. Facebook Inc.*, Case No. 1:20-cv-03590, (D.D.C. 2021) (U.S.) (pending).

139. *Id.*

140. Bundeskartellamt, Facebook, Exploitative Business Terms Pursuant to Section 19 (1) GWB for Inadequate Data Processing, at 7, available at

emphasized that such use of data is an abuse of its strong position in the market because the user agreements are crafted in such a way as to compel users to surrender their data.¹⁴¹

On February 2019, the Bundeskartellamt affirmed this preliminary assessment, stating that the fact that Facebook's data policy violates Europe's General Data Protection Regulation is a manifestation of its misused market power,¹⁴² to wit —

Using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to the general clause of Section 19(1) GWB. Taking into account the assessments under data protection law pursuant to the General Data Protection Regulation (GDPR), these are inappropriate terms to the detriment of both private users and competitors.¹⁴³

Google is also no stranger to sanctions from competition authorities based on the way it handles data. In 2019, the European Commission fined Google €1.49 billion for breaching EU antitrust rules,¹⁴⁴ viz., —

Today[,] the Commission has fined Google €1.49 billion for illegal misuse of its dominant position in the market for the brokering of online search adverts. Google has cemented its dominance in online search adverts and shielded itself from competitive pressure by imposing anti-competitive contractual restrictions on third-party websites. This is illegal under EU antitrust rules. The misconduct lasted over 10 years and denied other companies the possibility to compete on the merits and to innovate — and consumers the benefits of competition.¹⁴⁵

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v= (last accessed Jan. 31, 2023) [<https://perma.cc/3YLC-GKAE>].

141. *Id.*

142. *Id.*

143. *Id.*

144. Press Release by European Commission, *Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising* (Mar. 20, 2019), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 (last accessed Jan. 31, 2023) [<https://perma.cc/7AWV-FLJG>].

145. *Id.*

Earlier, in 2018, Google was also fined €4.34 billion for imposing restrictions on Android device manufacturers which ensure that site traffic is automatically redirected to its search engines,¹⁴⁶ to wit —

Google has used Android as a vehicle to cement the dominance of its search engine. These practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere. This is illegal under EU antitrust rules.¹⁴⁷

The European Commission pointed out that in particular, Google committed the following anti-competitive acts: it required manufacturers to preinstall the Google Search app as a condition for licensing Google's app store; bribed manufacturers and mobile network operators to exclusively preinstall the Google Search App; and prevented manufacturers from selling mobile devices with versions of Android that Google did not approve of.¹⁴⁸ Such behavior was found by the Commission to be illegal obstruction of development in light of these acts heavily favoring Google's own online processes, creating forced revenue streams.¹⁴⁹

Lastly, in 2017, Google was fined €2.42 billion for using its position as intermediary to promote its own advertisement spaces,¹⁵⁰ viz., —

Google has come up with many innovative products and services that have made a difference to our lives. That's a good thing. But Google's strategy for its comparison shopping service wasn't just about attracting customers by making its product better than those of its rivals. Instead, Google abused its

146. Press Release by European Commission, *Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine* (July 18, 2018), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (last accessed Jan. 31, 2023) [<https://perma.cc/5SWV-6CCT>].

147. *Id.*

148. *Id.*

149. *Id.*

150. Press Release by European Commission, *Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service* (June 27, 2017), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (last accessed Jan. 31, 2023) [<https://perma.cc/T3S7-44BF>].

market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors.¹⁵¹

These decisions share the following conclusions — Google and Facebook hold positions of power both as social networking websites and advertising intermediaries;¹⁵² they take advantage of their position by compelling users to sign agreements where they hand off their data and by barring third-party advertisers from taking advantage of their data; and such behavior is immeasurably detrimental to consumers and competitors alike. These create forced transactions where Google and Facebook benefit at a great personal cost to consumers.¹⁵³

All told, the intent of these jurisdictions in issuing these decisions is identical — to hold Google and Facebook liable for the position of power consolidated from their access to data. This paves the way for our own PCC to prove liability under its own abuse of dominant position provisions.¹⁵⁴ Our competition laws mirror the laws of foreign jurisdictions;¹⁵⁵ it is only right that our enforcement mechanisms likewise echo the decisive action of these jurisdictions.

