

Data Sharing between WhatsApp and Facebook: The CCI Opens an Investigation Against the Social Juggernauts

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Edited By Geeta Gouri & Swarnim Shrivastava

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Introduction

The switch from traditional brick-and-mortar business models to rapidly a evolving digital mode of doing business has impacted the way the Competition Commission of India (“CCI”) has been looking at cases involving data privacy and protection issues. The decisions by the CCI in the past few years indicate how the CCI has been slowly acclimatizing itself to these changing markets. Particularly with regard to competition cases involving WhatsApp as a party, the paradigm shift in the CCI’s decisional practice is evident.

Can the CCI Regulate Data Sharing and Privacy Concerns?

Earlier in June 2017 the CCI examined allegations of abuse of dominance against WhatsApp. It was alleged that WhatsApp’s privacy policy, updated in 2016, compels its users to share their data with Facebook. However, in dismissing the allegations the CCI observed that users were provided with the option to opt out of sharing user account information with Facebook within 30 days of the updated terms coming into operation. On the allegations of a breach of the Information Technology Act, 2000 (“IT Act”) and right to privacy, the CCI observed that violations of the IT Act do not fall within its purview.¹

Interestingly, in August 2020, the CCI noted that Facebook and WhatsApp undeniably deal with sensitive data which is amenable to misuse (i.e., through targeted advertisement) and may raise potential antitrust concerns, among other data protection issues. However,

in absence of any concrete accusation or specific information, the case against WhatsApp was dismissed with respect to the allegation of misuse of consumer data.²

In June³ and November⁴ 2020, while analyzing two combinations involving prominent players, the CCI noted that business combinations between entities having access to user data can be analyzed from the perspective of data-backed market power. Be that as it may, both combinations were approved by the CCI with a caveat that any anticompetitive conduct resulting from data sharing could be taken up under enforcement provisions (i.e., Section 3 and Section 4) of the Competition Act, 2002 (“Competition Act”).

Notably, the CCI in its E-commerce Report and Telecom Report had highlighted some data related issues that may raise competition concerns. The Market Study on E-commerce in India (“E-commerce report”) observed the intermediary role of the platform which allows it to collect and leverage competitively relevant data to enhance the quality of their platform and either introduce their own private label or boost its ‘preferred seller’.⁵

Recently, in March 2021 the CCI ordered a *suo moto* investigation against WhatsApp and Facebook (“WhatsApp Privacy Policy Case”). The CCI observed that WhatsApp through its updated privacy policy has made it mandatory for its users to accept the new terms and privacy policy including sharing their data with Facebook. Thereby, the CCI formed a *prima facie* opinion that the ‘take-it-or-leave-it’ nature of WhatsApp’s updated privacy policy and terms of service appear to be unfair for

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¹ *Vinod Kumar Gupta v. WhatsApp Inc.*, Case No. 99 of 2016.

² *Harshita Chawla v. WhatsApp Inc & Facebook Inc.*, Case No. 15 of 2020.

³ Combination Registration No. C-2020/06/747.

⁴ Combination Registration No. C-2020/09/775

⁵ *Market Study on E-commerce in India*, Competition Commission of India (January 8, 2020).

WhatsApp's users, and accordingly ordered a detailed investigation. Notably, the CCI also observed that cross-linking and data integration can strengthen the data advantage, as well as safeguarding and reinforcing the market power of dominant firms. Further, for Facebook collecting data from WhatsApp can be a means to supplement the consumer profiling that Facebook engages in across a vast number of locations and devices outside the Facebook platform. Thus, the CCI observed that the impugned data sharing provision may have exclusionary effects in the display advertising market, which has the potential to undermine the competitive process and create entry barriers other than leveraging.⁶

Is the CCI Stepping Beyond Its Jurisdiction?

The WhatsApp Privacy Policy Case also dealt with issues challenging the jurisdiction of the CCI in matters concerning data. The case has surely raised certain doubts as to whether the CCI has jurisdiction to deal with data-related matters in the absence of any data regulator.

Interestingly, in its Market Study on the Telecom Sector in India ("Telecom Report") the CCI observed that while overlapping jurisdictions between institutions cannot be eliminated, they ought to be harmonized through better regulatory design and improved lines of communication.⁷

The legislature had foreseen such issues and included inbuilt safeguards to deal with such issues. While Section 60 of the Competition Act contains a *non-obstante* clause and expressly provides that the provisions of the Competition Act will have effect notwithstanding anything inconsistent contained in any other law, Section 62 expressly provides that. The Competition Act would be in addition to and not in derogation of the provisions of any other law.

