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ATTENTION, DATA OR MONEY? RE-IMAGINING THE 'PRICE' IN SSNIP TESTS FOR ZERO-PRICE DIGITAL SERVICES

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I. INTRODUCTION

Traditional competition law tools like the Small but Significant Non-transitory Increase in Price **('SSNIP')** test underpin market definition by assessing whether a hypothetical monopolist could profitably raise prices by 5-10% without significant loss of sales to substitutes.[2249] Yet this framework falters in zero-price digital services, where platforms such as Google Search, Meta's social networks, and TikTok offer gratis access funded by advertising revenue and user data monetisation, rendering monetary price increases conceptually inapplicable.[2250] Users effectively "pay" through data surrender, attention allocation to ads, or privacy erosion, exposing SSNIP's limitations in capturing non-pecuniary trade-offs that drive dominance and harm consumer welfare.[2251]

This essay argues that "price" in SSNIP-type tests must evolve into a multi-dimensional construct incorporating monetary outlay, data volume/sensitivity, quality, and attention costs to accurately delineate markets and detect abuse in digital ecosystems. It first elucidates the SSNIP test's mechanics and its role in market definition under EU, US, and Indian regimes. The analysis then dissects zero-price market challenges, critiques existing adaptations like SSNDQ and data-as-currency models, and proposes a hybrid SSNAIP framework. Comparative perspectives across jurisdictions follow, alongside policy recommendations, concluding with calls for empirical refinement and inter-regime coordination.

[2249] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law OJ C372/5, paras 17–22.
[2250] OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms' (2017) 45.
[2251] Press Information Bureau, 'CCI imposes a monetary penalty of Rs. 1337.76 crore on Google for anti-competitive practices in Android mobile devices ecosystem' (PIB, 20 October 2022) https://www.pib.gov.in/PressReleasePage.aspx?PRID=1869748&reg=3&lang=2 accessed 11 December 2025.

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II. SSNIP Test and Its Role in Market Definition

The Small but Significant Non-transitory Increase in Price **('SSNIP')** test, also known as the hypothetical monopolist test, defines the relevant market as the smallest product set where a hypothetical monopolist could profitably impose a 5-10% price increase above the competitive level without losing significant sales to substitutes.[2252] This demand-side substitution analysis underpins merger reviews, dominance assessments, and abuse investigations across jurisdictions, ensuring competition law targets actual economic constraints on firm power.[2253] In the EU, the Commission Notice on Market Definition formalises SSNIP's application, emphasising price elasticity and empirical evidence like diversion ratios.[2254] India's Competition Commission (CCI) integrates it under section 2(t) of the Competition Act 2002, as evidenced in digital merger cases where geographic and product boundaries hinge on substitution patterns.[2255] US Horizontal Merger Guidelines similarly prioritise SSNIP while incorporating supply-side factors for dynamic markets.[2256]

Multi-sided platforms complicate SSNIP by introducing cross-side externalities: a price hike on one side (e.g., advertisers) may subsidise zero-pricing on the user side, requiring sequential or unified analysis to capture platform-wide profitability.[2257] Traditional SSNIP assumes observable monetary prices and elasticities, rooted in Chicago School efficiency paradigms that privilege allocative over non-price harms.[2258] Yet digital zero-price services expose its limits – no baseline price exists for increment on the consumer side, rendering elasticity unmeasurable and market boundaries indeterminate.[2259] This Chicago bias risks under-enforcing against data-driven dominance, as power manifests in lock-in rather than price gouging.

III. The Challenge of Zero – Price Markets

Zero-price digital services operate on dual-sided business models where consumers access platforms gratis while advertisers or data buyers fund operations, amplified by network effects that entrench incumbents.[2260] Platforms like Google Search and Meta's Facebook exemplify this: users receive 'free' services but surrender personal data for behavioural targeting, creating revenue streams exceeding traditional pricing.[2261] In India, the CCI's Google Android decision highlighted how data-driven ecosystems lock in app developers and users, with dominance stemming from pre-installation and data moats rather than monetary barriers.[2262] This structure renders SSNIP inapplicable, no small price increase is feasible on the zero-price side, as even minimal charges trigger infinite demand elasticity and user defection.[2263]

Enforcement authorities confront this discontinuity through ad hoc workarounds. The EU Google Shopping case bypassed SSNIP by defining markets around free general search while assessing tying effects on specialised services.[2264] Similarly, the Bundeskartellamt's Facebook ruling treated excessive data collection as exploitative abuse, blending competition with GDPR norms without relying on price-based delineation.[2265] In India, CCI's MakeMyTrip-OYO order penalised non-price

[2252] Supra note at 1.

[2253] *Matrimony.com Ltd v Google LLC* CCI Case Nos 07 & 30 of 2012, paras 149–152 (applying SSNIP to online search advertising).