V. GOOGLE AND FACEBOOK ARGUE THAT THE USE OF THEIR PLATFORM BY CONSUMERS IS FREE AND COMPLIANT WITH DATA PRIVACY LAWS, BUT THESE FALL FLAT IN LIGHT OF THE ENORMITY OF THE EFFECTS OF THEIR USER PRACTICES

A. *The Subjective Costs Outweigh the Fact That the Base Transaction Is Free*

It is asserted by Google and Facebook that the use of their products is free, but this is because, as illustrated above, their revenue source is composed of the transactions their users engage in. Facebook and Google are able to behave independently of competitors and consumers because of their unfettered access to user data.¹⁵⁶

151. *Id.*

152. OECD, *supra* note 23, at 15.

153. *Id.*

154. Philippine Competition Act, § 15.

155. *See id.*

156. Investopedia, How Facebook (Meta), Twitter, Social Media Make Money from You, *available at* <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx> (last accessed Jan. 31, 2023) [<https://perma.cc/L9UA-RAFU>].

Due to their extensive knowledge of consumer behavior, Google and Facebook artificially create conditions for their users which dictate their purchasing and browsing behavior as well as the websites and applications that they use.¹⁵⁷ The following subjective costs weigh on the supposedly free transaction — companies collect more personal data and consumers face less choice regarding privacy; personal data in the hands of dominant firms create more harm; and dominant firms can obtain quasi-regulatory powers over personal data that hamper competition.¹⁵⁸ This is evinced by the effect of technology giants on application and advertising markets, and the existing privacy policies of websites such as Facebook and Google.¹⁵⁹

B. Google and Facebook Assert That Their Actions Are Motivated by Privacy Concerns, but the Same Does Not Justify Anti-Competitive Behavior

Google and Facebook have cited privacy rules as the reason for limiting the access of independent firms.¹⁶⁰ Despite this, Google and Facebook still make use of the data they have collected and acquired,¹⁶¹ thus negating this assertion. While Google's advertising server has begun to restrict access to these data linked to specific user identification records, citing privacy concerns, it has permitted its own exchange and buying tools to access them by default, thus skewing further an already asymmetrical market.¹⁶²

157. Matt Stoller, et al., *Addressing Facebook and Google's Harms Through a Regulated Competition Approach*, available at <https://www.economicliberties.us/our-work/addressing-facebook-and-googles-harms-through-a-regulated-competition-approach> (last accessed Jan. 31, 2023) [<https://perma.cc/C6YS-C97N>].

158. Alline Blankertz, *How Competition Impacts Data Privacy and Why Competition Authorities Should Care*, at 2, available at https://www.stiftung-nv.de/sites/default/files/how_competition_impacts_data_privacy.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/E8GW-VVCK>].

159. *Id.* at 26.

160. Rachel Bovard, *Why Google's New Limits on Third-Party Cookies Are Another Attempt to Control the Web*, available at <https://thefederalist.com/2020/02/17/why-googles-new-limits-on-third-party-cookies-are-another-attempt-to-control-the-web> (last accessed Jan. 31, 2023) [<https://perma.cc/T2PC-Z6TT>].

161. *Id.*

162. Blankertz, *supra* note 158, at 30.

Google and Facebook are rightly referred to as “walled gardens” of the online advertising industry.¹⁶³ They are widely known to “generate their revenue from digital advertising.”¹⁶⁴ The imposition of barriers against third parties is just another attempt to wall off competition and increase their already immense control over the online advertising market.¹⁶⁵

VI. ALL TOLD, GOOGLE AND FACEBOOK ARE GUILTY OF ABUSE OF DOMINANT POSITION UNDER THE TERMS OF THE PCA

A. *This Conduct Hinders Competition in Light of Existing Marketing Conditions*

Previously, “competition authorities only intervene[d] in acquisitions where effective competition [was] likely to be significantly hindered. Data protection and privacy concerns frequently [fell] into the blind spot of such economic analysis.”¹⁶⁶ Increasingly, however, these bodies are recognizing that, in the online setting, digital privacy concerns are closely related to antitrust concerns.¹⁶⁷

