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The Problematic Stance of CCI in Whatsapp Pay Tying Case: An Opportunity Missed?

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The antitrust watchdog of India recently in *Harshita Chawla v Whatsapp and Facebook**[1]*** held that Whatsapp's proposed model of integrating its payments app called 'Whatsapp Pay' ('WPay') within its messaging app is not anti-competitive since it does not constitute 'tying in' due to lack of coercion. In reaching such a conclusion the Competition Commission of India ('CCI') erred in applying the same standard of the requirement of 'coercion', as is for brick-and-mortar entities, for digital markets. Moreover, its determination of market foreclosure is also problematic since it presupposes it on real and actual harm.

Background

India is, currently, the fastest growing FinTech market in the world. The adoption and implementation of Unified Payments Interface ('UPI'), a government-regulated real-time digital payment technology is credited as a significant driver of this growth. To contextualise, the value of the digital payments market, which was $65 bn in 2019 is expected to grow at a CAGR of 20% reaching approximately $140 bn by 2023. In an attempt to capitalize on this growth, Whatsapp Inc. ('Whatsapp') released its UPI based payment feature named *Whatsapp Pay* which received regulatory approval by National Payments Corporation of India ('NPCI') in February 2020. Whatsapp is the leading player in the smartphone-based OTT messaging service market in India with a massive userbase of 500 million users. Its proposed model of integrating these two apps will give it an instant consumer exposure to half a billion users, thereby allowing it to use its dominance in one market to penetrate into another market by tying these two applications.

Tying under Indian Competition Law

Under Indian jurisprudence, 'tying' refers to a practice whereby the seller of a product or service requires the buyers to also purchase another separate product or service ('tied product'). The economic literature, along with the decisions of antitrust authorities, has laid down certain conditions which need to be fulfilled to conclude a case of tying. Such conditions are

- the tying and tied products are two separate products;

- the entity concerned is dominant in the market for the tying product;
- there is an element of coercion; and
- the tying is capable of restricting/foreclosing competition in the market.[2]

CCI's Decision: A Critique

The CCI held that Whatsapp's practice of integrating WPay into Whatsapp messenger did not constitute tying on two grounds. *Firstly*, that the element of coercion in purchasing and using the two products together was absent; and *secondly*, because the entry of WPay is not capable of foreclosing competition in the payment services market.

The question of coercion

The case of the complainant was that integration of WPay into Whatsapp resulted in tying of the products. This is because post-integration, a customer cannot access one product without necessarily acquiring the other product. The respondents, on the contrary, argued that Whatsapp and WPay should not be treated as separate products, and the latter should be viewed as an additional feature of the original product.

The CCI, however, disregarded the arguments of the respondents and held that these two are separate products since they function in two separate markets. In doing so it also acknowledged that Whatsapp is a dominant player in the 'smartphone-based OTT messaging service market' in India. Hence, the first two conditions of tying are qualified. However, it ruled that the element of coercion is not met because;

- Whatsapp users do not have to 'mandatorily' use WPay but rather they retain complete discretion to use it or not.
- It does not restrict the users from using any other UPI-based service that they may have downloaded on their mobile devices.

This adherence to the requirement of coercion in its strict sense fails to consider that tying in the digital environment varies significantly from its brick-and-mortar-counterparts. Contrary to the position furthered by Indian competition authorities, the Court of First Instance of the European Union in *Microsoft v Commission**[3]*** held that in cases of tying in digital markets "*coercion exists when a dominant undertaking deprives its customers of the realistic choice of buying the tying product without the tied product*." This signifies that in digital tying, coercion should ideally be assessed at the time of sale rather than deriving it from effects on consumer behaviour post-purchase of the tied product. The *Microsoft* case is of special significance because the factual matrix is very similar to the present case. In *Microsoft*, the integration of Windows Media Player into the Windows Operating System was held to be tying in of products in contravention of Article 102 TFEU, which provides for restrictions similar to Section 4 of the Indian Competition Act, 2002.

