

The Competition Law Case Against Whatsapp's 2021 Privacy Policy Alteration

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Executive Summary

On January 4, 2021, Whatsapp announced a revised privacy policy through an in-app notification. It highlighted that the new policy would impact user interactions with business accounts, including those which may be using Facebook's hosting services. The updated policy presented users with the option of either accepting greater data sharing between Whatsapp and Facebook or being unable to use the platform post 15th May, 2021. The updated policy resulted in temporarily slowed growth for Whatsapp and increased growth for other messaging apps like Signal and Telegram. While Whatsapp has chosen to delay the implementation of this policy due to consumer outrage, it is important for us to unpack and understand what this (and similar policies) mean for the digital economy, and its associated competition law concerns. Competition law is one of the sharpest tools available to policy-makers to fairly regulate and constrain the unbridled power of large technology companies.

While it is evident the Indian competition landscape will benefit from revisiting the existing law and policy framework to reign in Big technology companies, we argue that the change in Whatsapp's privacy policy in 2021 can be held anti-competitive using legal provisions as they presently stand. Therefore, in this issue brief, we largely limit ourselves to evaluating the legality of Whatsapp's privacy policy within the confines of the present legal system.

First, we dive into an articulation of the present abuse of dominance framework in Indian Competition Law. Second, we analyze whether there was abuse of dominance-bearing in mind an economic analysis of Whatsapp's role in the relevant market by using tests laid out in previous rulings of the CCI

The framework for determining abuse of dominance as per The Competition Act is based on three factors:

1. Determination of relevant market
2. Determination of dominant position
3. Abuse of the dominant position

In two previous orders in 2016 and 2020, CCI has held that Whatsapp is dominant in its relevant market based on several factors, some of which we explore in some detail. These include:

1. Advantage in user base, usage and reach,
2. Barriers to entry for other competitors
3. Power of acquisition over competitors.

However, in both orders, CCI held that Whatsapp did not abuse its dominance by arguing that the practices in question allowed for user choice. We critique these judgments for not reflecting the market structures and exploitative practices of large technology companies.

We also argue that even if we use the test of user choice laid down by the CCI in its previous orders concerning Whatsapp and Facebook, the changes made to the privacy policy in 2021 did abuse dominance, and should be held guilty of violating competition law standards.

Our analysis revolves around examining the explicit and implicit standards of user choice laid out by the CCI in its 2016 and 2020 judgements as the standard for evaluating fairness in an Abuse of Dominance claim. We demonstrate how the 2021 changes failed to meet these standards.

Finally, we conclude by noting that the present case offers a crucial opportunity for India to take a giant step forward in its regulation of big tech companies and harmonise its rulings with regulatory developments around the world.

Introduction

On January 4, 2021, Whatsapp announced a revised privacy policy through an in-app notification.¹ It highlighted that the new policy would impact user interactions with business accounts, including those which may be using Facebook's hosting services. The updated policy presented users with the option of either accepting greater data sharing between Whatsapp and Facebook or being unable to use the platform post 15th May, 2021.² Not only has the updated policy resulted in temporarily slowed growth for Whatsapp and increased growth for other messaging apps like Signal and Telegram³, it has also prompted an antitrust hearing against Facebook in Turkey.⁴ Such discussions are hardly new, with a number of countries across the world analysing and critiquing the dominant stronghold that Facebook possesses in the field of social networks.⁵

Following this backlash, on January 13, 2021, WhatsApp published a blog post⁶ clarifying that the changes did not apply to personal communications (with friends and relatives) but only to communication with businesses via the Whatsapp platform. As per WhatsApp, messages to business accounts on WhatsApp can be shared with third-party service providers, which may include Facebook itself. As per the blog, "But whether you communicate with a business by phone, email, or WhatsApp, it can see what you're saying and may use that information for its own marketing purposes, which may include advertising on Facebook." While the content of messages remain encrypted, sharing metadata with Facebook also provides a competitive boost to Facebook's business

¹ Tech Desk, "Whatsapp privacy policy update delayed: Everything that has happened so far," *Indian Express*, Jan 16, 2021, <https://indianexpress.com/article/technology/social/whatsapp-privacy-policy-update-delayed-your-account-wont-be-deleted-7148553/>, For an explanation of the privacy concerns see Pallavi Bedi and Shweta Reddy, "PDP Bill is coming: Whatsapp privacy policy analysis," Centre for Internet & Society, 18 Jan 2021, <https://cis-india.org/internet-governance/blog/pdp-bill-is-coming-whatsapp-privacy-policy-analysis>

² Deeksha Somani, "What Will Happen If I Do Not Accept WhatsApp New Privacy Policy?," *Gadget Now* (blog), accessed March 4, 2021, <https://www.gadgetsnow.com/faqs/what-will-happen-if-i-do-not-accept-whatsapp-new-privacy-policy/article-show/81308329.cms>.