The purpose of laws on abuse of dominant position is to regulate and modify behaviors of corporations.¹⁶⁸ The appropriate remedies in these cases are “‘behavioral’ orders to cease conduct that thwarts the competitive process or structural measures ... to eliminate the ability of the dominant firm to commit the abuse.”¹⁶⁹ This is supported by the idea that the PCA focuses on exclusionary conduct as a means of evaluating abuse of dominant position.¹⁷⁰

163. Nico Pizzolato, *Walling Off Third-Party Cookies: Tech Giants Take on the Privacy Challenge*, MOBILE MARKETING MAGAZINE, May 23, 2019, available at <https://mobilemarketingmagazine.com/third-party-cookies-google-facebook-data-privacy-gdpr-teavaro> (last accessed Jan. 31, 2023) [<https://perma.cc/ZF3Z-95NE>].

164. *Id.*

165. *Id.*

166. Orla Lynskey, *A Legal Response to Data-Driven Mergers in BEING PROFILED: COGITAS ERGO SUM: 10 YEARS OF PROFILING THE EUROPEAN CITIZEN* 78 (2018).

167. *Id.*

168. Philippine Competition Act, § 2.

169. Robert Anderson, et al., *Abuse of Dominance in A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY* 70 (1999).

170. *Id.* at 72.

Specifically, the abuse of dominant position provision serves to analyze firm behavior based on existing market conditions.¹⁷¹ The wording of such provisions also allows for an expansive analysis, applicable in this situation where the digital market has advanced substantially. Regardless of the different methods of analysis in understanding the concept of abuse of dominant position, various authorities in different jurisdictions have found technology giants guilty of abuse of dominant position.¹⁷²

B. This Conduct Manipulates the Decision-Making Process of Consumers

Scholars also advocate for the use of the consumer choice framework in analyzing the violation of competition laws in the online setting.¹⁷³ Effective consumer choice requires two things: (1) options in the marketplace and (2) the ability to choose freely among them.¹⁷⁴ These are situations which clearly fall in the ambit of how Facebook and Google utilize data. The current process requires these third parties to decide quickly and bid for these advertising spaces.¹⁷⁵ This requires a nuanced analysis of consumer behavior, most often provided by data that Google and Facebook own.

As the Stigler Center reports, “consumer harm is greatest when market power is combined with behavioral biases.”¹⁷⁶ Consumers most certainly have biases, including choice overload and default and placement biases, which are dependent on accessibility to advertisements and their strategic positioning.¹⁷⁷ These are exploited to a significant degree through marketing methods.¹⁷⁸ The

171. *Id.* at 69.

172. Organisation for Economic Co-operation and Development, *supra* note 126, at 9.

173. Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713 (1997).

174. *Id.*

175. Stigler Center for the Study of the Economy and the State, Stigler Committee on Digital Reports: Final Report, at 9, available at <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> (last accessed Jan. 31, 2023) [<https://perma.cc/J9S8-8YFR>].

176. *Id.* at 8.

177. United Nations Conference on Trade and Development, *The Benefit of Competition Policy for Consumers*, ¶ 23, U.N. Doc. TD/B/C.I/CLP/27 (Apr. 29, 2014).

178. *Id.*

effects of these biases are amplified by the conduct of Google and Facebook, effectively limiting the choices of consumers without their knowledge.¹⁷⁹

A combination of Google and Facebook's advertising practices with a detailed knowledge of user behavior leads to this ability to dictate consumer choices.¹⁸⁰ In employing these advertising methods, Google and Facebook facilitate manipulations, such as default options and framing towards specific choices that are especially harmful. These consumers often regret these choices.¹⁸¹ These methods also feed on addictive behavior, packaging a plethora of options which are irresistible to the consumer, disregarding their well-being.¹⁸²

This dictates the quality of information accessible to consumers, which creates an artificially manipulated access to options available in the market. When you are at a mall searching for restaurant options, you have equal and easy access to all of the options available in that mall. When you are searching for restaurants online, the artificial conditions created by Google and Facebook are dictated by an idea crafted from collected data about you. Consumers, then, are not able to reap the full benefits of a robust marketplace. The appeal of technology is in the wealth of options available, which is greatly restricted by the conditions set by these websites.

