

## Harshita Chawla v. WhatsApp and Facebook<sup>1</sup>

Through this quarterly publication, CUTS International intends to undertake an independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt with in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefits of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

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<sup>1</sup> *Harshita Chawla v. WhatsApp and Facebook*, Case No. 15 of 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>.

## Introduction

*"The design of digital technology makes monopoly far more likely. There's something intrinsic about how the tech machine operates – software running on hardware – that leads to network effects of different kinds."*<sup>2</sup>

The Unified Payments Interface (UPI) has been India's greatest achievement in the digital payments sector so far. There is no denying that demonetisation in 2016 and COVID-19 now, have acted as the biggest catalysts in promoting digital payments. While various Peer-to-Peer (P2P) wallet providers such as PayTM, Freecharge, and Mobikwik were compelled to introduce UPI to their existing infrastructure, others such as PhonePe and Google Pay went on to build their payment services solely on the UPI interface.

Taking cue from the endless possibilities in this sector, Facebook backed WhatsApp (WA) also joined the race and showed its intent to foray into the digital payments market, by launching a payments services app – WhatsApp Pay (WA Pay). WA Pay will essentially allow users to send and receive money via its messaging app, WA. WA plans to launch this as an in-chat feature allowing users to transact with people on their contact list.

In 2018, the National Payments Corporation of India (NPCI) gave its consent to WA to roll out WA Pay to million users under the partnership with the ICICI Bank, in its beta testing mode.<sup>3</sup> However, it was not until February 2020 that WA received NPCI's approval to roll out WA Pay in a phased manner.<sup>4</sup>

The full scale launch of WA Pay was held up for more than two years owing to an affidavit filed by the Reserve Bank of India, in response to an interim application filed by the Centre for Accountability and Systemic Change before the Supreme Court.<sup>5</sup>

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<sup>2</sup> Arun Sundararajan, Harold Price Professor of Entrepreneurship and Technology, Stern School of Business, New York University, World Economic Forum's Annual Meeting of New Champions, China, 2019, <https://www.weforum.org/agenda/2019/07/these-are-some-of-the-best-quotes-about-technology-monopolies-in-2019/>.

<sup>3</sup> 'NPCI statement pertaining to WhatsApp BHIM UPI beta launch', NPCI, 16 February 2018, <https://www.npci.org.in/sites/default/files/NPCI%20statement%20pertaining%20to%20WhatsApp%20BHIM%20UPI%20beta%20launch.pdf>.

<sup>4</sup> 'What is WhatsApp Pay', Business Standard, [https://www.business-standard.com/about/what-is-whatsapp-pay#:~:text=WhatsApp%20Pay%20is%20an%20in,Corporation%20of%20India%20\(NPCI\)](https://www.business-standard.com/about/what-is-whatsapp-pay#:~:text=WhatsApp%20Pay%20is%20an%20in,Corporation%20of%20India%20(NPCI)).

<sup>5</sup> *Centre for Accountability and Systemic Change v. Union of India*, W.P.(C) No. 921/2018.

The Petitioners had contended that before allowing the full launch of WA Pay, an assurance should be taken from WA about complying with the necessary regulatory (data localisation) requirements. Recently, in August 2020, the NPCI observed that WA Pay has complied with all the pending data localisation parameters, thus giving permission to ICICI Bank – Payment Service Provider (PSP) for WA – to go live with WA Pay.<sup>6</sup>

In the midst of all this, a petition was filed in March 2020, before the Competition Commission of India (CCI) by Harshita Chawla (Informant) under Section 19(1)(a)<sup>7</sup> of the Competition Act, 2002 (Act). The Informant alleged contravention of provisions of Section 4<sup>8</sup> of the Act by WA and Facebook (collectively referred to as Parties), in launching their payments app service – WA Pay.

### **Contentions by Harshita Chawla**

1. The Informant defined the following two Relevant Markets (RM):
  - a. RM1 – Market for internet-based messaging applications through smartphones in India.
  - b. RM2 – Market for UPI-enabled digital payment applications in India.
2. Section 4(2)(a)(i)<sup>9</sup> – The users of Facebook-backed WA (will) automatically get WA Pay installed on their smartphones. Such ‘pre-installation’ is forced upon the users. This amounts to imposition of unfair condition on the users of the dominant product i.e. WA.
3. Section 4(2)(d)<sup>10</sup> – WA is leveraging its dominant position in RM1, by bundling WA with its payment system, WA Pay. This amounts to ‘coercion’, as a user who does not wish to install WA Pay but only WA does not have the option to do so, and vice versa.