[2254] Commission Notice (n 1) paras 20–36.

[2255] Competition Act 2002 (India), s 2(t); *XYZ v Alphabet Inc* CCI Case No 39 of 2018 (Google Android), paras 200–210 https://www.cci.gov.in/images/antitrustorder/en/order1666696935.pdf accessed 11 December 2025.

[2256] US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (2023) § 4.1.

[2257] OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms' (OECD 2017) 20–25.

[2258] *Digital Market and Zero-Pricing: Is SSNIP Test Applicable?* (IndiaCorpLaw, 2 October 2019) https://indiacorplaw.in/2019/10/02/digital-market-zero-pricing-ssnip-test-applicable/ accessed 11 December 2025.

[2259] Pablo Ibáñez Colomo, 'The SSNIP Test and Zero-Pricing Strategies: Considerations for Applying the HMT to Digital Platforms' (2018) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337765 accessed 11 December 2025.

[2260] Supra note at 10.

[2261] Supra note at 3.

[2262] Supra note at 7.

[2263] Supra note at 1, paras 52–55 (acknowledging zero-price limits).

[2264] *Google Shopping* (Case AT.39740) Commission Decision paras 145–150.

[2265] Bundeskartellamt, *Facebook – Exploitative Business Terms Pursuant to Section 19(1) GWB* (B6-22/16) https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf accessed 11 December 2025.

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exclusivity clauses fostering dependency, analogising digital data lock-in to traditional foreclosure.[2266] These responses reveal SSNIP's Chicago School heritage, prioritising allocative efficiency over total welfare harms like privacy erosion or attention capture risking under-detection of dominance in data economies.[2267]

IV. Existing Alternatives and Adaptations

Competition authorities have developed SSNIP alternatives for zero-price markets, primarily the Small but Significant Non-transitory Decrease in Quality **('SSNDQ')** test, which assesses whether a hypothetical monopolist could profitably degrade quality such as privacy standards or user experience – without losing users to substitutes.[2268] Copenhagen Economics highlights SSNDQ's applicability to zero-price products where quality drives competition, as seen in EU guidance adapting it for digital platforms.[2269] Australian and Singaporean commissions endorse SSNDQ over SSNIP for quality-focused substitution analysis, though quantification challenges persist, particularly for subjective metrics like data protection.[2270]

Data-as-counter performance models, rooted in EU consumer law, treat personal data surrender as contractual 'payment' equivalent to money, extending to competition analysis. Directive (EU) 2019/770 explicitly covers digital services where consumers provide data instead of monetary price, enabling arguments that data extraction functions as a price proxy in SSNIP-type tests.[2271] Scholarship critiques this for valuation inconsistencies but praises its alignment with GDPR purpose limitation, as in Bundeskartellamt's Facebook exploitation findings.[2272] The Small but Significant Non-transitory Increase in Costs **('SSNIC')** test further refines this by targeting attention costs (e.g., ad-load increases) or information burdens, offering measurable proxies like time spent or tracking intensity.[2273]

These adaptations: SSNDQ, SSNIC, and data-as-currency, address SSNIP's gaps but face limits: quality subjectivity risks arbitrary enforcement, data metrics lack standardisation, and attention costs demand empirical innovation. EU's draft Market Definition Notice signals convergence towards hybrid qualitative-quantitative tools, urging Indian CCI to integrate similar flexibility amid digital merger scrutiny.[2274] None fully resolves multi-dimensional harms, necessitating a unified re-imagining of 'price'.

V. A Re-Imagined Concept of 'Price'

Competition law must reconceptualise 'price' as a multi-dimensional bundle encompassing monetary outlay, data surrendered **('volume', 'sensitivity', 'processing scope'),** and attention costs **('ad exposure', 'engagement time')** to restore SSNIP-type tests' efficacy in zero-price ecosystems.[2275] This hybrid approach draws from behavioural economics, where attention scarcity functions as a finite currency platforms monetise via addictive design, and information economics, positing data as a non-fungible input akin to capital.[2276] A proposed Small but Significant Non-transitory Increase in Attention/Input Price **('SSNAIP')** test queries whether a hypothetical monopolist could elevate any dimension, e.g., intensifying tracking or ad-load while sustaining advertiser revenue,

[2266] *Re: Alleged Anti-competitive Conduct (Online Intermediation Services)* CCI Case No 40 of 2019 (MakeMyTrip–OYO) https://www.cci.gov.in/images/antitrustorder/en/order1666696935.pdf accessed 11 December 2025, paras 300–350.

[2267] Supra note at 11.

[2268] Copenhagen Economics, 'Quality: A Game Changer in Market Definition?' (30 July 2025) https://copenhageneconomics.com/insight/quality-a-game-changer-in-market-definition/ accessed 11 December 2025.