VII. GOOGLE AND FACEBOOK EMPLOY DATA IN THEIR METHODS OF EXCLUSIONARY CONDUCT AND, UNDER THE PCA, MUST BE EVALUATED IN DEFINING ANTI-COMPETITIVE BEHAVIOR

A. This Exclusionary Conduct Is the Crux of the Argument for Abuse of Dominant Position of These Websites

As competition law expert Toshiaki Takagawa puts it, the core tool in competition law against such platforms is the provision against exclusionary

179. *Id.*

180. Stigler Center for the Study of the Economy and the State, *supra* note 175, at 69 (citing Stratechery, Tech's Two Philosophies, available at <https://stratechery.com/2018/techs-two-philosophies> (last accessed Jan. 31, 2023) [<https://perma.cc/EX6D-TT4T>]).

181. *Id.*

182. As Adam Alter, Professor of Marketing at the Stern School of Business, put it, "[l]ife is more convenient than ever, but convenience has also weaponized temptation." ADAM ALTER, IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED 19 (2017).

conduct,¹⁸³ under which abuse of dominant position falls.¹⁸⁴ Abuse of dominant position is admittedly tricky to define. PCC Commissioner Johannes Bernabe describes the same as a fluid concept.¹⁸⁵ It is this fluidity, however, that allows us to introduce the use of data in its application.

In general, when evaluating abuse of dominant position, competition authorities determine the following: the relevant market, the product, and the geographical area.¹⁸⁶ Competition authorities also examine whether the entity allegedly practicing abuse of dominance are actually dominant in the market.¹⁸⁷ This usually involves the determination of market share or the identification of market barriers imposed by this entity.¹⁸⁸

The conduct of Google and Facebook has brought to light the use of data in anti-competitive practices.¹⁸⁹ Despite the fact that data is free as it is voluntarily given by the consumer, it is continually being monetized by these websites.¹⁹⁰ In using data, there is a network effect in that platforms benefit from higher numbers of users, barring platforms with smaller numbers of users from entering the market.¹⁹¹ This can be concluded from how Google and Facebook have amassed user information and subsequently, revenue. The more users join these platforms; the more data is accessible.¹⁹² This gives Google and Facebook greater control.

183. Toshiaki Takigawa, *Super Platforms, Big Data, and The Competition Law: The Japanese Approach in Contrast with the USA and EU*, 9 J. ANTITRUST ENFORCEMENT 289, 289 (2020).

184. Philippine Competition Act, § 15 (b).

185. Johannes Benjamin R. Bernabe, Abuse of Dominance, available at https://www.phcc.gov.ph/column26-bm-cjrb-abuse_of_dominance (last accessed Jan. 31, 2023) [<https://perma.cc/R3N8-YN2N>].

186. *Id.*

187. *Id.*

188. *Id.*

189. Brian M. Kwong, et al., *Facebook: Data Mining the World's Largest Focus Group*, 15 GRAZIADIO BUS. REV. 1, 1 (2013).

190. *Id.* at 2.

191. Tim Stobierski, What Are Network Effects?, available at <https://online.hbs.edu/blog/post/what-are-network-effects> (last accessed Jan. 31, 2023) [<https://perma.cc/KC7P-3PKV>].

192. *Id.*

B. Use of and Access to Data Should Be Primary Considerations in Conducting Abuse of Dominant Position Analysis of These Two Technology Giants

Use of and access to data should be primary considerations in conducting abuse of dominant position analysis. The need to make this paradigm shift is evident in that the shift to e-commerce has rendered product and geographical evaluation less effective.¹⁹³ To truly evaluate anti-competitive practices of a platform that sets no limitations on demographics is to look beyond these criteria. Websites such as Google and Facebook continually redefine the rules of business, giving one an additional understanding of how the abuse of dominant position provision¹⁹⁴ can be utilized.