In the present circumstances, consumers do not have a choice to subscribe to Whatsapp messaging service without necessarily subscribing to its payments service. Hence, in principle, the element of 'coercion' should be perceived as present. The OECD Report on Abuse of Dominance suggests

that in digital markets, coercion should not be construed in its traditional sense. It states that the effect of even a *nudge* (such as pre-installation) can be equally conceptualised as an equivalent of coercion.[4]

This must also be looked at from the perspective of the nature of the market. Digital markets are often termed as winner-take-all markets in which a single firm or technology company practically vanquishes all its other competitors.[5] Economically, it is irrelevant whether this transfer of market power happens on account of a contractual relationship or product novelty.[6] Hence, dominant entities competing in digital markets have the highest incentive to tie or bundle their products to maintain a grip over the market. Hence, when tying is to be assessed in a digital market, which is often not affected by price characteristics, the threshold of the 'coercion' requisite should be kept low and be treated as a subjective standard in line with the rule of reason to ensure fair competition.

Potential market foreclosure

In this case, the CCI rejected the notion of market foreclosure on the basis that competitors in the payments service markets are backed by big multinational companies.[7] It is apparent from the CCI's order that it considers market foreclosure to be a concern only when the damage causes real and significant harm to competitors. This position is not necessarily correct. The Court of Justice of the European Union affirmed that total foreclosure is not necessary; it is enough if competitors are "disadvantaged, which is deemed to occur when demand for their products is reduced."[8] Even under Indian jurisprudence, to qualify the condition of 'market foreclosure' for constituting tying, it is sufficient that the rivals are disadvantaged and consequently led to competing less aggressively.[9]

Tying and bundling techniques used by firms to link the sale of two distinct products together make it more difficult for rivals of the stand-alone products to compete.[10] If the firm has market power over at least one of the products, it creates the possibility of harm for competition and consumers.[11] This fear is compounded by the implication of network effects. That is, when a platform is dominant in one market, it may have the ability to leverage its network effects and take advantage of economies of scope to enter into new platform markets.[12] This can damage the competitors of the dominant undertaking in the non-dominant market. Hence, in light of the fact that Whatsapp has a userbase of 500 million and its holding company Facebook possesses behavioural data of 300 million users in India, permitting Whatsapp to integrate WPay into its messaging service is bound to affect the competition in the payments services market. To this end, the position furthered by the Indian competition watchdog is erroneous and fails to develop the law on tying in digital markets in line with its European counterparts.

Conclusion

Integration of WPay into Whatsapp messaging app clearly evinces a contravention of the restriction contained under Section 4 of the Competition Act, 2002. The CCI erred by negating the presence of coercion and market foreclosure because when considered in light of network effects, consumer behaviour and leveraging of dominance it is evident that competition in the payments services market will be affected adversely. The governing legislation, which is the Competition Act of 2002 is still at a fairly nascent stage and demands progressive interpretation. It is crucial that

Indian antitrust authorities actively develop the competition law framework of the country to cover digital realities. It will be interesting to see how the law on tying develops in the Indian jurisdiction in the coming days.

Disclaimer: The views expressed by the authors are personal and do not represent the views of the chamber set/ firm.

[1] Harshita Chawla v. Whatsapp and Facebook, CCI, Case no. 15 of 2020 ['Harshita Chawla case'].

[2] Abir Roy, Competition Law in India: A Practical Guide, 220 (Kluwer Law International, 2016) ['Abir Roy'].

[3] Case T-201/04, Microsoft Corporation v. Commission, ECLI:EU:T:2007:289.

[4] OECD (2020), Abuse of dominance in digital markets, 44 available at www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf last accessed on 06.01.21 ['OECD Guidelines on Abuse of Dominance']

[5] Carl Shapiro and Hal Varian, Information rules, 177 (Harvard Business Review Press, 1998).

[6] Stefan Holzweber (2018) Tying and bundling in the digital era, European Competition Journal, Vol 14, Nos 2-3, 353.

[7] Harshita Chawla case, Para 97.

[8] Case T-83-91, Tetra Pak v. Commission, [1994] ECR II-755; Case C-333/94 P, Tetra Pak v. Commission, [1996] ECR I-5951.

[9] Abir Roy, supra note 2, 180.

[10]Abusing a dominant position — Overview, LexisNexis, available at https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MK1-F187-53G2-00000-00/Abusing_a_dominant_position_overview last accessed on 05.01.2021.

[11] OECD Guidelines on Abuse of Dominance, supra note 4.

[12] Bourreau, M. and A. de Streel (2019), "Digital Conglomerates and EU Competition Policy", available at http://www.crid.be/pdf/public/8377.pdf last accessed on 05.01.21.

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