

WhatsApp Goes Through the Looking-Glass of India's Competition Enforcement

Kluwer Competition Law Blog

March 27, 2021

Krithika Ramesh, Payel Chatterjee, Vinay Shukla (Nishith Desai Associates)

Please refer to this post as: Krithika Ramesh, Payel Chatterjee, Vinay Shukla, 'WhatsApp Goes Through the Looking-Glass of India's Competition Enforcement', Kluwer Competition Law Blog, March 27 2021, <http://competitionlawblog.kluwercompetitionlaw.com/2021/03/27/whatsapp-goes-through-the-looking-glass-of-indias-competition-enforcement/>

On 24 March 2021, the Competition Commission of India ('**CCI**') passed an order initiating investigation against WhatsApp Inc. ('**WhatsApp**') and Facebook Inc. ('**FB**') to determine if WhatsApp's updated privacy policy terms allowing it to share user data with FB and its subsidiaries constituted an abuse of dominance ('**Initiation Order**').^[1] The Initiation Order shoves India's competition enforcement through the looking glass i.e., into an unexpected, but interesting direction.

Commentators in India have taken the position that data privacy issues should be handled under data privacy laws and have called for the implementation of the pending Data Privacy Bill.^[2] The Initiation Order is a step following the European approach to addressing the exploitation of user data through antitrust laws.^[3] We discuss the Initiation Order's most remarkable aspects – (a) the leap towards *ex-ante* enforcement outside of merger control and (b) quality degradation as abuse of dominance.

A new incipency standard?

This is the first time the CCI has initiated a *suo moto* investigation against a technology company. Newspaper articles reporting the change in policy stated that WhatsApp had preconditioned user access to acceptance of the updated terms piqued the CCI's interest.^[4] Notably, the Initiation Order relies on the CCI's past inquiries against WhatsApp on factual and temporal considerations like market definition and dominance.^[5] In doing so, the Initiation Order also perpetuates the errors of the past by substituting subjective perception of 'popularity' to infer dominance.^[6] Despite the clear lack of evidence with respect to dominance or effects on the market, the CCI refused the parties a hearing to address its concerns.

If the Initiation Order is the beginning of a trend, then it points to a new incipency standard. For instance, the Initiation Order was passed even though the policy terms were not implemented, leaving no time for clues to emerge on the likely impact in the market.^[7] The CCI's theory of harm seems to be two-fold – consumer harm through exploitation and the cementing of the parties' dominance (thanks to all the additional data accumulated through WhatsApp).

The CCI's Claim on Squeezing User Choice

The CCI took the *prima facie* view that the updated terms constitute an abusive imposition on the consumers due to the "take it or leave it" approach of the Policy. The CCI relied on its analysis in previous inquiries against WhatsApp and observed that in the previous versions of the updates, existing users had an option to opt-out of sharing their data with FB.^[8] WhatsApp clarified in its written submissions that it would continue to honour the opt-out commitment exercised by users in the past.^[9] But CCI dismissed this submission after being unable to verify this statement against the updated policy terms. Basis this, the CCI claimed that choice is not available in this version of the update.^[10]

In CCI's view, users don't switch, because it is impractical to switch when the entire network doesn't. This gives WhatsApp the necessary leverage to subject privacy-sensitive users to unfair terms. The CCI also commented that the updated terms are too broad and set out unintelligible terms on how user data would be used. According to the Initiation Order, this deprives the user of meaningful choice and control over their data. Therefore, the updated terms were considered an imposition on the users.

The CCI's Dominance Maintenance Claim

The second concern is based on leveraging leading to exclusions of rivals. According to the CCI, information sharing between WhatsApp and FB could create an invincible competitor that would lead to foreclosure.^[11] The Initiation Order issues a cautionary tale against the vertical integration of data between a parent and subsidiary. In doing so, the CCI does not consider that the existing vertical integration of FB and WhatsApp may have already created the synergies that the CCI wants to pre-empt or that the synergies may be pro-competitive. While reviewing FB's minority investment into jio (the telecom company) the CCI observed that the parties did not hold exclusionary, inimitable or rare data that would give them an advantage over their competitors.^[12] The Initiation Order does not explain the CCI's change in stance since the jio decision.

Piecing the Moving Parts: Quality Reduction in a Dynamic Market

Competition on its own will not act like pixie dust.^[13] Commentators posit that the pressure of keeping costs down can cause firms to skimp on quality and safety.^[14] One cannot rule out the fact reduction in consumer data protection and loss of control over personalized data can be taken as a reduction in quality under the antitrust law and be exploitative. In such cases, competition enforcement must not hesitate to examine non-price factors. With this preface, intervention should be limited to cases where evidence reveals that quality degradation is likely to lead to consumer harm in the long term.

Measuring quality degradation as harm to the consumer

Ensuring quality through competition enforcement is a noble goal. However, it may chill innovation if the moving parts of industry dynamics are ignored. To begin with, the CCI could consider if the reduction in quality is likely to be short-lived. For instance, the CCI while dismissing a complaint against Hewlett Packard ('**HP**') noted that the consumers purchasing technology products are sophisticated enough to account to compare after-sales services offered by HP and rivals.^[15] The informant's case rested on the premise that HP laptops were very popular in India and consumers didn't have the power to resist unfair aftermarket service clauses offered with HP laptops. The CCI declared that sophisticated consumers would opt to purchase rival laptops if they were bothered by HP terms of service.