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<sup>6</sup> ‘WhatsApp Pay has now met all data localization rules, NPCI tells RBI’, ET Bureau, The Economic Times, 4 August 2020, <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/whatsapp-pay-has-now-met-all-data-localisation-rules-npci-tells-rbi/articleshow/77343179.cms>.

<sup>7</sup> Section 19(1)(a) of the Act states that the CCI may inquire into alleged contraventions either of provisions under Section 3 or Section 4, upon receipt of any information from any person, consumer, or association.

<sup>8</sup> Section 4 of the Act states that no enterprise shall abuse its dominant position and subsequently lays down what will classify as ‘abuse of dominance’.

<sup>9</sup> Section 4(2)(a)(i) of the Act states that if an enterprise directly or indirectly, imposes unfair or discriminatory conditions for the purchase or sale of goods, it would amount to ‘abuse of dominance’.

<sup>10</sup> Section 4(2)(d) of the Act states that if an enterprise makes the concluding of any contract subject to the acceptance of ‘supplementary obligations’, which by their very nature, have no connection with the subject of the contract, would amount to ‘abuse of dominance’.

4. Section 4(2)(e)<sup>11</sup> – The UPI-enabled digital payments market would normally require huge amounts of investment of money, time, and requisite skills by any new entrant. By bundling the already existing messaging app, WA with the payment app, WA Pay, the Parties have by-passed all such requirements, causing an adverse effect on competition (AAEC), market participation and ultimately the consumers. Thus, WA is leveraging its dominance in RM1 to favour and protect its position in RM2.
5. Additionally, the Informant also contended that Facebook is inherently a predatory entity known to focus on buying out its competition. All such acquisitions raise considerable competition concerns, along with issues around data protection. Considering the huge data sets of users which the Parties can use for their commercial advantage, it is contended that such acquisitions cause an AAEC in the market.
6. By using personal data through WA, 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 and Facebook**

1. Facebook and WA are separate and distinct companies, and since the Informant has not highlighted any allegations against Facebook, Facebook should be deleted from the memorandum of parties.
2. The Informant has no *locus standi*, mainly because she has not claimed any injury or suffered invasion of her legal rights as a consumer. Moreover, the Informant is indulging in forum shopping and has not provided any evidence in support of her allegations.
3. The Informant has incorrectly defined RM1 as 'market for internet-based instant messaging apps in India', as WA operates in a broader market of 'market for user attention', such as social networking, messaging, gaming, content viewing and sharing, photo and video sharing, and music.
4. WA does not enjoy a dominant position in either, the market as defined by the Informant, or the broader market of 'market for user attention'. A snapshot of

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<sup>11</sup> Section 4(2)(e) of the Act states that if an enterprise uses its dominant position in one relevant market to enter into or protect itself in other relevant market(s), it will amount to 'abuse of dominance'.

historical market shares of WA or share of usage by consumers does not accurately reflect the market power of a firm.

5. Section 4(2)(a)(i) - Users are not compelled to use WA Pay by virtue of them using WA, as to use WA Pay, users have to accept a separate 'terms of service' agreement and privacy policy. Additionally, they also have to separately provide information and undertake various steps to link their bank account. Thus, there is no element of imposition or 'coercion' as it is a voluntary step.
6. Section 4(2)(d) - WA and the payment feature, WA Pay, are not separate products, rather the latter is simply an additional feature, whose launch is subject to approval by the NPCI. Thus, the question of bundling does not arise, as the requirement of there being two separate products is not satisfied.
7. Section 4(2)(e) - Since users retain full discretion and optionality in choosing whether to use WA Pay, there is no question of 'abuse' of dominant position by WA.

### **Order by the Competition Commission of India**

The CCI ruled in favour of WA, and held that there is no contravention of law. The basis of the dismissal was that UPI payment apps is still an evolving market and considering that WA Pay is still in its beta phase, it is implausible to assume that "*WhatsApp Pay will automatically get a considerable market share based on pre-installation.*"<sup>12</sup> The detailed order by the CCI is as follows:

### ***Locus Standi***

The CCI ruled in favour of the Informant while recognising that the purpose of the Act is to follow an inquisitorial system. Moreover, it was highlighted that the case at hand involves competition issues *in rem*, thus addressing a larger question of market distortion.

The CCI also stated that the Informant classifies as an aggrieved party within the meaning of the Act, and there is no requirement for an aggrieved party to show direct injury as a consumer. Neither the Act specifies any such requirement explicitly, nor can the same be implicitly read into the provisions which clearly point towards the inquisitorial scheme of the Act. This is furthered by the fact that the CCI has the powers to initiate proceedings *suo moto* as well.

