

# Competition Law Hotline

September 01, 2020

## NO ABUSE OF DOMINANCE BY WHATSAPP AND FACEBOOK: A SHOT IN THE ARM FOR WHATSAPP PAY?

- CCI dismisses allegations of abuse of dominance levelled against Facebook and WhatsApp, in respect of their much-awaited UPI app *WhatsApp Pay*.
- CCI held that mere existence of an App on the smartphone does not necessarily convert into transaction/usage.

WhatsApp Pay, being a Unified Payment Interface (“UPI”) based payments service, allows users to send and receive money via the app. WhatsApp plans to launch the UPI as an in-chat payment feature allowing users to make transactions via WhatsApp to their contact list. The Reserve Bank of India (“RBI”) and National Payments Corporation of India (“NPCI”) scrutinized this feature. It was launched as a part of a trial run in India in February 2018, introducing payments through WhatsApp Pay to a million users under a partnership with ICICI Bank in its beta testing mode.<sup>1</sup> On February 7, 2020, the messaging app received NPCI’s approval to roll out its digital payment service in a phased manner.<sup>2</sup> In a recent petition before the Supreme Court (“SC”) pertaining to expansion of its payment service, WhatsApp assured SC of complete compliance with the necessary regulatory requirements which is currently pending.

In the recent decision of *Harshita Chawla v. WhatsApp and Facebook*<sup>3</sup>, the Competition Commission of India (“CCI”) dismissed all allegations of abuse of dominance against WhatsApp Inc. (“WhatsApp”) in respect of launching its much awaited UPI app ‘*WhatsApp Pay*’ in India. Interestingly, this comes at a juncture when CCI has lately become active in initiating probes against various tech players across different markets. The case had garnered a lot of media attention as it marked the beginning of the CCI’s scrutiny of digital payments sector. Please see below our detailed analysis of the same.

### FACTS

The present petition was filed in March before the CCI under Section 19(1)(a) of the Competition Act, 2002 (“Act”), alleging contravention of provisions of Section 4 of the Act. Harshita Chawla (“Informant”) filed a case against WhatsApp and Facebook Inc. (“Facebook”) (collectively referred to as “Parties”) for abusing their dominant position in launching their payment app services.

### CONTENTIONS OF INFORMANT

- Facebook-owned WhatsApp is leveraging its dominance in the internet-based instant messaging apps, by bundling its messaging app with the payment system, i.e. WhatsApp Pay in contravention of Section 4(2)(a)(i) of the Act. This can also be termed as ‘coercion’ and in contravention of Section 4(2)(d) of the Act. Facebook is inherently a predatory entity known to focus on buying out its competition.
- Pre-installation of WhatsApp Pay could be seen as WhatsApp leveraging its dominance in first relevant market to favour and protect its position in another relevant market, thereby violating Section 4(2)(e) of the Act.
- Automatic installation of WhatsApp Pay in the WhatsApp messaging platform was touted to create an unfair advantage due to usage of its vast, existing database of users to popularise the payment platform.
- Position of WhatsApp can be fairly segregated into two markets:
  1. Market for internet-based messaging application through smartphones; and
  2. Market for UPI-enabled digital payment applications.
- Services provided by the internet-based messaging apps through smartphones form a separate and distinct market and cannot be substituted or interchanged with the traditional electronic communication services.
- Concerns related to data security of the personal information were also raised before the CCI. Usage of personal data through WhatsApp, Facebook can customise advertisements and suit user situations and attract attention. Facebook monetises this user data, generates revenue, and drives out healthy competition from the market.

### ARGUMENTS BY WHATSAPP:

- Locus standi of the Informant was challenged as he failed to provide any evidence in support of its allegations.
- Informant’s identification of the relevant market, i.e. the ‘market for internet-based instant messaging apps in India’, was incorrect as it operates in a much broader market, i.e. ‘market for user attention’ such as *inter alia*, social networking, messaging, gaming, content viewing and sharing, photo and video sharing and music.
- WhatsApp does not enjoy a dominant position in the market proposed by it or even in the narrow market proposed by the Informant. A snapshot of historical market shares of WhatsApp or share of usage by consumers is not equivalent to an accurate representation of the market power of a firm.
- Registration for WhatsApp Pay necessitates users to accept separate ‘terms of service’ agreement and privacy

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policy and hence, are not compelled to use such payment services by virtue of its customers using WhatsApp. There is no element of imposition or coercion involved as it is a voluntary decision.

- WhatsApp submitted that the payments feature is not a separate product, so question of bundling does not arise. In fact, it is an additional feature, whose commercial launch is subject to approval by NPCI. Furthermore, there is no 'abuse' of any dominant position according to Section 4(2)(e) of the Act.