[2269] ibid (explaining SSNDQ logic for zero-price products).

[2270] IRCCl, 'Market Definition, Power in Digital Economy and Challenge of Zero-Price Markets' (5 April 2022) https://www.irccl.in/post/market-definition-power-in-digital-economy-and-challenge-of-zero-price-markets-time-to-evolve accessed 11 December 2025.

[2271] Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services OJ L136/1, art 3(1).

[2272] Laura Drechsler, 'Data As Counter-Performance: A New Way Forward Or A Dead End?' (IRIS 2017) https://cris.vub.be/ws/portalfiles/portal/36462976/IRIS2017_DRAFT_Drechsler_V3.pdf accessed 11 December 2025.

[2273] Supra note at 11, (discussing SSNIC conversion).

[2274] HSF Kramer, 'A New EU Market Definition Notice Fit for New Market Realities?' (11 February 2024) https://www.hsfkramer.com/notes/crt/2024-02/a-new-eu-market-definition-notice-fit-for-new-market-realities accessed 11 December 2025.

[2275] Nona Karadzhova, 'Competition Law in Digital Era – How to Define the Relevant Market?' (SSRN, 2 April 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531316 accessed 11 December 2025.

[2276] Transformative Private Law Forum, 'Data as Counter-Performance and Transformative Contract Law' (16 December 2020) https://transformativeprivatelaw.com/data-as-counter-performance-and-transformative-contract-law/ accessed 11 December 2025.

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mirroring traditional elasticity logic through user switching thresholds.[2277]

Practical metrics render SSNAIP feasible: data 'price' via GDPR-compliant audits of collection intensity; attention via average session duration or click-through burdens; quality degradation through privacy scores or churn post-policy changes.[2278] India's ex-ante reforms gain from this framework, as TCLF analysis defends attention-economy regulation against zero-price foreclosure, building on CCI's recognition of non-price dependency in platform cases.[2279] EU scholarship integrates consumer law's data-as-counter performance doctrine, arguing exploitative data practices equate to price hikes under abuse provisions.[2280] US FTC guidance echoes this via innovation proxies, urging total welfare metrics beyond Chicago price-centrism.[2281]

This re-imagining preserves SSNIP's substitution core while expanding to digital realities, enabling precise dominance detection and tailored remedies like data portability mandates. Empirical validation through A/B testing and econometric panels remains essential, fostering convergence between competition, data protection, and consumer regimes.[2282]

VI. Comparative and Policy Perspectives

Jurisdictions increasingly converge on recognising that zero-price digital services require non-monetary notions of 'price', yet diverge in how explicitly they embed data and attention into competition analysis. The EU's Digital Markets Act **('DMA')** moves beyond case-by-case SSNIP by imposing ex ante obligations on 'gatekeepers' in core platform services, justified by data-driven network effects and user lock-in rather than monetary price effects alone.[2283] EU policy documents accompanying the new Market Definition Notice emphasise quality and data as competitive parameters, signalling an official willingness to treat privacy and data practices as functional equivalents to price in assessing market power.[2284] US enforcement, while retaining traditional market definition tools, increasingly highlights privacy, innovation, and data exploitation in Big Tech cases, even when services are free to users; recent guidelines stress non-price effects and platform incentives to degrade quality once dominance is entrenched.[2285] Indian competition law, through CCI's digital cases, acknowledges dependence on dominant platforms and data advantages, but has not yet formalised a doctrinal shift away from price-centred tests, relying instead on pragmatic, effects-based reasoning in Android, app store, and online intermediation disputes.[2286]

India's CCI has pragmatically navigated zero-price challenges without doctrinal overhaul, as seen in the Google Android ruling where data moats and network effects defined dominance absent monetary pricing.[2287] The MakeMyTrip–OYO decision further illustrates non-price foreclosure through exclusivity and deep discounts, creating dependency analogous to digital attention lock-in.[2288] Proposed ex-ante reforms under the Digital Competition Bill 2025 signal intent to designate Systemically Significant Digital Intermediaries (SSDIs) based on multi-dimensional criteria like user engagement and data control, bypassing SSNIP

[2277] OECD, 'Quality Considerations in Digital Zero-Price Markets' (2018) https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/03/quality-considerations-in-the-zero-price-economy_85631bda/ accessed 11 December 2025.

[2278] Supra note at 20.

[2279] TCLF, 'In Defence of the Proposed Ex-Ante Competition Law Reforms in India: An Attention Economy Perspective' (1 October 2024) https://tclf.in/2024/10/01/in-defence-of-the-proposed-ex-ante-competition-law-reforms-in-india-an-attention-economy-perspective/ accessed 11 December 2025.

[2280] Supra note at 24, pg. 15–20.

[2281] US Federal Trade Commission, 'Merger Guidelines' (2023) § 4.3 (innovation and quality emphasis).