³ "WhatsApp Growth Slumps as Rivals Signal, Telegram Rise," *NBC News* (blog), accessed January 15, 2021, <https://www.nbcnews.com/tech/tech-news/whatsapp-growth-slumps-rivals-signal-telegram-rise-rcna223>.

⁴ "Turkey Starts Antitrust Investigation into WhatsApp, Facebook," *The Indian Express* (blog), January 12, 2021, <https://indianexpress.com/article/technology/tech-news-technology/turkey-starts-antitrust-investigation-into-whatsapp-facebook/>.

⁵ "FTC Sues Facebook for Illegal Monopolization," Federal Trade Commission, December 9, 2020, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>. Aoife White, "Facebook Is the Latest Tech Company to Come under EU's Antitrust Scrutiny - BNN Bloomberg," *BNN Bloomberg* (blog), July 2, 2019, <https://www.bnnbloomberg.ca/facebook-is-latest-tech-company-to-come-under-eu-s-antitrust-scrutiny-1.1281705>.

⁶ "Answering your questions about Whatsapp's privacy policy" (blog), <https://faq.whatsapp.com/general/security-and-privacy/answering-your-questions-about-whatsapps-privacy-policy/?lang=en>

strategy which centres around targeted advertising, which means that Whatsapp's policy change must comply with competition law.

While Whatsapp has chosen to delay the implementation of this policy due to consumer outrage, it is important for us to unpack and understand what this (and similar policies) mean for the digital economy, and its associated competition law concerns.

The Indian competition law framework will certainly benefit from revisiting the existing law and policy framework to reign in Big technology companies, we argue that the change in Whatsapp's privacy policy in 2021 can be held to be anti-competitive using legal provisions as they presently stand. Therefore, in this Issue Brief, we largely limit ourselves to evaluating the legality of Whatsapp's privacy policy within the confines of the present legal system, and existing jurisprudence laid down by the CCI.

First, we dive into an articulation of the present abuse of dominance framework in Indian Competition Law. Second, we analyze whether there was abuse of dominance-bearing in mind an economic analysis of Whatsapp's role in the relevant market by using tests laid out in previous rulings of the CCI.

Background

The tussle regarding Whatsapp's privacy policy and data sharing practices with Facebook started as far back as 2016. That year, Whatsapp announced an alteration of its privacy policy to share some user data with Facebook for several purposes, including targeted advertising. Whatsapp users were given a thirty day window to opt out of this sharing mechanism, after which its data would be shared anyway. The policy was challenged before the Delhi High Court for violating citizen privacy.⁷ The Delhi High Court did not invalidate the policy but ascribed a cut off-date (September 25th 2016) holding that the data collected before that date had to be deleted and not shared with Facebook, an order Whatsapp complied with.⁸ The privacy policy was also challenged before the Competition

⁷ Supreme Court Observer, "Whatsapp-Facebook Privacy," (blog), <https://www.scobserver.in/court-case/whatsapp-facebook-privacy-case>. Delhi High Court judgment (23rd Sept) of 2016 available at: https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1194/WhatsApp_DHC_Order.pdf

⁸ *Ibid*

Commission of India (CCI) by a complaint alleging abuse of dominance.⁹The CCI held in favour of Whatsapp¹⁰ [**hereinafter ‘2016 CCI order’**].

The company was once again brought before the CCI in 2020 on different grounds that its integration of a payment option (Whatsapp Pay) into its application was anticompetitive. Even though this petition did not concern data sharing practices, this provided the CCI with another opportunity to highlight Whatsapp’s anti-competitive practices. However, the CCI in its order found that once again Whatsapp did not abuse its dominance¹¹ [**hereinafter ‘2020 CCI order’**]

Five years later, the regulatory mood world-over has changed with all states, with even the laissez-faire driven United States looking to reign in Big Tech through antitrust legislation.¹² A re-examination of key economic and legal issues posed by exploitative data-sharing practices is key for protecting consumer welfare in today’s digital economy.

Explanation of competition law framework

Before diving into this analysis, let us quickly unpack the relevant competition law framework in the Indian Competition Act, 2002 [**hereinafter ‘Competition Act’**] here.¹³

⁹ Competition Commission of India, “Case No. 99 of 2016,” 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

¹⁰ Competition Commission of India, “Case No. 99 of 2016,” 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

¹¹ Competition Commission of India, “Case No. 15 of 2020,” 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

¹² Kari Paul, “‘This Is Big’: US Lawmakers Take Aim at Once-Untouchable Big Tech,” *The Guardian*, December 19, 2020, sec. Technology, <http://www.theguardian.com/technology/2020/dec/18/google-facebook-antitrust-lawsuits-big-tech>.