### CCI ORDER

The Act does not prohibit the mere possession of dominance that could have been achieved through superior economic performance, innovation, or pure accident but only its abuse. The Act, however, prohibits the dominant position of an entity in one market to enter into, or protect, other relevant market.<sup>4</sup> The CCI, through its order, analyses factors under Section 4 to determine whether an enterprise is abusing its dominant position in the relevant market.

### Locus Standi

- The CCI ruled in favour of the Informant stating him to be an aggrieved party within the meaning of the Act. While ruling so, the CCI also acknowledged the significance of such a case considering it delves into an issue which is a case *in rem*, dealing with underlying larger question of market distortion.
- The CCI also observed that the Informant need not necessarily be an aggrieved party to file a case. Neither the Act specifies any such requirement explicitly nor the same can be implicitly read into the provisions, given the inquisitorial scheme of the Act. CCI relying on the controversial ruling of NCLAT in the *Samir Agrawal case*<sup>5</sup> opined that a single case alone cannot offer the leverage to the opposite parties to put forth such contentions that go against the scheme of the Act.

### Relevant Market

- CCI disagreed with the relevant market proposed by WhatsApp and observed that the first relevant market would be '*market for Over-The-Top (OTT) messaging apps through smartphones in India*' and the second relevant market for the purposes of assessment of antitrust allegations would be '*market for UPI enabled Digital Payments Apps in India*'. Although in terms of nomenclature the first relevant market seems to be different than what was originally proposed by the Informant, the CCI was of the view that both the markets are same in essence, largely covering the same set of players and competition dynamics.
- While demarcating the relevant markets, the CCI also observed that WhatsApp and Facebook are third-party apps providing internet-based consumer communication services which again can be sub-segmented based on different parameters. Notably, while WhatsApp is primarily an OTT messaging app, Facebook is a social networking app connecting many users simultaneously. WhatsApp and Facebook falling in different markets with their services not being substitutable, the CCI rejected the '*market for user attention*' (as proposed by WhatsApp) for the purposes of the investigation.

### Dominant Position

- CCI observed that, despite operating in separate markets, Facebook and WhatsApp are group entities and therefore, WhatsApp's market position needs to be assessed based on such considerations. The CCI held WhatsApp to be *prima facie* dominant in the first relevant market '*market for OTT messaging apps through smartphones in India*'.
- While conclusively determining the dominance, the CCI placed reliance on its advantage of reaping the benefits of network effect, increased switching costs, lack of interoperability between platforms, lack of constraints among the major players in the market such as Facebook Messenger, and on the indications of dominance from the market data despite having chances of infirmities.

### Abuse of Dominance

- The CCI did not find merit in allegations with respect to abuse of dominance as the mere existence of an App on the smartphone does not necessarily convert into transaction/usage. Given that WhatsApp had categorically ensured the offering of full discretion to the users with regard to the usage of its payment app services and provision of separate registration requiring the users to accept the terms of services and privacy policy, the CCI ruled in favour of WhatsApp.
- With regard to allegations of violation of Section 4(2)(d) of the Act, the CCI differed in its views. CCI clarified that the term 'tying' actually refers to a practice whereby the seller of the product/service ('tying product') requires the buyers to also purchase another separate product or service ('tied product'). On the other hand, bundling usually refers to act of selling two products in fixed proportions in a specific price as a bundled package. The following necessary conditions need to be fulfilled for a tying case to be made out:
  - The tying and tied products are two separate products;
  - The entity concerned is dominant in the market for tying products;
  - The consumer has no choice to buy one of the products: tying or tied;
  - The tying is capable of restricting/foreclosing in the market.
- Tested on these parameters, the CCI observed that the first two conditions along with the dominance of the entity were met, especially when WhatsApp Messenger and WhatsApp Pay are distinct products offering different services to the users. However, with regard to the other two conditions, the CCI ruled in favour of WhatsApp. Due to the voluntary installation of WhatsApp messenger (stated by WhatsApp) coupled with (i) no explicit coercion on the user to use WhatsApp Pay exclusively or (ii) influencing the consumer choice implicitly in any other manner, the third condition was not met.
- Notably, WhatsApp Pay received approvals to act as a payment app in India only in February 2020 in beta version, and also seems to have complied with the data localisation norms as stipulated by NPCI. CCI taking a pragmatic approach noted that WhatsApp actual conduct is yet to manifest in the market, especially when the number of users being served under the beta version is limited to less than 1% of its users in India.
- In light of the above, CCI ruled out the unwarranted and implausible apprehensions of the Informant on WhatsApp using its dominant position in the first relevant market to gain leverage in the second relevant market. CCI did not find any contravention of the provisions of Section 4 of the Act against WhatsApp or Facebook and directed closure under Section 26(2) of the Act.