VIII. IN DISCRIMINATING AS TO WHOM THEY SHARE THEIR DATA WITH, GOOGLE AND FACEBOOK MUST BE REGULATED

A. There Is a Growing Need for a New Regulatory Regime

Google and Facebook's unfettered access to data from both its users and third parties and, subsequently, the process in which they eliminate the same, allows these companies to exert control over the industry.¹⁹⁵ The industry itself is growing at an unprecedented pace, matched only by the growth of these two websites.¹⁹⁶

It is incumbent upon competition authorities to nip these practices in the bud and eliminate both the unscrupulous use of personal data and the exclusion of third parties from effectively participating in the market. In an age where the internet drives business, competition law must be viewed in convergence with other facets of technology law, including that of privacy.

Such a confluence of disciplines calls for a more nuanced regulatory regime for Google, Facebook, and other emerging technology giants. It is respectfully submitted that the National Privacy Commission (NPC) and the

193. Quinn Malloy, Benefits of E-Commerce for Customers and Businesses, *available at* <https://www.cloudtalk.io/blog/benefits-of-e-commerce-for-customers-and-businesses> (last accessed Jan. 31, 2023) [<https://perma.cc/X8CH-R4PA>].

194. Philippine Competition Act, § 15 (b).

195. Oliver Hail, Google and Facebook to Face New Regulatory Agency in the UK From Next Year, *available at* <https://www.proactiveinvestors.co.uk/companies/news/935104/google-and-facebook-to-face-new-regulatory-agency-in-the-uk-from-next-year-935104.html> (last accessed Jan. 31, 2023) [<https://perma.cc/X54E-T5TZ>].

196. *Id.*

PCC create a joint committee in creating a regulatory regime for Google and Facebook. It is easier for Google and Facebook to escape liability for their actions because of the existing gap in regulatory mechanisms,¹⁹⁷ especially given their positions as technology companies, which must be regarded as forming a class of their own. Google and Facebook cannot be held accountable by sanctions alone; they must also be monitored via an agency that has created specific mechanisms for doing so.

In 2021, the United Kingdom Competition and Markets Authority launched the Digital Markets Unit (DMU), whose first task is to create and oversee a new code of practice on digital platforms.¹⁹⁸ The DMU will coordinate with other regulatory bodies, including its communications regulatory agency and its information rights office, to hone in on these technology companies.¹⁹⁹ Thus far, the DMU has launched investigations on Apple's app store and Google's "Privacy Sandbox" browser changed and created a new system identifying companies with a strategic position ("Strategic Market Status").²⁰⁰ The goal of the new system is to make interventions that are pro-competition.²⁰¹

In the U.S., governance studies and antitrust experts Stephanie K. Pell and Bill Baer have emphasized the need for government regulation in dealing with these companies, in this wise — "comprehensive federal privacy legislation — setting legal guardrails for all companies on the collection, sale, and sharing of data — would mitigate the competition concerns that arise when dominant

197. Filippo Lancieri, *Narrowing Data Protection's Enforcement Gap*, 74 MAINE L. REV. 15, 16 (2022).

198. Aniko Adam et al., *The UK Competition Regulatory Regime for Digital Markets: Overview*, available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/07/uk_competition_regulatory_regime_digital_markets.pdf (last accessed Jan. 31, 2023) [<https://perma.cc/GA6Q-U8BL>].

199. Haill, *supra* note 195.

200. Travers Smith, *The UK's New Competition Regime for Digital Markets: To Remedy a Gap in the CMA's Toolkit*, available at <https://www.traverssmith.com/knowledge/knowledge-container/the-uks-new-competition-regime-for-digital-markets-to-remedy-a-gap-in-the-cmas-toolkit> (last accessed Jan. 31, 2023) [<https://perma.cc/UCG5-28A4>].

201. *Id.*

platforms act as sole gatekeepers to impose their own privacy requirements on other companies.”²⁰²

Such an uncompromising stance must be emulated in the Philippine setting — while the PCC²⁰³ has been in existence for seven years and the NPC²⁰⁴ for 11 years, they have quickly become hallmarks of rights protection and economy building. The advent of a new committee while these agencies are building upon the foundations of their work will provide ease in building foundations, and allow greater flexibility as these agencies explore a new regulatory regime.

