

# LAW & POLICY UPDATE

## COMPETITION & ANTITRUST



## Clearing the way for WhatsApp Pay, CCI says no abuse of dominance

By: Bharat Sharma, Partner & Krishal Morjaria, Associate

In its order dated August 18, 2020, Competition Commission of India (**CCI**) dismissed allegations of abuse of dominant position which were levelled against WhatsApp and Facebook in anticipation of introduction of their online payments service, WhatsApp Pay, in Indian market.

WhatsApp Pay, an in-chat payment option that is intended to be made available to users of the popular instant messaging service WhatsApp, was launched to a million such users in India on a trial basis in February 2018. It allows users to send and receive money online via Unified Payments Interface (**UPI**), developed by National Payments Corporation of India (**NCPI**).

On February 07, 2020, NPCI gave its approval to roll out WhatsApp Pay in India in a phased manner. Subsequently, an informant raised allegations of abuse of dominant position against WhatsApp Inc. (WhatsApp) with respect to the launch of WhatsApp Pay. These allegations have been dismissed by CCI in its recent order of *Harshita Chawla v. WhatsApp and Facebook*.

Ms. Harshita Chawla (**Informant**) petitioned before CCI under Section 19(1)(a) of Competition Act, 2002 (**Act**), alleging contravention of provisions of Section 4 of the Act. The contentions laid down by Informant in his petition to CCI can be categorized primarily into following two sets:

- WhatsApp is leveraging its existing dominant position in relevant market of internet-based instant messaging applications, in order to create a stronghold in market for UPI enabled digital payment applications, which is being done by pre-installation of WhatsApp Pay service in WhatsApp messenger application. This pre-installation amounts to imposition of an unfair term/condition on the user by WhatsApp as a dominant entity. Also, since there are two different markets in question, two products released by WhatsApp should be made available independently of each other and the fact that it is not so amount to bundling of two services, as a result of which there is an element of coercion involved. For evidence, Informant has relied on information available in the public domain.
- Facebook, WhatsApp and their other group entities together cause an adverse effect on the competition as these companies have huge data sets of users which they intend to use to create a monopoly by driving out healthy competitions from their markets.

Certain additional issues were raised as well regarding security of user data and national security being potentially compromised if anti-competitive activities of WhatsApp and Facebook (**Opposing Parties**) are left unchecked and unregulated. The Informant prayed to CCI for an investigation against Facebook and WhatsApp under the Act and in meanwhile, to order Opposing Parties to cease their abuse of dominance which they are conducting by bundling their digital payment service with their messenger service.

The submissions by the Opposing Parties as responses to these allegations were that:

- The Informant has no locus standi due to not being an aggrieved party itself and that the petition should be dismissed on this ground itself.
- WhatsApp does not operate in two separate relevant markets as contended by the Informant but in fact is in one relevant market being the '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.
- There exists no element of coercion because users have the option to opt in for the payment service by accepting a separate 'terms of service' agreement without there being any mandatory imposition of the same.
- The payments service is not a product in of itself, instead is an additional feature being offered, which is similar to when WhatsApp had introduced new features such as voice messaging, video calling, image and document sharing, among others.

CCI order in this matter dismissed the allegations of abuse of dominant position against Opposing Parties. On the first count, CCI observed that an Informant need not necessarily be an aggrieved party to file a case under the Act since neither the spirit of the Act nor any specific provision calls for such a narrow interpretation of the definition. It also rejected proposal of WhatsApp that there is only one relevant market i.e. 'market for user attention'. It observed that this does not hold true and in fact market segmentation suggested by Informant is correctly interpreted.

Regarding dominant position, CCI observed that while it may not be easy to ascertain with preciseness the size of the market and relative market share of WhatsApp, market data relied upon by the Informant does give an indication of dominance of WhatsApp in market and its popularity among Indian users. Thus, CCI held WhatsApp to be prima facie dominant in first relevant market i.e. 'market for OTT messaging apps through smartphones in India'. However, CCI also observed that Act does not prohibit mere possession of dominance that could have been achieved through superior economic performance, innovation, or pure accident but only its abuse.

Given that WhatsApp categorically offers full discretion to its users with regard to opting in for its payment service, there seems to be no element of coercion involved as alleged by Informant and hence it follows that there has been no abuse of its dominant position by WhatsApp. This manner of introduction of a new service cannot be said to be a case of bundling of services, it is instead to be understood as a practice of 'tying' in terms of the antitrust context, whereby sale of one product requires customer to also buy another product as a condition of first transaction. The practice of 'tying' in this case is however not said to result in an antitrust case due to a choice being offered to the customer.

CCI also admitted that Opposing Parties being group entities, in spite of operating in separate markets, can be said to be in an advantageous position in respective markets in which they operate as a result of their combined strengths and that the same may result into potential antitrust and other data protection issues. However, it observed, in current case no specific information has been shared which supports these claims.

In conclusion, CCI did not find any contravention of the provisions of abuse of dominance of the Act against Opposing Parties and directed closure of matter.