Nevertheless, WhatsApp and Facebook

challenged the order of the CCI before the Delhi High Court ("DHC"). WhatsApp argued that since the judicial challenge to its updated privacy policy is already pending before the Supreme Court and the DHC, it is not proper for the CCI to consider the same issues in exercise of its *suo moto* powers under the Competition Act. Earlier in the *Bharti Airtel* case, the Supreme Court deferred the jurisdiction of the CCI until the Telecom Regulator of India examines and decided upon the factual and technical matrix of the case. However, the DHC limited the application of the *Bharti Airtel* case and upheld the jurisdiction of the CCI to adjudicate upon competition concerns pertaining to data collection and usage. It further observed that it would have been prudent for the CCI to have awaited the outcome of the petitions before the Supreme Court and the DHC. However, pending petitions before other courts cannot oust the jurisdiction of the CCI.⁸

Presently, the matter is *pendente lite* in the DHC and awaits consideration by the division bench. Needless to say, the case would leave behind a historic precedent for similar disputes on the subject.

Global Trends: Antitrust Wave Against the Big Techs?

'Data' is the new 'profit' and the global trends indicate that the antitrust regulators worldwide are well aware of it. In Europe, the European Commission ("EC") has proposed two legislative proposals: The Digital Services Act ("DSA") and the Digital Markets Act ("DMA"), as part of the European Digital Strategy. While the DMA governs gatekeeper online platforms and targets lack of competition in the digital market, the DSA governs online intermediaries and is essentially concerned with transparency and consumer protection.⁹ Meanwhile, in the United States, the House Judiciary Committee's

⁶ *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Suo Moto Case No. 01 of 2021.

⁷ *Market Study on the Telecom Sector in India*, Competition Commission of India (January 22, 2021).

⁸ *WhatsApp LLC v. Competition Commission of India*, W.P.(C) 4378/2021 & CM 13336/2021.

⁹ [Aline Blankertz](https://www.brookings.edu/techstream/what-the-european-dsa-and-dma-proposals-mean-for-online-platforms/) and [Julian Jaurisch](https://www.brookings.edu/techstream/what-the-european-dsa-and-dma-proposals-mean-for-online-platforms/), *What the European DSA and DMA proposals mean for online platforms*, BROOKINGS (January 14, 2021), <https://www.brookings.edu/techstream/what-the-european-dsa-and-dma-proposals-mean-for-online-platforms/>

Subcommittee on Antitrust, Commercial, and Administrative Law released an investigation report on competition on digital markets. The report is the result of 16 months investigation launched against the Big 4 tech giants- Google, Apple, Facebook, and Amazon.¹⁰

In particular, the Indian competition watchdog isn't the first antitrust regulator to have initiated an investigation against WhatsApp over its new privacy policy. On January 11, the Turkish Competition Authority announced that it will launch an investigation against Facebook and WhatsApp to determine whether there's been an abuse of market dominant position.¹¹ Moreover, only last year on June 23, 2020, the (German) Federal Court of Justice held Facebook guilty of abusing its dominant position by sharing data across platforms without their users' consent.¹² Recently on March 24, 2021, the Higher Regional Court of Düsseldorf halted the proceedings and filed a request for a preliminary ruling before the European Court of Justice ('ECJ') thereby putting the ball in their court.¹³

Conclusion

It is evident from the trends indicated in this note that Antitrust enforcers around the world are becoming increasingly active in launching cases against the big tech companies. At the same time, many countries are actively enacting new privacy laws. Be that as it may, the trends beg the question: How is the intersection between data privacy laws and competition law going to affect the business community? Apart from ongoing proceedings against WhatsApp's updated privacy policy, the Ministry of Electronics and Information Technology also issued a cautionary notice to WhatsApp to roll back its update in the privacy policy on May 18, 2021.¹⁴ Evidently, the Indian government is taking a hardline stance on the new updates, but WhatsApp is also giving a fair fight in the belief that their policy does not affect personal messages but only business communication, with users having an option to block businesses they want to interact with. However, there is very little certainty on how things are going to unfold for the Big Tech giants in the near future.

¹⁰ *Investigation of Competition in Digital Markets*, Subcommittee on Antitrust, Commercial, and Administrative Law (October 4, 2020).

¹¹ [Kayahan Cantekin](https://www.loc.gov/law/foreign-news/article/turkey-personal-data-protection-authority-and-competition-authority-launch-probes-into-changes-in-whatsapp-privacy-policy/), *Turkey: Personal Data Protection Authority and Competition Authority Launch Probes into Changes in WhatsApp Privacy Policy*, LIBRARY OF LAW CONGRESS (February 8, 2021), <https://www.loc.gov/law/foreign-news/article/turkey-personal-data-protection-authority-and-competition-authority-launch-probes-into-changes-in-whatsapp-privacy-policy/>

¹² *The Federal Court of Justice provisionally confirms the allegation of abuse of a dominant market position by Facebook*, FEDERAL COURT OF JUSTICE (June 23, 2020), <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html>

¹³ Higher Regional Court Düsseldorf, Kart 2/19 (V), (March 24, 2021), https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html

¹⁴ Rounak Jain, *Indian government threatens legal action against WhatsApp's new privacy policy – WhatsApp refuses to back down*, BUSINESS INSIDER INDIA (May 20, 2021), <https://www.businessinsider.in/tech/apps/news/indian-government-asks-whatsapp-to-scrap-its-privacy-policy-calls-it-unfair-and-discriminatory/articleshow/82796725.cms>.