B. An Independent Review of Google’s and Facebook’s Algorithms Must Be Conducted

Numbers are at the core of every website; no website exists without a code outlining its existence.²⁰⁵ The new regulatory regime policing Google and Facebook must include an independent review of its algorithms in order to ensure proper enforcement. Academics have noted that the algorithm of the platforms are at the core of these websites’ business models — while these companies do not produce content per se, they curate content on behalf of their users.²⁰⁶ This content curation necessarily includes matching these users with potential advertisers in the online targeted advertising space.²⁰⁷

202. Stephanie K. Pell & Bill Baer, Protecting National Security, Cybersecurity, and Privacy While Ensuring Competition, *available at* <https://www.brookings.edu/blog/techtank/2022/01/19/protecting-national-security-cybersecurity-and-privacy-while-ensuring-competition> (last accessed Jan. 31, 2023) [<https://perma.cc/E4FK-6Y62>].

203. Philippine Competition Act.

204. National Privacy Commission, About Us, *available at* <https://www.privacy.gov.ph/about-us> (last accessed Jan. 31, 2023) [<https://perma.cc/82VB-ZC4E>].

205. IONOS, Source Code: What Exactly Is It?, *available at* <https://www.ionos.com/digitalguide/websites/web-development/source-code-explained-definition-examples> (last accessed Jan. 31, 2023) [<https://perma.cc/58YF-AWDG>].

206. Ján Mazúr & Mária T. Patakýová, *Regulatory Approaches to Facebook and Other Social Media Platforms: Towards Platforms Design Accountability*, 13 MASARYK U. J.L. & TECH. 219, 221 (2019).

207. *Id.*

Access to these algorithms will enable regulatory bodies to better understand the mechanisms behind online advertising and create a measured response to combat the anti-competitive practices that form part of this process. While authorities have been able to form conjectures on how Google and Facebook's algorithms work, actual access to the code will help experts formulate policies that get to the crux of the matter.²⁰⁸ It is also easier and more effective to enact systemic changes if the code dictating the program is subject to review. Changes to how Google and Facebook are run cannot be limited to policies or internal rules, but must also include the building block of these websites, the code itself.

Anent concerns regarding the algorithm and code being part of trade secrets, such concerns can be assuaged by a non-disclosure agreement with the regulatory body — thus supporting the idea that government intervention is paramount in ensuring compliance with data privacy and competition laws.²⁰⁹ The existence of a regulatory agency ensures accountability for the code and algorithm behind Google and Facebook, but also provides safeguards in terms of handling of these processes and data; internal regulation cannot provide adequate enforcement mechanisms, while private third-party regulation cannot ensure the confidentiality required in reviewing these codes.

C. Compulsory Review of Every Facebook and Google Acquisition

The PCA provides for compulsory notification of the PCC for mergers and acquisitions that reach a certain threshold, to wit — “[t]he Commission shall have the power to review mergers and acquisitions based on factors deemed relevant by the Commission.”²¹⁰

The current threshold for notification is ₱6.1 billion for the size of the party transacting and ₱2.5 billion for the size of the transaction.²¹¹ While

208. *Id.* at 241.

209. Philippine Competition Act, § 2.

210. *Id.* § 16.

211. Press Release by Philippine Competition Commission, *PCC Provisionally Sets Threshold for Mandatory M&A Notification: Php 6.1B for Size of Party, Php 2.5B for Size of Transaction* (Sept. 16, 2022), available at <https://www.phcc.gov.ph/press-releases/pcc-new-thresholds-2022> (last accessed Jan. 31, 2023) [<https://perma.cc/N68R-TNBR>].

Google and Facebook are without a doubt worth more than this amount²¹² and thus subject to notification, a new rule should be created to foresee the possibility of new websites and applications having these privacy and competition concerns; all mergers and acquisitions involving websites and applications should be subject to notification.