This is further evidenced by Biden inducting long-term Big tech skeptic Tim Wu into his administration: Cecilia Kang, “A Leading Critic of Big Tech Will Join the White House,” *The New York Times*, March 5, 2021, sec. Technology, <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html>.

Further as per reports, Biden will also nominate high profile anti trust scholar Lina Khan to the Federal Trade Commission:

Ryan Tracy and John D. McKinnon, “Biden to Name Antitrust Scholar Lina Khan for FTC Post,” *Wall Street Journal*, March 9, 2021, sec. Politics, <https://www.wsj.com/articles/biden-to-name-antitrust-scholar-lina-khan-for-ftc-post-11615316987>.

¹³ T. Ramappa, *Competition Law in India: Policy, Issues, and Developments* (Oxford University Press, 3rd ed, 2016) 156-170

Modern competition economics argues that abuse of a dominant position by a player harms consumer welfare and therefore must be prevented.¹⁴ An investigation to determine an 'abuse of dominance' allegation proceeds on three steps.

1. Determination of the 'relevant market.'

The first step in the investigation is to identify the relevant market, which must be done to identify the degree to which a specific undertaking is dominant within that specific market. The relevant market may be characterized in terms of 'product' (specific item, class of items or benefits rendered) or 'geography' (benefits rendered in any given geographic territory).

2. Determination of dominant position

A dominant position is defined under Section 4 of the Competition Act as a position enjoyed by an enterprise which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.¹⁵ Section 19(4)¹⁶ of the Competition Act elucidates several factors which may be considered during an investigation into dominance. These include market share of the enterprise; size and resources; economic power, including commercial advantages over competitors; and consumers dependence on the enterprise.

3. Determination of abuse of dominance

The competition law framework in India does not view mere dominance as a violation and mandates a determination of abuse of dominance by the entity. A set of criteria to determine abuse are laid out in Section 4(2) (a to e)¹⁷ of the Competition Act. If it is found

¹⁴ *Ibid*, at 156

¹⁵ *Ibid*. at 156

¹⁶ Section 19(4), 2002 Competition Act. Available at:

http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—(a) market share of the enterprise; (b) size and resources of the enterprise; (c) size and importance of the competitors; (d) economic power of the enterprise including commercial advantages over competitors; (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise; (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (i) countervailing buying power; (j) market structure and size of market; (k) social obligations and social costs; (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any other factor which the Commission may consider relevant for the inquiry

¹⁷ Section 4(2), Competition Act, 2002, Available at:

http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

to be abusing dominance, then the Competition Commission may pass any orders as per Section 27 or direct a division of the enterprise as per Section 28 of the Competition Act.¹⁸

Is there abuse of dominance here?

In order to answer the question of whether the change in Whatsapp's privacy policy results in abuse of dominance on the part of WhatsApp, we use the three pronged approach that mirrors the competition law framework outlined in the Competition Act. The first step of our approach is to identify the relevant market(s) in which Whatsapp and Facebook operate. Secondly, we determine whether WhatsApp occupies a position of dominance within this market, keeping in context its relationship with Facebook. Finally, we examine the characteristics of WhatsApp's actions with respect to its position in the market to determine whether it has abused a dominant position to create anti-competitive outcomes.

Relevant market

The first step to investigating an abuse of dominance claim is understanding the relevant market for Whatsapp.

In its 2016 order, the CCI described the relevant market for whatsapp as "the market for instant messaging services using consumer communication apps through smartphones."¹⁹ It updated this definition in its 2020 CCI Order, noting that the relevant product market for Whatsapp was the "market for Over-The-Top (OTT) messaging apps through smartphones." The relevant geographic market was India.²⁰

The CCI, in that very order, also pointed out that there existed a distinction between the relevant market occupied by Whatsapp and that occupied by Facebook - describing them as an OTT application and a Social Networking application respectively. A similar conclusion was achieved recently in abuse of dominance proceedings against Facebook in Germany. German Competition authorities where Whatsapp was considered to be a separate market due to their technical characteristics and application.²¹ The German

¹⁸ Sections 27 and 28, Competition Act, 2002, Available at: http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

¹⁹ ¶11, Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

²⁰ Competition Commission of India, "Case No. 15 of 2020," 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

²¹ Decision, Case Summary, 15 February 2019. https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 pp.5

authorities used demand-side substitutability to hold that the relevant product market is a “private social network market with private users as the relevant opposite market side.”²²

It must be noted, however, that despite finding the fact that Whatsapp and Facebook operate in separate relevant markets the CCI still recognised that the companies’ strengths are intrinsically linked to each other’s position in the marketplace, due to Facebook’s ownership of Whatsapp.²³ This very fact will form the foundation of much of the next section’s analysis on Whatsapp’s dominant position in the marketplace.