[2282] RCCI, 'Practical Indicia Approach in Delineation of Relevant Market' (27 April 2023) https://www.irccl.in/post/multi-sided-markets-practical-indicia-approach-in-delineation-of-relevant-market accessed 11 December 2025.

[2283] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act) OJ L265/1, recitals 2–5, arts 3–6.

[2284] European Commission, 'A new EU Market Definition Notice fit for new market realities?' (Staff Working materials, 2024) (discussed in HSF Kramer, 'A new EU Market Definition Notice fit for new market realities?' (11 February 2024) https://www.hsfkramer.com/notes/crt/2024-02/a-new-eu-market-definition-notice-fit-for-new-market-realities accessed 11 December 2025).

[2285] Supra note at 33, §§ 2.2, 4.3 (non-price effects, quality and innovation in digital markets).

[2286] Supra note at 7.

[2287] Supra note at 35.

[2288] Supra note at 18.

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limitations.[2289] This aligns with global trends but demands Indian-specific adaptations: robust data valuation guidelines drawing from IT Rules 2021, empirical benchmarks for attention metrics (e.g., daily active users, session time), and inter-agency coordination with MeitY and TRAI to harmonise privacy-competition interfaces.[2290]

Policy recommendations for India include: **(i)** formalising SSNDQ/SSNAIP hybrids in CCI guidelines, piloted via Android follow-ons; **(ii)** mandating platform transparency on data extraction and ad-load for merger reviews; **(iii)** fostering empirical toolkits through NCAER collaborations for switching cost analysis. These measures address resource constraints via tech-neutral thresholds, preserving innovation while countering exploitative practices. Absent such evolution, India's digital economy projected to hit $1 trillion by 2028, risks unchecked gatekeeper power, undermining consumer sovereignty in attention-data markets. Global learning from DMA's gatekeeper designations and US quality-focused enforcement underscores the urgency: competition law must transcend price-centrism to safeguard welfare in zero-price paradigms.[2291]

The EU explicitly integrating SSNDQ and data/quality factors **('DMA', 'GDPR-linked reasoning')**, the US relying on expanded notions of quality and innovation harms within existing antitrust frameworks, and India evolving through case law that recognises network and data effects without overhauling statutory tests. Building on the proposed multi-dimensional concept of 'price', policy reforms could: encourage authorities to treat data extraction, privacy deterioration, and attention capture as measurable price analogues; promote cooperation between competition, consumer, and data protection regulators to avoid contradictory standards; and develop guidance for using empirical indicators like ad-load, cross-service tracking, and switching frictions when applying SSNIP-type logic to zero-price services.[2292] Such reforms would reduce under-enforcement risk in digital markets by aligning legal tools with economic reality, while preserving legal certainty through clear, published methodologies for assessing non-monetary 'prices'.

Jurisdiction	Key Instruments/Cases	Zero-Price Treatment
EU	DMA; Draft Market Notice	SSNDQ; data/quality as price proxies
US	FTC Merger Guidelines	Non-price harms (innovation/privacy)
India	Google Android; Digital Competition Bill	Network/data effects; pragmatic effects-based

VII. Conclusion

The SSNIP test's reliance on monetary price renders it obsolete for zero-price digital services, where dominance arises from data extraction, attention capture, and network lock-in rather than price gouging. Reconceptualising 'price' as a multi-dimensional metric: integrating data volume, attention costs, and quality degradation, revitalises market definition, as demonstrated through SSNAIP-style adaptations that preserve elasticity logic while capturing digital realities. Jurisdictional convergence, from EU's DMA ex ante rules to India's CCI effects-based pragmatism, underscores this evolution's necessity, enabling precise dominance detection and consumer welfare protection.

[2289] Digital Competition Bill 2025 (Draft, MeitY 2024).
[2290] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021.
[2291] Supra note at 31.
[2292] OECD, 'Quality Considerations in Digital Zero-Price Markets' (2018) (proposing indicators for quality and data-related harms in digital services).

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While promising, the multi-dimensional 'price' approach invites challenges: data and attention metrics risk subjectivity, demanding costly empirical validation that smaller authorities like India's CCI may lack resources for. Over-reliance on hybrid tests could dilute legal certainty, inviting litigation over thresholds (e.g., what constitutes 'significant' data increase?), and conflate competition with privacy goals, blurring regulatory remits. Behavioural assumptions underpinning attention scarcity may overlook user heterogeneity, while platforms could game metrics through dark patterns, undermining enforcement efficacy.

Future reforms should prioritise empirical tools for non-monetary valuation, such as A/B testing for switching thresholds and standardised data audits, alongside inter-regime coordination between competition, consumer, and privacy authorities. Absent such innovation, competition law risks perpetuating Chicago School blind spots, under-enforcing against platform power in the attention-data economy.