### ANALYSIS

WhatsApp has been trying to roll out its payment app in India for the past two years and is only being tested to 1 million out of the 400 million users it plans to reach. However, so far, it has not been successful in launching across

the country. The tech giants have also been facing scrutiny in other jurisdictions as well. Recently, in Brazil, the second largest market for WhatsApp, one week after the launch of WhatsApp Pay, the Brazil Central Bank suspended the payment service introduced by WhatsApp.<sup>6</sup> The reason it cited was to 'preserve an adequate competitive environment'. The Central Bank felt the need for a thorough analysis before the practice can be allowed. However, the same analogy cannot be squarely applicable to the present matter, given the highly regulated environment in the payment app services market. The RBI and NPCI being the first points of contact provide for a host of checks and balances, before allowing any such entity to go full scale.

Further, Facebook was held liable in an antitrust claim,<sup>7</sup> by the (German) Federal Court of Justice relying on the usage of personal data by Facebook to provide each user with personalized experience. In respect of similar allegations, the CCI has adopted a very cautious stance, clarifying that in the absence of any concrete allegation or any specific information to support such competition concerns related to targeted advertising, one cannot categorically rule against Facebook or WhatsApp.

With CCI ruling that presence of associated links between two relevant markets is not necessary, there was a possibility of dominant entities falling within the CCI's regulatory overreach.<sup>8</sup> The Competition Law Review Committee in its report, noted that while associated linkages should generally exist between the relevant markets, it may be prudent to allow some flexibility to the CCI.<sup>9</sup> Although such flexibility could have led to an unfavourable outcome in the present case, CCI's practical approach and WhatsApp's assurances with regard to tying product concerns avoided such an outcome.

This order of the CCI reinforces the principle in its earlier order in 2017<sup>10</sup> against WhatsApp indulging in predatory pricing. It reflected a position that merely being 'dominant' in the market cannot be held to be a contravention of the Act and that such 'dominance' has to actually be abused in order to constitute such a contravention. This is yet another occasion where CCI has reiterated the approach taken in the *Airtel-Reliance* case,<sup>11</sup> that expansion into new markets should not always be looked critically. While WhatsApp does have a fundamental, strong, base established but the same may not be true for its payment arm, considering the presence of its competitors such as Google Pay, Paytm and others existing in digital payments space for longer duration and are in a position of strength.

The CCI order will likely provide a much-needed breather for Facebook and WhatsApp. Apart from directly influencing similar matters such as the one involving allegations against Google for unfair promotion of Google Pay,<sup>12</sup> this order might bolster the Indian Government's vision of encouraging digital payments and allowing for competitive services being offered to the users.

With the COVID-19 era highlighting the need for digital payments more than ever, the present order of the CCI might well be a shot in the arm for WhatsApp and Facebook. However, one cannot lose sight of the CCI's practical approach in this case based on WhatsApp's assurances of its business model not being in violation of the Act. CCI terming it as 'premature' indicates that WhatsApp, on abusing the leverage, might find itself locking horns with CCI again.

– Dibya Behera, Vinay Shukla, Payel Chatterjee & Pratibha Jain  
You can direct your queries or comments to the authors

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<sup>1</sup> <https://www.npci.org.in/press-release-no-168-16022018-npci-statement-pertaining-whatsapp-bhim-upi-beta-launch>.

<sup>2</sup> *Id.*

<sup>3</sup> Harshita Chawla v. WhatsApp and Facebook, available at <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>.

<sup>4</sup> Section 4(2)(e) of the Act.

<sup>5</sup> Competition Appeal (AT) No.11 of 2019.

<sup>6</sup> <https://www.bloombergquint.com/business/brazil-s-central-bank-suspends-whatsapp-payments>.

<sup>7</sup> <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html>.

<sup>8</sup> MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd, available at <https://www.cci.gov.in/132009>.

<sup>9</sup> [http://www.mca.gov.in/Ministry/pdf/ReportCLRC\\_14082019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf).

<sup>10</sup> Shri Vinod Kumar Gupta v. WhatsApp Inc., available at <https://www.cci.gov.in/node/3189>.

<sup>11</sup> Bharti Airtel v. Reliance Industries, available at <https://www.cci.gov.in/node/3204>.

<sup>12</sup> <https://www.businesstoday.in/current/corporate/cci-probes-google-pay-app-over-questionable-promotion-techniques/story/405177.html>.

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