The nature of websites and applications is volatile. Every year, there is a new development that allows companies to effectively skirt enforcement due to their nature as unexplored technologies.²¹³ Today, we deal with concepts such as the metaverse,²¹⁴ big data,²¹⁵ and blockchain,²¹⁶ all of which are largely unregulated.²¹⁷ The first step to creating effective regulatory systems is to be continually aware of these changes. Through the PCA, the government is given a greater role in ensuring effective competition.²¹⁸ As the consequences of any transaction involving websites and mobile applications are far-reaching and will undoubtedly affect consumer welfare, these should be automatically subject to notification.

IX. CONCLUSION

In the digital era, data is currency and technology giants such as Google and Facebook, by their nature as social media conglomerates, have immediate access to a wealth of data.²¹⁹ Their access to data is dictated by unscrupulous

212. Amarendra Bhushan Dhiraj, Apple, Amazon, Google, Facebook, and Tesla are Now Collectively Worth More than \$8.1 Trillion, *available at* <https://ceoworld.biz/2021/01/09/apple-microsoft-amazon-google-facebook-and-tesla-are-now-collectively-worth-more-than-8-1-trillion> (last accessed Jan. 31, 2023) [<https://perma.cc/J6G8-2YGN>].

213. Mining Technology, The Metaverse: Technology Trends, *available at* <https://www.mining-technology.com/comment/the-metaverse-technology-trends> (last accessed Jan. 31, 2023) [<https://perma.cc/YH3T-B72L>].

214. *Id.*

215. SAS, Big Data: What It Is and Why It Matters, *available at* https://www.sas.com/en_ph/insights/big-data/what-is-big-data.html (last accessed Jan. 31, 2023) [<https://perma.cc/Q6C4-ATMV>].

216. Mining Technology, *supra* note 213.

217. Nataliya Amosova, *Risks of Unregulated Use of Blockchain Technology in the Financial Markets*, 71 ATLANTIC PRESS 9, 12 (2018).

218. See William D. Eggers, et al., *Data as the New Currency*, 13 DELOITTE REV. 19, 21-22 (2013).

219. Philippine Competition Act, § 2.

practices — the inclusion of terms and conditions involving the surrender of data as a precondition to joining these websites and the tracking of user activity outside user interactions in these websites.²²⁰ In addition to serving this function as a social media platform, Google and Facebook also serve as intermediaries that sell online advertising space, with the sale of these spaces contingent on the data that they have readily available.²²¹ This constitutes misuse of personal and purchasing information.²²²

In conjunction with the privacy aspect of this conduct, Google and Facebook are also committing anti-competitive acts.²²³ The use of personal and purchasing data constitutes a barrier to entry because it eliminates third-party advertisers from the market and the subsequent misuse of the data creates consumer harm.²²⁴ Such behavior substantially lessens and restricts competition, resulting in abuse of dominant position under Section 15 of the PCA.²²⁵ This position is bolstered by American and European jurisdictions, upon whose statutes our own competition law is modeled, also finding Google and Facebook guilty of abuse of dominant position under their own competition laws.²²⁶

Such threats to a healthy business environment require government intervention. Data and technology are nuanced topics — there is a need for a special regulatory committee to oversee enforcement mechanisms over Google, Facebook, and other emerging technology giants. Such regulatory practices necessarily include review of the underlying algorithms of these websites and any technology-oriented merger or acquisition, regardless of the party or transaction size, because these transactions are of public import.²²⁷

Technology possesses the power to create a vigorous marketplace, but also the power to impose stifling restrictions upon this market. Enforcement via competition law is a necessary instrument to effectively harness this power to create. Through enforcement, every third-party advertiser will face a playing

220. Bundeskartellamt, *supra* note 66, at 1–2.

221. Organisation for Economic Co-operation and Development, *supra* note 126, at 53.

222. *Id.*

223. Philippine Competition Act, § 15 (b).

224. OECD, *supra* note 23, at 25.

225. Philippine Competition Act, § 15.

226. Organisation for Economic Co-operation and Development, *supra* note 126, at 9.

227. Philippine Competition Act, § 2.

field that is not shadowed by unregulated access to the data of other parties, and every consumer will have choices dictated not by an unauthorized algorithm but by the actual wealth of options available online. The internet, whose appeal is precisely predicated upon availability, must evolve into a marketplace that does not bend to the whims of a few players.