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<sup>12</sup> *Ibid* 1 at para. 97.

### **Relevant Market**

The CCI observed that WA and Facebook are third-party apps providing internet-based communication services which can be sub-segmented and thus, are not functionally substitutable. WA being primarily an over-the-top (OTT) messaging app, and Facebook being a social networking app which connects many users simultaneously, means that both function in different markets. With that reasoning, the CCI rejected the broad market i.e. 'market for user attention' proposed by the Parties.

The CCI then observed that RM1 would be 'market for OTT messaging apps through smartphones in India' and RM2 for the purposes of assessment of competition allegations would be 'market for UPI-enabled digital payment apps in India'. It also stated that even though in terms of nomenclature, RM1 appears different from the one proposed by the Informant, it largely covers the same set of players and competition dynamics.

### **Dominant Position**

The CCI observed that Facebook and WA are group entities and though they may operate in separate relevant markets, their strengths can be attributed to each other's positioning in their respective markets. In that regard, WA's market position must be assessed keeping in mind its affiliation to Facebook. Thus, CCI held WA to be *prima facie* dominant in RM1 i.e. 'market for OTT messaging apps through smartphones in India'.

While ascertaining the dominance of WA, the CCI relied on factors such as advantage to WA because of network effects, lack of interoperability between platforms, and increased switching costs, among other things.

### **Abuse of Dominance**

The CCI did not find merit in the allegations by the Informant with regard to WA abusing its dominant position and stated that the mere existence of an app on the smartphone does not necessarily convert into transaction/usage.

With regards contravention of Section 4(2)(a)(i) of the Act, the CCI took into consideration WA's assurance that users will continue to have full discretion whether to use WA Pay or not, subject to separate registration requiring the users to accept a 'terms of service' agreement and privacy policy. Thus, the CCI ruled in favour of WA.

While determining the violations under Section 4(2)(d) of the Act, the CCI partially agreed with the Informant, but opined in favour of the Parties. The CCI took to clarifying that the allegation would actually be of 'tying' and not 'bundling'. That is because 'tying' refers to a practice whereby the seller of a product or service requires the buyers to also purchase another separate product or service. On the other hand, 'bundling' typically means that two products are sold by the seller in a fixed proportion as a bundled package at a particular price.

The CCI further laid down certain conditions which must be fulfilled to determine a case of 'tying':<sup>13</sup>

1. The tying and tied products are two separate products;
2. The entity concerned is dominant in the market for the tying product;
3. The customers or consumer does not have a choice to only obtain the tying product without the tied product; and
4. The tying is capable of restricting/foreclosing competition in the market.

The CCI by differentiating between 'tying' and 'bundling' made it clear that WA and WA Pay are two distinct and separate products with different functionalities. Moreover, it was already ascertained by the CCI that WA is dominant in the RM1 i.e. 'market for OTT messaging apps through smartphones in India'. Therefore, the first two conditions to determine 'tying' were fulfilled.

However, the CCI ruled that the third and fourth conditions are not fulfilled. With regard to the third condition, the CCI observed that the consumers are at freewill to use WA Pay or any other UPI-enabled digital payments app and the installation of the former does not explicitly mandate or coerce the user to use WA Pay exclusively or to influence consumer choice.

With regards the fourth condition, the CCI observed that the UPI-enabled digital payments market consists of various established players. *"To perceive that WhatsApp will automatically get a considerable market share only on the basis of its pre-installation seems implausible."*<sup>14</sup> Further, the CCI also noted that WA Pay had only recently (February 2020) been granted approval to act as a payment app in India in beta version. It also seems to have complied with the data localisation norms as

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<sup>13</sup> *Ibid* 1 at para. 93.

<sup>14</sup> *Ibid* 1 at para. 97.

stipulated by NPCI to operate fully. Thus, as the actual conduct of the app is yet to manifest in the market, the CCI agreed with the Parties that the allegations on WA are premature. Thus, the fourth condition is also not fulfilled.

Lastly, with regards to allegations by the Informant about misuse of data by the Parties, the CCI opined that:<sup>15</sup>

*"Facebook and WhatsApp undeniably deal with customer sensitive data which is amenable to misuse and may raise potential antitrust concerns among other data protection issues. However, in the present case, the Informant has only alleged that WhatsApp/Facebook have access to data which they are using for doing targeted advertising. There is neither any concrete allegation, nor any specific information to support the competition concern of the Informant."*

Thus, the CCI held that the concerns raised by the Informant related to data security also do not raise any competition concerns and therefore, do not warrant any further scrutiny.