Dominant position

Having identified the market wherein it operates, the dominant position of Whatsapp within that market can be determined by examining the metrics outlined in Section 19(4) of the Competition Act.²⁴ The Act outlines a number of indicators that regulators can point to as proof of a company’s dominant position. The Competition Law Review Committee (**CLRC**) report [**hereinafter ‘CLRC report’**] noted that the criteria laid down in 19(4) is inclusive in nature, and that 19(4)(b) which makes mention of the “size and resources of the enterprise” is broad enough to include data ownership as a factor for determining dominance.²⁵

It is worth noting that the CCI, both in the 2016 and 2020 orders, have identified Whatsapp as having a dominant position in the marketplace. Our analysis will not only reiterate the reasoning behind the CCI’s findings, but will also go further in order to demonstrate that Facebook too holds a dominant position in its market. Our purpose for doing so builds on the CCI’s finding that the strength of the two companies are linked and serves to demonstrate how Whatsapp benefits from Facebook’s position within its own market. All economic factors laid out in our analysis speak to the criteria in Section 19 (4) (a),(b),(c) and (d).

²² Ecem Susoy Uygun, “Germany’s Federal Cartel Office Prohibits Facebook From Combining User Data From Different Sources,” Mondaq (blog), March 19, 2019, <https://www.mondaq.com/germany/data-protection/791408/germany39s-federal-cartel-office-prohibits-facebook-from-combining-user-data-from-different-sources>.
Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (Bundeskartellamt February 6, 2019). Available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4

²³ “At the outset, the Commission observes that Facebook and WhatsApp are group entities and though they may operate in separate relevant markets, their strengths can be attributed to each-others’ positioning in the respective markets in which they operate”
¶180, Competition Commission of India, “Case No. 15 of 2020,” 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

²⁴ Section 19(4), 2002 Competition Act. Available at: http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

²⁵ ¶2.15, Chapter 8, “Report of the Competition Law Review Committee” (Ministry of Corporate Affairs, Government of India, July 2019), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

1. Advantages in user base, usage and reach

Whatsapp exerts an extensive advantage over competitors in terms of user base in India. As per a press conference given by the Minister of Electronics and Information Technology Ravi Shankar Prasad at the start of 2021, the messaging service has a user base of 530 million users in India.²⁶ The CCI in the 2020 order found that not only was Whatsapp the most used messaging application, but that the second most used messaging application was Facebook Messenger. As Facebook owns both Facebook Messenger and Whatsapp, they cannot be determined to be limited by each other's position in the market. It further noted that Whatsapp (independent of Facebook Messenger) had a significantly larger user base than its competitors such as Snapchat.²⁷

Moving on to Facebook, the Government's previously mentioned press conference revealed Facebook to have 410 million users in India while Instagram contributed another 210 million.²⁸ In contrast, competitors like Twitter ranked around 175 million users²⁹ - thereby clearly proving Facebook's position of dominance in its relevant market.

Whatsapp, and Facebook, undoubtedly would point to applications such as Youtube, and their enormous user base in the country as proof of a competitive marketplace. However, internal documents produced before the US House Antitrust committee indicate that Facebook themselves identify a difference between social network platforms like Facebook and Whatsapp and content consumption platforms like Youtube.³⁰ In any case the 2020 CCI Order identifies the marketplace for Whatsapp as a market for "Over-The-Top (OTT) messaging apps through smartphones in India" and the marketplace for Facebook as social networking. Since Youtube is neither a "messaging app" nor a "social networking app", it cannot be said to be in the same marketplace as Whatsapp.

2. Barriers to entry for other competitors

Another measure noted in the 2002 Act is the existence of barriers of entry into the marketplace. Whatsapp and Facebook's dominance is further entrenched by such

²⁶ Special Correspondent, "Govt Announces New Social Media Rules to Curb Its Misuse," *The Hindu*, February 25, 2021, sec. National, <https://www.thehindu.com/news/national/govt-announces-new-social-media-rules/article33931290.ece>.

