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India: Antitrust Regulation in the UPI Payments Sector

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The digital payments sector in India has grown exponentially over the last five years due to deeper data and smartphone penetration. The Unified Payment Interface (**UPI**) system launched by the National Payments Corporation of India (**NPCI**) has been the main driver of this growth. FY 2019-20 witnessed UPI transactions in India grow exponentially at the compounded annual growth rate (**CAGR**) of 414%.^[1] UPI transactions are primarily undertaken between two user's bank accounts using the Immediate Payment Service (**IMPS**) technology. This article proposes to examine the issues arising out of two orders of the Competition Commission of India (**CCI**) in the UPI sector namely *Harshita Chawla v WhatsApp Inc. & Anr*^[2] (**WhatsApp Pay Case**) and *XYZ v. Alphabet Inc*^[3] (**Google Pay Case**).

CCI's foray in the UPI payments sector: Conflicting Stands

Position re the WhatsApp Pay Case

In the WhatsApp Pay Case, the CCI examined the anti-competitive effect of tying in WhatsApp Pay, the proposed UPI app with the popular messaging service. At the outset, the CCI delineated the relevant markets to be "*the market for the over-the-top messaging services for smartphones in India*" and *prima facie* found that WhatsApp is dominant in the said market. The CCI observed that UPI payments qualify to be a separate product market independent of other payment methods on account of its differing technology and user convenience. Accordingly, the CCI held the "*market for UPI Payment applications in India*" to be a separate product market.

The CCI noted that users were not constrained from using WhatsApp (the tying product) if they chose not to use WhatsApp Pay (the tied product). The CCI observed that there are numerous steps involved in operationalising a WhatsApp Pay account including numerous Know-Your-Customer requirements (**KYC**) which would disincentivize new users to automatically shift. Moreover, it was observed that several other third-party UPI service providers are available and could be freely downloaded by users who did not wish to use WhatsApp Pay and sought to make UPI payments.

Hence, in relation to allegations of leveraging its dominant position in the OTT messaging market to influence the UPI payments market, the CCI observed that "*the absence of coercion and presence of well-established players in the market*" does not raise any competition concerns. The

availability of choice to users and adequate competitive constraints imposed by the presence of well-established competitors led to the dismissal of the complaint against WhatsApp.

Position re the Google Pay Case

Interestingly, the CCI took a contrasting stand when examining allegations against Google for leveraging its dominance in the “*market for supply of licensable operating system (OS) for smartphones*” to influence the “*market for apps facilitating payments through UPI*” in its favour. It was alleged that Google had leveraged its dominance in the market for licensable OS for smartphones by incentivizing manufactures to pre-install Google Pay, thereby placing Google Pay at an advantage over other players.

Google licenses its Android OS through its Mobile Application Distribution Agreement (**MADA**) which mandates manufacturers to pre-install some “must-have” Google apps in order to obtain the license to Android OS. Incidentally, Google is already facing a CCI investigation on account of the onerous license terms of the MADA.^[4] However, Google argued that Google Pay is not one of the apps covered by the MADA and is not required to be mandatorily pre-installed. Instead, it was pointed out that Google entered into mere revenue sharing agreements (**RSA**) with some smartphone manufacturers which is a mere monetary incentive to promote its related product. Furthermore, only those manufacturers interested in this incentive enter into these RSAs i.e., they retain a choice.

The CCI however observed that due to the “must-have” nature of some of Google’s products in the smartphone ecosystem such as Google Search, Google Chrome etc., there appears to be an unequal relationship between Google and smartphone manufacturers. It was held that the issue of coercion/choice was required to be examined from this perspective. Further it was also noted that Google has a significant presence in the market for apps facilitating payments through UPI in India. It was held that financial incentives provided to manufacturers under the RSAs may have the effect of creating a sense of exclusivity and default as users may not opt for competing payments applications owing to an existing *status-quo* bias for the default application. The CCI held that such contractual arrangements with smartphone manufacturers have the potential to disturb the level playing field in the “*market for apps facilitating payments through UPI*” and thereby merit an investigation.

As can be seen from the foregoing the CCI has adopted a contrasting approach in the two cases involving UPI payments applications. In relation to the pre-installation of Google Pay, the CCI took note of Google’s dominance in the market for the supply of licensable OS for smartphones & other product markets including that of general search services etc and rejected the argument that manufacturers have any meaningful choice. On the contrary, despite WhatsApp absolute dominance in the market for OTT messaging services in India, the CCI observed that users have a choice to not use WhatsApp Pay services. The steps required to register with WhatsApp Pay and the presence of competing UPI applications influenced the CCI’s decision. Pertinently though, the same argument applies even with respect to Google Pay but was not considered by the CCI before ordering an investigation.

