CCI'S ANTITRUST PROBE AGAINST WHATSAPP: BIG DATA PROCESSING AND COMPETITION LAW

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INTRODUCTION

WhatsApp found itself in the eye of the storm earlier this year when it announced that it is rolling out its new privacy policy, the acceptance of which would be mandatory for WhatsApp users in India. The fallout of this announcement, albeit relatively innocuous, forced the company to put its plan to mandatorily have users consent to its new privacy policy on hold. The center of the controversy is WhatsApp sharing some of the user data with Facebook, its parent company. The data so shared will be utilized by Facebook to build user profiles for targeted advertising. The Competition Commission of India (**"CCI"**) took suo motu cognizance of the matter and ordered a probe against WhatsApp and Facebook.[1] The order of the CCI and its jurisdiction in the matter was challenged before the Delhi High Court. However, vide its order dated 22nd April 2021, the Court dismissed the plea against the CCI's order for a probe[2], in effect, giving the green light to the Directorate General's ("**DG**") office to conduct a detailed investigation in order to find out if the actions of the companies under probe have antitrust implications.

Whilst protection of personal data falls within the ambit of specific legislation (like the General Data Protection Regulation in Europe and the proposed Personal Data Protection Bill, 2019 of India) and the mechanism established therein, the potential consequences of data processing by companies like Facebook and WhatsApp are not limited to the matter of privacy of an individual. From an antitrust perspective, not only is the approach of WhatsApp in making the acceptance of its new terms and conditions mandatory questionable, but the nature and aftermaths of the data sharing it intends to engage in might intrude into areas that are antitrust concerns.

[1] In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021, before the Competition Commission of India, available online at https://www.cci.gov.in/sites/default/files/SM01of2021_0.pdf

[2] Shreya Agarwal, *Delhi High Court Dismisses WhatsApp, Facebook's Challenge To CCI Order For Probe On New Privacy Policy*, Live Law.in, 22 April 2021, available at https://www.livelaw.in/top-stories/delhi-high-court-dismisses-whatsapp-facebooks-challenge-to-cci-order-for-probe-on-new-privacy-policy-172922

CONSTITUTIONAL IMPLICATIONS OF DATA PROCESSING

Both Facebook and WhatsApp are, in principle, free services as consumers are not required to pay a subscription fee for availing services of either of these platforms. In exchange for their services, these companies require consumers to agree to their terms of service, which include personal data processing. Often the users while agreeing to such terms do not understand the magnitude of its consequences, mainly because these terms and policies are drafted using complex legal parlance, and more often than not they are vague, amorphous, and practically unintelligible to the layman. One may argue the case of these companies by stating that their actions are validated by the express consent of the consumer. However, to what extent can the consumers be made to agree to such data processing under the umbrella of *party autonomy*? This question becomes relevant especially when such data processing can amount to a violation of their fundamental right to privacy. When one party to a contract, enjoying a position of dominance, can effectively dictate the terms of the contract in such a way that the autonomy of the other party is compromised, then there is a need for the law to intervene. But this falls outside the purview of the CCI and is a matter to be addressed by data-protection laws and the authorities under the same.

DATA PROCESSING AND COMPETITION LAW

In microeconomics, freedom of economic agents theory refers to the ability of the various agents in the market to allocate resources in such a manner as they deem fit. In the context of consumers, this means their freedom of choice, i.e. their economic freedom to decide whom they should buy a product or avail a service from. This is in fact at the heart of Competition Law because the economic freedom of a buyer would hinge on market competition. As Friedrich Hayek said "*Our freedom of choice in a competitive society rests on the fact that, if one person refuses to satisfy our wishes, we can turn to another. But if we face a monopolist we are at his absolute mercy*."[3]

The link between the data practices of companies and Competition Law lies in this concept of '*consumer freedom of choice'*. If a company imposes unreasonable conditions on its consumers, then, in a competitive market, consumers are expected to switch to other enterprises providing a similar product/service. But despite the arbitrary terms of service, if the consumers

[3] Hayek, Friedrich (1994). The Road to Serfdom. University of Chicago Press. ISBN 978-0-226-32061-8.

continue to avail of the company's services, then it could indicate a lack of freedom of choice for such consumers and it warrants an inquiry by the CCI.

However, it is important to note that the imposition of arbitrary conditions by a dominant company by itself cannot be deemed as anti-competitive. For there to be a violation of Competition Law, the actions of the company should have had the effect of choking customer choice by driving out competition. The investigation by the authorities under the Competition Law will need to focus on the reason why consumers have chosen *not to switch* to other service providers in the market despite the enterprise imposing such arbitrary conditions. There might be two possible reasons; one, the enterprise in question might be enjoying its dominant market share due to its business superiority, in which case the CCI does not have a reason to intervene because consumers have chosen the enterprise as a result of their product/service quality. But on the other hand, if the dominance or the superior market share of the enterprise is due to its actions which have the effect of driving the competition away, then it warrants scrutiny by the CCI because in such a case the consumers are not opting for the said enterprise for the quality of its services, but because the actions of the company have severely stifled the consumers' choice to opt for alternatives.