²⁷ Competition Commission of India, "Case No. 15 of 2020," 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ "Investigation of Competition in Digital Markets" (Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

barriers of entry faced by competitors that seek to enter and establish themselves within the space. These barriers take two clear forms -

a) The unassailable network effect afforded to whatsapp and facebook

In the context of social networks, there is an incredibly strong network effect. This effect is the phenomena whereby the utility of the platform for both users and advertisers increases as the number of users on the platform increases.³¹ In the case of both messaging and social media applications, since platforms are not interoperable, it leads to these platforms having tipping points³², such that once a company gains dominance within a marketplace, it is difficult for competitors to overcome the network advantage the company gains. As such, Whatsapp and Facebook benefit greatly from having a user base that far exceeds their competitors. Furthermore, in the case of Whatsapp and Facebook, much of the competition being faced is by other applications within the same family of companies - such as Facebook Messenger and Instagram respectively - further solidifying the network advantages they possess.

b) High switching costs to existing users

Whatsapp, Facebook, and their family of apps, are designed in a way to ensure that they are not interoperable with other applications.³³ As such, in a situation wherein a user has their social circle spread across a multitude of platforms, the user is forced to create multiple accounts on each of these platforms. This presents users with both a real cost in terms of time taken to start this new account, the time and effort required to share information across multiple platforms as well as an opportunity cost of using one platform over another at any given time³⁴. Given that

³¹ Fiona M. Scott Morton and David C. Dinielli, "Roadmap for an Antitrust Case Against Facebook" (Omidyar Network, June 2020), <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>.

³² "Investigation of Competition in Digital Markets" (Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf, Fiona M. Scott Morton and David C. Dinielli, "Roadmap for an Antitrust Case Against Facebook" (Omidyar Network, June 2020), <https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf>.

³³ "Report of the Competition Law Review Committee" (Ministry of Corporate Affairs, Government of India, July 2019), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf
"Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report" (George J. Stigler Center for the Study of the Economy and the State, July 1, 2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

³⁴ Bill Goodwin, Sebastian Klovig Skelton, and Duncan Campbell, "How Facebook's 'Switcheroo' Plan Concealed Scheme to Kill Popular Apps," *ComputerWeekly.Com* (blog), accessed January 15, 2021, <https://www.computerweekly.com/feature/How-Facebooks-Switcheroo-plan-concealed-scheme-to-kill-popular-apps>.

these apps restrict interoperability, there is a clear lack of incentive for users to make the switch onto a competing platform.

c). Data availability

Another part of the network effect is the availability of data to Facebook when compared to competitors. Having access to a wider database can prove a critical factor in the success of a social network.

The amassing of data by online companies has enabled businesses to undertake data driven innovations that allows them to better assess consumer demands, habits, and preferences. In the context of Facebook's relationship with Whatsapp, communication with business accounts on Whatsapp can be used by Facebook to devise customised advertising for the same user based on information that the user has revealed on an entirely different platform. The CLRC has clearly stated that " access to data can represent a form of competitive advantage."³⁵ It argues that feedback loops provide incumbent businesses with the ability to monetise their services and also obtain additional funds to improve the quality of services therefore getting even more users. Such loops, the report argues, could serve as a barrier to entry in digital markets.

As such, on both the business and user side, social media platforms gain exponentially from having a larger and more detailed dataset to pull from. Access and ownership of this dataset can therefore provide a platform with a significant competitive advantage - as advertisers and users will both prefer the more personalised experience offered.

It is important to note that this aspect is not directly related to WhatsApp's dominance in its marketplace, as Whatsapp does not operate on an advertising based business model. However, as both we (as demonstrated in the following point regarding power of acquisition) and the CCI have noted,³⁶ Facebook's dominance in its marketplace has significant effects in strengthening Whatsapp's position in the OTT messaging app market in India.

3. Power of Acquisition over competitors

This final point once again speaks to the interlinked relationship between Facebook and Whatsapp's dominant positions. Facebook has, over the course of its existence, purchased over 60 other companies, that span the spectrum of digital businesses - social networks, virtual reality companies, blockchain platforms,

³⁵ ¶2.15, Chapter 8, "Report of the Competition Law Review Committee" (Ministry of Corporate Affairs, Government of India, July 2019), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

³⁶ ¶80, Competition Commission of India, "Case No. 15 of 2020," 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

content creators, etc.³⁷ Internal documents produced before the US Antitrust Committee³⁸ show how Facebook utilised a strategy of acquiring any potential competitors at a nascent stage, thereby preserving and even extending their market dominance. Given the relationship between Whatsapp and Facebook, Facebook's immense capital reserves provide Whatsapp with de facto acquisition power as well - thereby strengthening its ability to exert a dominant position over the OTT messaging app marketplace in India.

Abuse of dominance

The final stage of our analysis is to determine whether Facebook and Whatsapp have abused their dominant position in the marketplace. The conditions for abuse of dominance have been laid out in Section 4(2) of the Competition Act.³⁹

In determining whether Facebook has abused its dominant position in the marketplace we look first at the CCI's ruling on Whatsapp changes to its privacy policy in 2016 and contrast that with changes made in 2021.