Further, going by the standards in the Google Pay case, concerns regarding *status-quo* bias would seemingly apply in the case of WhatsApp Pay as well owing to the ubiquitous nature of WhatsApp

messenger service and easy integration of its payment service. In fact, at the time when the CCI order was passed, many industry experts had expected WhatsApp Pay to play the role of a market disruptor.[5] Nonetheless, the CCI did not find that sufficient to initiate an investigation. Evidently, there is no uniformity followed by the CCI while assessing different factors in relation to the UPI payments market.

Pre-installation of Google Pay: An Interventionist CCI?

The concept of *status-quo* bias/power of default was considered by the European Commission (EC) in a similar investigation against Google.[6] The EC found certain conditions in the Android licensing agreements with smartphone manufacturers dealing with the use of Android and Google Search, to be abusive and anti-competitive. The EC observed that the obligation to pre-install Google Search in its contracts with smartphone manufacturers creates a significant *status-quo* bias for users on account of the dominance of Google in the general search services market. This was considered anti-competitive by the EC in that competing products not only had to compete with Google Search in quality but also needed to overcome the user's *status-quo* bias on account of the pre-installation.

Last year, the Antitrust Division of the Department of Justice (DOJ) in the United States has filed a similar complaint under the Sherman Antitrust Act of 1890 (**Sherman Act**) against Google for its abusive conditions in its agreements with smartphone manufacturers.[7] One of the allegations in the complaint pertains to RSAs entered into between Google and incentivising pre-installation of Google Search by smartphone manufacturers. The DOJ observed that “*consumers typically do not change their mobile device's default search functions, making securing preset default status for search access points important for effective distribution of general search engines*”. Similar observations were made by the DOJ in the context of personal computer distribution channels.

It may be seen that the theory of harm identified by these antitrust agencies runs along similar lines. However, it is unclear how the CCI has applied the said theory in the case of the pre-installation of Google Pay. As per data released by the NPCI, Google Pay has a 35% market share, with its rival PhonePe enjoying 44% share in terms of volume of transactions in March 2021.[8] On the contrary, Google's search application enjoys near-absolute dominance in the general search services market of various nations of the European Economic Community with market shares ranging between 90% to 98%.[9] Similarly, the DOJ has observed that in the US, Google enjoys an 88% market share in the market for general search services. Evidently, these market shares unequivocally reflect Google's absolute dominance in the market for search services across jurisdictions.

Further, unlike the cases in relation to the pre-installation of Google Search in the US and EU, there is no evidence found by the CCI to observe that *status-quo* bias would afflict Indian consumers due to pre-installation of Google Pay. On the contrary, over the last one year, competitors like PhonePe and Paytm UPI have grown in market share, many times at the cost of Google Pay, despite the existing RSAs incentivizing manufacturers to pre-install Google Pay on smartphones during this period.[10]

CCI has further overlooked that increase in the user base of an app is not driven solely by user downloads, unlike the market for search engines. Person-to-merchant transactions and the degree

of acceptability by local merchants also affects the extent of downloads/usage significantly in this sector.[11] The issue of *status-quo* bias does not affect the on-boarding of merchants as that is determined by the nature of terms and incentives offered by the different UPI players. At the same time, a significant competitor like PayTM enjoys the benefits of direct vertical linkages with the banking infrastructure that improves user experience and reduces transaction failures and increases user onboarding. [12] This facility puts Google Pay at a disadvantageous position vis-à-vis its competitor. Thus, unlike the cases against pre-installation of Google Search in the EC and US, there are substantial competitive constraints in the market for UPI payment apps that prevent Google from leveraging its dominance in the market for licensing of operating systems for smartphones.

Furthermore, there also does not appear to be any evidence that the RSAs are exclusive in nature and that manufacturers are prevented from pre-installing rival applications. The informant in the case did not make any allegations to that effect. On the contrary, Google submitted that many other developers make their payment apps available to OEMs for preinstallation as well. This submission was left unaddressed by the CCI.

This is unlike the investigations launched by the DOJ or the EC against Google for RSAs that incentivised the pre-installation of Google Search (a market where Google enjoys a dominant position). Both the authorities had found that these RSAs typically contained exclusivity provisions, prohibiting the pre-installation of a competing general search service.

Conclusion

Since 2019, NPCI had considered the imposition of market-share caps to prevent concentration in the market.[13] A few days before the CCI passed its order in the Google Pay Case, NPCI announced the new regulatory regime that caps the market share of UPI operators to 30%.[14] In March 2021, Standard Operating Procedures were released for operationalising the proposed market share caps. While the merits of such a policy remain debatable, the CCI ought to have accounted for such steps before launching an investigation against Google.