## Analysis

With this order, the CCI has clearly demonstrated that there is still room for recognising and appreciating the power of network effects and convenience. By finding no contravention in WA automatically installing WA Pay on the users' phone, the CCI has shown that we are still waiting for an *ex post* competition assessment, rather than conducting an *ex ante* assessment and stopping the harm before it is caused.

This is problematic given the increasingly dynamic markets we are facing right now. In that regard, it becomes important for the CCI to (while safeguarding the rights of businesses) recognise which conduct/deals by companies have the 'potential' to cause an AAEC, and thus regulate them before such potential harm translates to real harm.

The CCI also failed to address the questions related to data issues raised by the Informant. The rationale given was that the Informant has not made any concrete allegation – however, since the CCI has the power to initiate investigations *suo moto*,

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<sup>15</sup> *Ibid* 1 at para. 101.



why did it need more 'concrete' allegations from the Informant? The CCI could have followed suit of the German Competition Authority and the German Federal Court and decided to at least deliberate upon this further, rather than simply dismissing it. Data protection issues become even more vital when substantial concerns were already raised related to WA adhering to data localisation norms, which delayed the full scale launch of WA Pay for over two years.

The CCI opined that the mere installation of WA Pay on users' phone does not amount to any contravention of the law, as the user still has full discretion to use it or not. However true that might be, the CCI failed to take into consideration the Indian audience/user base. Indian users feed off convenience. The fact that India is WA's largest market, with a 400 million user base, shows the enormous network effects that WA will enjoy after launching WA Pay and automatically installing it on users' phones. Currently, India's average UPI transactions per month are estimated to be around 790 million.<sup>16</sup> The addition of a UPI feature on WA will enable it with a 400 million subscriber base instantaneously.

In that regard, the argument that merely a 'pre-installation' does not amount to an abuse, can be rebutted simply by the argument 'why have two apps on your phone when one of them does the job'. WA company officials have also agreed to the great network effects they will enjoy. One of them quoted to the Economic Times that, *"WhatsApp is already ubiquitous in India and payments will just be a default option on the app, unlike other apps which people will have to download separately."*<sup>17</sup>

It is imperative to understand the 'default' option here. The argument for privacy policies on apps and 'default' settings have been debated enough to know that consumers do not generally change these 'default' settings. Having a default option on WA to transact with people on their contact list, increases users' convenience, which WA can easily feed off to enjoy unparalleled network effects.

There is a reason why Facebook is not entering the market with a Facebook Pay (which has recently been launched in the United States of America), or Messenger Pay or Instagram Pay, or even a separate app for WA Pay, for that matter. The idea is

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<sup>16</sup> UPI Product Statistics, <https://www.npci.org.in/product-statistics/upi-product-statistics>.

<sup>17</sup> Anandita Singh Mankotia and Anumeha Chaturvedi, 'Concerns over security: Govt fears WhatsApp may share payments data with Facebook, others', The Economic Times, 26 July 2019, <https://economictimes.indiatimes.com/tech/internet/concerns-over-security-govt-fears-whatsapp-may-share-payments-data-with-facebook-others/articleshow/70388273.cms?from=mdr>.

very clear – to tie payments as a feature to WA. Even the CCI has opined that WA is dominant in the market for OTT messaging apps.

There is no doubt that on the face of it and taking into consideration the provisions of the Act, the analysis by the CCI is correct. Facebook and WA will also be relieved to have gotten some leeway. However, while more competition is objectively good for the users, it needs to be seen how and from whom such competition is entering the market. In this case, it might not be a plus point considering it is coming from one large conglomerate – which will have access to customer sensitive data and payments in volumes, which can act as a single point of failure.

If gone unchecked and unregulated, WA has the potential to become India's WeChat – a social networking app in China that allows users to do everything from messaging, calling, shopping, payment, and host of other services on a single platform. WA already has a business feature, which acts as the main or only online presence for many mom-and-pop stores.<sup>18</sup>

It is time for the CCI to adapt a futuristic *ex ante* approach, rather than waiting for companies to cause an AAEC in the market, which more often than not, is irrecoverable making it almost impossible to return to the *status quo*.

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<sup>18</sup> Mario Sergio Lima and Kurt Wagner, 'Brazilian Authorities Suspend WhatsApp Payments', Bloomberg Quint, 24 June 2020, <https://www.bloombergquint.com/business/brazil-s-central-bank-suspends-whatsapp-payments>.