CCI's 2016 order holding that there was no abuse of dominance

As mentioned previously, Whatsapp's change in its policy was challenged before the CCI. The change in its policy also related to allowing for data sharing between Whatsapp and Facebook, though it did so by providing users the option to opt out of this data sharing. The case brought forth questions of Whatsapp, and by extension Facebook's, dominance in the market. The 2016 CCI order⁴⁰ held that while Whatsapp was in a dominant position in the market, there was no abuse of dominance. The CCI's decision against a finding of abuse of dominance was premised on four broad points:

³⁷ "Investigation of Competition in Digital Markets" (Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.
Aoife White, "Facebook Told by U.K. Watchdog to Monitor Giphy Independence," *Bloomberg.Com*, August 10, 2020, <https://www.bloomberg.com/news/articles/2020-08-10/facebook-told-by-u-k-watchdog-to-monitor-giphy-independence>.

³⁸ *Ibid*

³⁹ Section 4(2), Competition Act, 2002, Available at: http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

⁴⁰ Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

First, the CCI agreed with Whatsapp's argument that data sharing with Facebook was optional due to the opt-out clause provided to users.⁴¹

Second, the CCI seemed to believe data was being shared with the 'Facebook family of companies' for legitimate purposes such as improving user and product experiences or improving infrastructure and delivery systems and overall cybersecurity.⁴² This understanding was entirely flawed. It is unclear to us why sharing greater data improves cybersecurity by "fighting spam, abuse or infringement activities." Further, improving user experience is essentially a euphemism for entrenching Facebook in the relevant market as it is able to tailor the user's online experience in a manner that allows them to attract potential advertisers, and continue to engage in targeted advertising.

Third, the CCI held that privacy and Information Technology Act infringements did not come within the jurisdiction of the CCI.⁴³

Fourth, the CCI held that zero-pricing of Whatsapp did not amount to predatory pricing as several other messaging services, including Whatsapp, earn revenue from its services and are hence able to provide the service free.⁴⁴ The second argument advanced by the CCI order refuting the notion of predatory pricing was that users retain the option to shift to other messaging services as other communication apps are also free, easily downloadable, and a user can move from one app to another.⁴⁵ However the Commission failed to consider two key considerations that would negate their conclusion. The first of these considerations is that consumers end up "paying" for these platforms by providing them with data on their personal information and preferences - which is ultimately monetized by the platform through advertising. Given the unusual nature of costs borne by the consumer in this model, a report from the CLRC Competition Law Review Committee in July 2019 found that data is subsumed under the current law's definition of price.⁴⁶

⁴¹ ¶15, Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

⁴² Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

⁴³ ¶17, Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

⁴⁴ ¶18, Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

⁴⁵ ¶19, Competition Commission of India, "Case No. 99 of 2016," 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

⁴⁶ ¶2.2, Chapter 8, "Report of the Competition Law Review Committee" (Ministry of Corporate Affairs, Government of India, July 2019), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf. As an interesting aside, if data is price, then could Whatsapp's privacy alteration be seen as charging an unfair excessive price to users as data is being shared with a greater number of entities without providing a better

Further, the CCI's conclusion ignores entirely the network effects that Whatsapp and Facebook benefit from. There is little point of shifting to another messaging application if all the individuals you message are still on Whatsapp. Abuse of dominance by technology companies was a relatively new domain for the CCI in 2016, which may have resulted in these omissions. But this was not the case in 2020.

The CCI's 2020 ruling on Whatsapp clarifying a new standard for consumer choice

In 2020, the CCI examined whether Whatsapp abused its position of dominance in the OTT messaging application market in India through integration of a payment platform called Whatsapp-Pay. As a result of this integration, a user downloading Whatsapp had to download Whatsapp Pay as well, as the payment platform came pre-installed with the messaging application. While the case involved a number of claims made by the petitioner, for the purpose of our analysis, we shall be focusing on the claim made under Section 4(2)(a)(i) of the Competition Act, i.e. "such pre-installation amounts to imposition of unfair term/condition on the user by a dominant entity i.e. WhatsApp messenger."⁴⁷

In its order⁴⁸, the CCI employed the test of 'user choice' to determine whether Whatsapp Pay's pre-installation amounted to an unfair term or condition placed on the user. The CCI noted that in order to use Whatsapp Pay, users must undertake a voluntary registration process that is separate from any process required to use the messaging service.⁴⁹ Furthermore, the CCI noted that Whatsapp clarified that there was no requirement on the user to utilise Whatsapp Pay in order to access the messaging service. They also clarified that users will have full discretion in utilising any payment platform of their choice while still retaining access to Whatsapp. The CCI therefore concluded that, "*in the absence of any explicit or implicit imposition by Whatsapp which takes away discretion from the user, the mere integration of the two applications does not seem to contravene Section 4(2)(a)(i) of the Act.*"⁵⁰