The CCI notes that the consumers are sophisticated enough to comprehend the change in policy terms^[16] but assumes that switching is impractical because of network effects. In contrast, a survey estimates that 45% of the WhatsApp user base in India is likely to switch to rivals as a reaction to change in terms.^[17] Thus, economic evidence can establish if consumers are sophisticated enough to switch to rivals. The CCI does accept that users have started flocking to rivals but dismissed this after noting that WhatsApp has not experienced a decline in user base.^[18] Surprisingly, there is no reference to the possibility of multi-homing by users, which could explain why WhatsApp did not experience a decline in users. The Initiation Order also considers the lack of interoperability as an additional switching cost without really analyzing its applicability on messaging services.

Ability to 'impose' unfair terms

If consumers can respond to quality degradation, firms have an incentive to preserve quality. In such a case harm to the consumer is likely to be short-term. Quality degradation may adversely impact the incumbent's business, which is likely to lose market share to rivals.

In the case against DLF (a real-estate development company), the appellate court found that unilateral modification of terms of the apartment buyer agreement by DLF constituted exploitative abuse.^[19] DLF had modified key terms including adding additional apartments, which significantly reduced the common area available to the buyer under the initial agreement. Unlike in *DLF*, there seems to be evidence that users are switching as a response. This suggests that WhatsApp (despite its popularity) lacks the ability to 'impose' terms on its users.

Preserving Innovation

The timing of the change in policy terms suggests that this is FB's attempt to stay on top of new technology, through R&D and innovation. TikTok has been systematically siphoning FB's share of the market.^[20] At the same time, both Apple and Android have announced that they are going to limit sharing consumer information with third parties.^[21] Some estimate that the new restrictions could result in a 50% drop in FB's ad revenues.^[22] This also implies that the fears that the parties would become durable monopolies may be unfounded. In the absence of consumer harm, the change in policy may be a sign of aggressive competition and should be preserved.

Concluding Remarks: Reading (and Re-arranging) the Tea Leaves

It is trite to mention that the threshold for ordering an investigation in the tech sector is low. The Initiation Order is no exception and in line with the CCI Chairperson's comment made a few weeks ago that enforcement action may be triggered based on market studies. But it's worth considering the cost of overenforcement on public resources. The CCI's investigation was triggered by newspaper reports. By denying the parties a hearing, the CCI may have lost the opportunity to evaluate if the claims in the press reports were plausible.^[23] WhatsApp in its written submissions explained that users who had opted out of sharing their information with FB would continue to be able to do so.^[24] The CCI considered that the data being collected was unduly expansive, lacked transparency and did not offer users choice on the use of their data.^[25] In light of WhatsApp submission that the policy was not implemented at the time of the CCI inquiry, the CCI's reservations to the user carve-outs could have been addressed in an oral hearing. Thus, the cost to the public for this seemingly premature investigation could have been diverted towards other enforcement priorities.

Investigations stemming from new business strategies may compromise legal certainty^[26] and inhibit innovation from firms lead by demure management. There is no formal mechanism for without prejudice settlements in India. Given the frequency with which unpredictable issues creep up in technology markets, the CCI could use its pre-investigation hearing as a consultancy meeting to adopt a collaborative approach (as opposed to the confrontational step of ordering *ex-ante* investigations).

Krithika Ramesh, Vinay Shukla and Payel Chatterjee are Leaders in the Competition Law Practice at Nishith Desai Associates.

[1] http://cci.gov.in/sites/default/files/SM01of2021_0.pdf

[2] <http://bwlegalworld.businessworld.in/article/Competition-Regulator-Should-not-be-Burdened-with-WhatsApp-Privacy-Issue/26-02-2021-381801/>

[3] <https://www.debevoise.com/insights/publications/2020/08/regulating-the-internet-are-eu-antitrust>

[4] *Supra Note 1*, para 1.

[5] *Id*, para 20.

[6] *Id*, para 19.

[7] *Id*, para 14. The CCI states that the fact that it has power to pass interim measures means that it can intervene even if the alleged conduct is about to occur.

- [8] *Id.*, para 12 the CCI relied on *Vinod Gupta v. Whats App* Case No. 99 of 2016 and *Harshita Chawla v. WhatsApp Inc.*, Case No. 15 of 2020.
- [9] *Id.*, para 16.
- [10] *Id.*, paras 3-4.
- [11] *Id.*, Para 33.
- [12] For completeness, Facebook invested through a wholly owned subsidiary Jaadhu Holdings LLC. *Jaadhu/Jio* Combination Registration No. C-2020/06/747,, https://www.cci.gov.in/sites/default/files/Notice_order_document/order-747.pdf
- [13] Maurice E. Stucke, Ariel Ezrachi "Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants" (March 2020).
- [14] *Id.*
- [15] *Trend Electronics v. Hewlett Packard Sales*, Case No. 92 of 2015,, <https://www.cci.gov.in/sites/default/files/922015.pdf>
- [16] *Supra Note 1*, para 32.
- [17] <https://www.thehindubusinessline.com/info-tech/45-per-cent-of-whatsapp-users-in-india-plan-to-shift-to-telegram-survey/article33707955.ece>
- [18] *Supra Note 1*, para 20.
- [19] COMPAT upholds CCI order in DLF Belaire Owners Association Case, *Juris Law Corp* (May, 2014),, <https://indiacorplaw.in/2014/05/guest-post-compat-upholds-cci-order-in.html>
- [20] <https://www.platformer.news/p/how-social-networks-got-competitive-cci-order-in.html>
- [21] <https://www.platformer.news/p/how-social-networks-got-competitive-cci-order-in.html>
- [22] *Id.*
- [23] *Supra Note 1*, para 25. The CCI has shifted the onus of validating the claims relied to pass the Initiation Order on to the investigating officer.
- [24] *Id.*, para 16.
- [25] *Id.*, paras 24, 27 & 28.
- [26] Firms need predictability to be able to comply with antitrust laws,, <https://leconcurrentialiste.com/melamed-nascent-competitors/>