Digital markets in India are constantly evolving and new technologies, marketing strategies, and other innovations often disrupt this sector. Many aspects of these markets rightly merit an investigation. However, an investigation absent empirical assessment of the nature of harm and the structure of the industry amounts to an overreach. Such interventions can potentially stifle innovation which is essential for the growth of tech markets and the UPI market in particular. Keeping the bigger picture in mind, the CCI must exercise due caution when confronted with allegations of anti-competitive conduct in the digital sphere.

[1] *The Indian Payments Handbook 2020-2025*, PWC India, at page 4 *The Indian Payments Handbook 2020-2025*, PWC India, at page 4, available at

<https://www.pwc.in/assets/pdfs/consulting/financial-services/fintech/payments-transformation/the-indian-payments-handbook-2020-2025.pdf>.

[2] *Harshita Chawla v. WhatsApp Inc & Anr.*, Case No. 15 of 2020 vide order dated 18.08.2020

[3] *XYZ v. Alphabet Inc.*, Case No. 07 of 2020 vide order dated 09.11.2020

[4] *Umar Javed v. Google LLC* Case No. 39 of 2018, vide order dated 16.04.2019

[5] See generally, “With the launch of WhatsApp payments, UPI ecosystem set for ‘major’ disruption”, available at <https://www.thehindubusinessline.com/money-and-banking/with-the-launch-of-whatsapp-payment-supi-ecosystem-set-for-major-disruption/article33040161.ece>. See also, “WhatsApp Vs Paytm: The Coming Disruption In E-Payment Business” available at <https://swarajyamag.com/ideas/whatsapp-vs-paytm-the-coming-disruption-in-e-payment-business>; and “PhonePe Continues to Dominate UPI Market While WhatsApp Pay Grows 2x”, available at <https://www.medianama.com/2021/01/223-phonepe-continues-to-dominate-upi-market-while-whatsapp-pay-grows-2x>.

[6] CASE AT.40099 (*Google Android*), “Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement”, (pages 169-193), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

[7] *United States v. Google LLC*, No. 1:20-cv-3010 (D.D.C. 20.10.2020) (Compl.), Federal District Court for the District of Columbia, available at <https://www.justice.gov/atr/case-document/file/1329131/download>

[8] See generally, “Phone Pe continues to dominate UPI with 44% market share Google Pay Trails by 9%”, available at

<https://inc42.com/buzz/phonepe-continues-to-dominate-upi-with-44-share-google-pay-trails-by-9/>.

[9] *Supra* note 9 at page 150 ¶681, available at

https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

[10] See generally, “Paytm is betting big on UPI and though it’s still a distant third, analysts believe it could have an edge over PhonePe and Google Pay”, available at

<https://www.businessinsider.in/tech/apps/news/paytm-is-betting-big-on-upi-and-though-its-still-a-distant-third-analysts-believe-it-could-have-an-edge-over-phonepe-and-google-pay/articleshow/81527588.cms>.

[11] *Ibid*

[12] Paytm also operates as a bank in the UPI architecture through the virtually operating Paytm Payments Bank which allows for seamless transactions as UPI transactions are routed through bank accounts. See more at <https://www.medianama.com/2021/05/223-paytm-upi-payments-merchants/>.

[13] See, “UPI entities may face cap on market share” available at <https://economictimes.indiatimes.com/industry/banking/finance/upi-entities-may-face-cap-on-market>

[share/articleshow/70986116.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://www.npci.org.in/PDF/npci/upi/circular/2020/OC-97-Guidelines-for-TPAPs-in-UPI.pdf).

[14] “Guidelines on volume cap for Third Party App Providers (TPAPs) in UPI”. NPCI Circular No NPCI/UPI/OC-97/2020-21 dated 05.11.2020, available at:

<https://www.npci.org.in/PDF/npci/upi/circular/2020/OC-97-Guidelines-for-TPAPs-in-UPI.pdf>.

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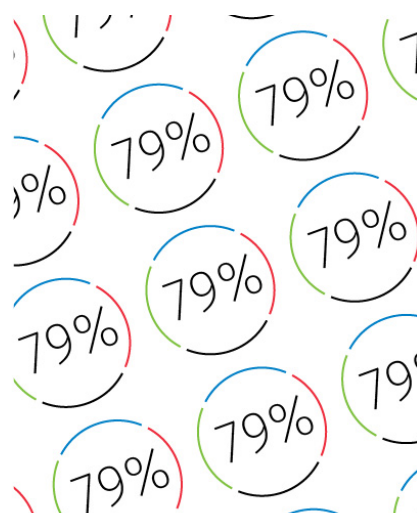
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