Mandatory nature of data sharing and consequent abuse of dominance

The Test of User Choice in determining unfairness

service. Excessive pricing has not been tackled by the CCI yet in other sectors and thus far allegations of excessive pricing has been rejected, especially because of the lack of a model to accurately determine the same. Yet, this offers a potential avenue of redress. Thanks to Vasudha Passi for pointing this idea out to us.

⁴⁷ ¶ 89, Competition Commission of India, "Case No. 15 of 2020," 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

⁴⁸ ¶ 91, Competition Commission of India, "Case No. 15 of 2020," 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

⁴⁹ *Ibid*

⁵⁰ *Ibid*

In both the 2016 and 2020 judgements, the CCI has used the existence of ‘user choice’ as a test to determine whether or not the actions taken by Whatsapp amounted to the imposition of unfair terms or conditions on the user under Section 4(2)(i)(a) of the Competition Act.

The CCI, in these two orders, has revealed that the test of user choice consists of two elements: An ‘explicit’ element and an ‘implicit’ element. The explicit element of the test, invoked by the CCI in 2016 posits that user choice would exist insofar as the user is explicitly provided with the choice to opt out of a company’s new practices or policies without limiting their ability to access the service or good that the company provides. This was demonstrated in paragraph 15 of the 2016 order. The CCI pointed to the existence of an opt out clause to demonstrate that users were provided with a thirty day window to opt out of data sharing between Whatsapp and Facebook - and therefore the changes to Whatsapp’s privacy policy did not amount to abuse of dominance.⁵¹

The implicit element of the test on the other hand seems to hinge on the premise that user choice exists as long as the changes made by the company do not limit the ability of the user to access the original good or service provided. The implicit element of the test was subsequently outlined by the CCI in paragraph 91 of its 2020 order. The CCI noted that the user was not forced to utilise Whatsapp pay in order to make use of Whatsapp’s messaging service, and therefore there was no violation by Whatsapp under Section 4(2)(i)(a) of the Competition Act⁵² While there was no explicit choice provided to users, the mere existence of the option to opt-out was deemed sufficient by the CCI.

The explicit standard of user choice was also used by the majority decision of the CCI in a 2018 order to hold that Google Linking of the Google Flight commercial unit to its specialized search result page could cause "users to be devoid of additional choices or results and therefore, such conduct amounts to an unfair imposition upon the users availing search services."⁵³ As a result, Google was held to be in contravention of Section 4(2)(a)(i) of the Act. In this case, while users still have the option to search for other third-party travel units, the lack of explicit options provided by Google combined with their prioritization of their own flights unit was held to be an abuse of dominance.

Why is 2021 different from 2016 and 2020?

As discussed before, this Issue Brief limits itself to reasoning already laid down by the CCI in previous relevant decisions. A more detailed discussion on the lacunae in these

⁵¹ ¶15, Competition Commission of India, “Case No. 99 of 2016,” 2016, <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>.

⁵² ¶91, Competition Commission of India, “Case No. 15 of 2020,” 2020, <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf>

⁵³ ¶253, Competition Commission of India, “Case Nos. 07 and 30 of 2012,” 2018, <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

decisions is left for another time. Keeping the rulings of the CCI in mind, it is clear that the mandatory nature of the changes that Whatsapp made to its privacy policy in 2021, fails the 'user choice' test and as such clearly amounts to the setting of unfair terms or conditions on the user and is a violation of Section 4(2)(a)(i) of the Competition Act.

Writing for the Quint, Parsheera argues that a unilateral change of terms enabling the exploitation of data in this manner would provide no effective choice to the user.⁵⁴ Despite the fact that the Competition Act refrains from defining 'unfairness', it is clear that the CCI, using argumentation in its own judgments could use its discretion to apply the term in the context of a lack of effective choice faced by consumers in making a purchase.⁵⁵

Unlike in 2016, the changes to Whatsapp's privacy policy in 2021 do not include an opt out clause which would allow for users to still use the application without consenting to the sharing of data with Facebook. This clearly falls short of the explicit standard of user choice laid out in the 2016 case. Further, the nature of the changes in 2021 prevent users from separating their use of Whatsapp's messaging service and the data sharing with Facebook. As such, users are forced to have their data shared with Facebook if they wish to use Whatsapp and engage with businesses on Whatsapp. Thus, the 2021 changes also fail to meet the implicit standard of user choice that the CCI laid out in its 2020 judgement.