In the last decade, the concept of *consumers' freedom of choice* has taken prominence in the field of Competition Law. In Europe, competition authorities have used this concept in many landmark decisions. For example, in the *France Télécom Case*[4], which came up before the European Commission, the Commission held that the practice of the company to offer its service at even lower than the marginal price was abusive because it had the effect of stifling freedom of choice of consumers with the withdrawal of one or a number of its competitors from the market. In the *Microsoft Case*[5], the stifling of consumer choice was due to something called the *supplementary obligation* in the nature of tying and bundling. Microsoft had developed a multimedia software called Windows Media Player in its computer operating platform, *'Windows',* which was pre-installed in all the computers running on the Windows platform. This negatively affected the rival companies making multimedia software because people found no purpose to additionally install another software when there was a built-in media player in Windows. Further, because of the popularity of Windows Media Players and its wide use by consumers, encoding was done by the content providers to suit the Windows

[4] Case C-202/07 P, France Télécom v. Commission, [2009] E.C.R. I-2369
[5] Commission Decision COMP/C-3/37.792 — Microsoft, [2007] O.J. L 32/23

Media Player software, which again meant that the contents that could be provided by rival software became limited. The European Commission concluded that this was an abuse of dominance as the practices of the company effectively reduced the consumers' freedom of choice to an unacceptable level. In the *Intel case*[6], it was found that the Company engaged in practices of paying computer manufacturers to not commercialize chips developed by their rivals AMD and further they also provided conditional rebates for exclusive orders with Intel and not placing orders with AMD. These practices were deemed to be aimed at driving the competition away and thereby severely stifled consumer freedom of choice. To this extent, one can argue that intervention by CCI is warranted to see if WhatsApp and Facebook have abused their dominance by stifling consumer choice through their actions.

ASSESSING ABUSE OF DOMINANCE

Enforcement agencies under Competition Law should conclude the abuse of dominance only when they can establish that the practices of the enterprise, dominant in the relevant market, has excluded an equally efficient competitor and that this has in turn resulted in harm for the consumer.[7] In the instant case, for holding WhatsApp and Facebook guilty of violating Competition Law, firstly, it will have to be established that the actions of the companies have resulted in the foreclosure of competition which in turn has had a negative effect on *consumer choice*. Again, such a foreclosure may be a result of a direct act of the dominant company as illustrated in the *Intel Case*[8], or it might be indirect like in the *Microsoft Case*[9]. Further, it needs to be established that the reduction in choice of consumers has proved to be detrimental to the consumer either through the negative effects on price or through negative effects on quality. Here, '*price'* cannot be a factor since the services of Facebook and WhatsApp does not have any subscription fee or download charges. However '*negative effects on quality'* can be a criterion. *The Report of the Stigler Committee on Digital Platforms*[10], released in 2019, took the view that the imposition of restrictive conditions concerning data processing will fall within the ambit of a *decrease in quality*. In the case of WhatsApp, requiring mandatory consent for data processing outside the network (with Facebook) can potentially be seen as a restrictive condition having a *negative effect on quality*.

[6] Case COMP/C-3/37.990 — Intel.
[7] Dr. Versha Vahini, Indian Competition Law 238 (LexisNexis, 2016)
[8] Supra Note 6
[9] Supra Note 5
[10] *Stigler Committee on Digital Platforms Final Report*, Stigler Center for the Study of the Economy and the State, 2019, available at https://www.publicknowledge.org/wp-content/uploads/2019/09/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf

WHAT ARE THE PROBABLE AREAS OF INFRACTIONS BY WHATSAPP AND FACEBOOK?

Abuse Related to Conditions of Purchase or Sale[11]

A dominant enterprise is said to have engaged in abusive behavior if it imposes an unfair and discriminatory condition in the sale of its product or service. Now one might question the applicability of this rationale in the case of WhatsApp, considering how it does not charge any subscription/download fee. But this notion is misconceived. Consideration need not be in terms of money or monetary benefit. In the case of WhatsApp, the data of its customer base, which it collects, is in effect the consideration. This data is invaluable as it can be processed for building user profiles and analyzing consumer behavior etc. which in turn is used for targeted advertising.

In this context, the CCI can evaluate to what extent the data processing conditions imposed through the terms of service are reasonable. The rationale provided by *Bundesgerichtshof*, Germany's Federal Court of Justice in the *Facebook case* may provide a benchmark. Considering that WhatsApp has already launched the 'WhatsApp Business' application and that there are talks of introducing Ads within the platform, the CCI may hold that requiring consumers to consent to data processing within the network, for its own targeted advertising purposes is not abusive; but, the '*take it-or leave it'* approach requiring mandatory consent for data processing outside the platform (with Facebook) can be seen as an imposition of an unfair and discriminatory condition in providing the services and accordingly an abuse of the dominant position.

Supplementary Obligations[12]

This concept is relevant in the case of WhatsApp, especially concerning consumers who do not have an account with Facebook and is interested in using WhatsApp only. From the perspective of consumers, providing consent to have their data shared with Facebook (a separate social media platform), is a supplementary obligation that has no relevance or connection with the subject matter of the contract *viz.* using the services of WhatsApp. This comes within the ambit of what is known as *Tying and Bundling arrangements*, which is again an abuse of the dominant position by an enterprise.

[11] Section 4(2) (a) (i), The Competition Act, 2002
[12] Section 4(2) (d), The Competition Act, 2002

Leveraging[13]

In the case of Facebook (as a group) there is a case to be made that extensive data collection and user profiling based on data collected from WhatsApp and other platforms will harm the competitors of Facebook in the targeted advertising space. Such a vast amount of data will put Facebook in a distinctively advantageous position, making it difficult for its competitors to get advertising contracts. Accordingly, the CCI may also inquire if Facebook, by building user-profiles through cross linking of data from different platforms, can use its position of dominance in one market (through WhatsApp and other platforms) to protect or leverage its position in another, such as the 'targeted advertising market'. This may, in turn, cause entry barriers for new players in the market.[14]

With the Hon'ble High Court of Delhi having given the go ahead for the probe by CCI, it will be interesting to see how the DG's investigation will approach the matter of '*abuse of dominant position*'.

[13] Section 4(2) (e), The Competition Act, 2002
[14] Section 4(2) (b), The Competition Act, 2002