As such, utilising the CCI's own framework, it is apparent that Whatsapp's changes to its privacy policy in 2021 is in direct violation of Section 4(2)(a)(i) of the Competition Act. In its removal of user choice, the changes "impose[s] unfair or discriminatory condition[s] in purchase or sale of goods or service."⁵⁶

Scope for Harmonisation with Global practices

The current situation represents a clear opportunity for the CCI to align itself with the global trend in the enforcement of competition law against similar anti-competitive practices by Whatsapp and Facebook. Other jurisdictions have recognised the dominant positions that Whatsapp and Facebook occupy and have made rulings keeping that in mind. For example, The German Competition Authority (Bundeskartellamt) decided that Facebook imposes a condition on the private use of its network by collecting infinite amounts of user data, including from third party sources such as Instagram or Whatsapp.⁵⁷

⁵⁴ Smriti Parsheera, "WhatsApp's Privacy Terms: What Competition Commission Must Note," *The Quint* (blog), February 17, 2021, <https://www.thequint.com/voices/opinion/whatsapp-change-in-privacy-terms-what-it-means-dominance-abuse-competition-law>.

⁵⁵ Ibid

⁵⁶ Section 4(2), Competition Act, 2002, Available at: http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

⁵⁷ Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (Bundeskartellamt February 6, 2019). Available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4

Facebook then allocates this data to the user's Facebook accounts and uses them for several purposes, including targeted advertising. Germany has now amended its competition law framework to proactively target these violations.⁵⁸ While the existing competition law framework is sufficient to tackle anti-competitive data sharing, amendments to the law help shore up enforcement of the law, and tackle a variety of other anti-competitive practices in the digital economy-including gatekeeping, access to data, and anti-competitive mergers.⁵⁹

Keeping both the global developments, and the CLRC report in mind, there is ample scope for the CCI to devote more thought to the anti-competitive data sharing practices, which serves as the backbone of the digital economy. Globally, competition policy and enforcement has undergone a shift in the past five decades-stemming from an incomplete understanding of consumer welfare as short-term price effects. This is in contrast to the anti-trust framework that prevailed across several countries upto the 1980s which championed the notion that mere dominance and structural concentration was enough for regulators to intervene.⁶⁰ The behaviour of tech giants in the present digital ecosystem, and their ability to concentrate market structures and harm consumer welfare by reducing choice, vigorous profiling, and privacy violations without necessarily raising 'price in monetary terms' begs for a rethink.

Conclusion

Since 2017, the present government has touted a vision for 'data sovereignty' to protect Indian users and consumers from the exploitative practices of foreign technology companies operating in India, for private gain.⁶¹ While several regulatory measures such as data localisation, digital taxation, and obligations on social media intermediaries have been used by the government to further this vision, it is surprising that the strongest stick in the arsenal -competition law- remains unused. This lack of regulatory scrutiny is particularly surprising when judicial forums including courts have been approached by

⁵⁸ Hans-Georg Kamann et al., "New Antitrust Rules For The Digital Economy," December 16, 2020, <https://www.mondaq.com/germany/cartels-monopolies/1016570/new-antitrust-rules-for-the-digital-economy-german-digitalization-act-nears-the-finish-line>.

⁵⁹ Ibid

⁶⁰ Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126 (2017 2016): 710. Available at: <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=yli>

⁶¹ PTI, "India 'Important Digital Power', Won't Compromise on Data Sovereignty: Ravi Shankar Prasad," *The Financial Express* (blog), July 7, 2020, <https://www.financialexpress.com/industry/technology/india-important-digital-power-wont-compromise-on-data-sovereignty-ravi-shankar-prasad/2016438/>.

private individuals.⁶² The Competition Commission of India must use the tools at its disposal to prevent the denigration of the welfare of Indian consumers.

While there may be a case for amending the Competition Act to tackle the practices of large technology companies, as demonstrated in the article, there is enough maneuvering ground in the present law itself to evaluate the economics of Facebook's market power, and use it to prevent abuse of dominance. Scrutinising Whatsapp's 2021 Privacy Policy offers a unique opportunity for the CCI to evaluate the questions, examine relevant evidence, and rule on the impacts Whatsapp could have on a free and fair digital economy.

⁶² ANI, "Delhi HC Adjourns Hearing on Plea against WhatsApp's New Privacy Policy," *Hindustan Times*, March 1, 2021, <https://www.hindustantimes.com/india-news/delhi-hc-adjourns-hearing-on-plea-against-whatsapp-s-new-privacy-policy-101614587844154.html>.