

Unpacking CCI's Anti-Trust Order against Whatsapp and Meta

Aditya Bhardwaj, Partner
Rinki Singh, Senior Associate

Pursuant to a *suo motu* investigation initiated by the Competition Commission of India (“**CCI**”) into WhatsApp’s 2021 Privacy Policy update (“**2021 Privacy Policy**”), the CCI on November 18, 2024, passed its final order under Section 27 of the Competition Act, 2002 (“**Competition Act**”) whereby it imposed a penalty of INR 213.14 crore (USD 25.4 million) upon Meta Platforms, Inc. (“**Meta**”) for violation of provisions of Section 4 of the Competition Act by WhatsApp LLC (“**WhatsApp**”) and Meta in the relevant market(s) defined by the CCI. In addition to penalty, CCI also passed a cease-and-desist order along with certain remedies to be observed by WhatsApp and Meta on an on-going basis. Just days before the CCI passed its Order imposing the penalty, the European Commission also fined Meta EUR 797.72 million (USD 844 million) for breach of antitrust rules by tying its online classified ads service Facebook Marketplace to its personal social network Facebook and imposing unfair trading conditions on other providers of online classified ads. This latest decision of the CCI might translate as a significant setback for WhatsApp, as it has its largest user base of 500 million in India.

Brief facts

In 2021, WhatsApp updated its 2021 Privacy Policy in India whereby its users were mandatorily made to accept the new terms and policy in entirety by February 8, 2021, on failure of which, the Users would have to forego the access to their respective accounts after the said date. The 2021 Privacy Policy included terms with respect to sharing of User’s data with Meta’s platforms like Facebook and Instagram, including phone numbers, contacts, and transaction details, for advertising and business-related purposes. Quite interestingly, WhatsApp had previously updated its privacy policy in 2016 and 2019 and at that point in time the Users were given an option to choose to consent for sharing their WhatsApp data with Facebook. However, in 2021 Privacy Policy update the Users were forced to agree for sharing of their WhatsApp data, else risk losing access to their accounts.

In January 2024, the CCI took *suo motu* cognizance of the 2021 Privacy Policy of WhatsApp and passed a *prima facie* order under Section 26(1) of the Competition Act on March 24, 2021 (“**Prima Facie Order**”). Additionally, two more information(s) were also filed before the CCI, which were clubbed with the *suo motu* investigation of the CCI. The CCI *vide* its Prima Facie Order directed the Director General (“**DG**”) to cause an investigation into the matter.

The *Prima Facie* Order of the CCI was challenged by way of writ petition by Meta and WhatsApp [collectively referred to as Opposite Parties (“**OPs**”)] before the Hon’ble Delhi High Court which was dismissed *vide* judgment dated April 22, 2021. The Petitioners then preferred a Letter Patent Appeal(s) against the said judgment before the Division Bench of Hon’ble Delhi High Court which were also dismissed by the court *vide* judgement dated August 25, 2022, whereafter Ops approached the Hon’ble Supreme Court of India through a Special Leave Petition (“**SLP**”) which was also dismissed *vide* judgment dated October 14, 2022.

The DG submitted its Investigation Report to the CCI on January 12, 2023, wherein it found the conduct of Meta (through WhatsApp) to be in contravention of the provisions of Section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Competition Act, The DG in its report defined following two relevant markets:

- i. Market for Over-the-Top (“**OTT**”) messaging apps through smartphones in India (hereinafter referred to as “**OTT Messaging Market**”);
- ii. Market for online display advertising in India (hereinafter referred to as “**Online Display Advertising Market**”).

Considering the DG’s Report, the CCI determined following two key issues in its analysis:

- A. Whether CCI has jurisdiction in the matter?
- B. Whether OPs have abused their dominant position and has violated the provisions of Section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Competition Act?

Analysis of the CCI

A. Jurisdiction of the CCI

The OPs challenged the jurisdiction of the CCI on the basis that the DG in its Investigation Report has arrived on incorrect findings on the issues related to data protection and privacy laws, which are outside the purview of the

Competition Act. That two special statutes, the Digital Personal Data Protection Act, 2023 and the Information Technology Act, 2000 along with the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, address data protection and privacy issues in India and thus, the same being subject specific laws preside over the Competition Act. Additionally, OPs also submitted that the questions of data protection and privacy law analyzed by the DG are also being adjudicated by Hon'ble Supreme Court and Hon'ble Delhi High Court. A decision thereto would be binding upon the DG as well as the CCI. Therefore, DG shouldn't have arrived at any pre-emptive findings on the issue.

In this regard, CCI held that data-related practices may lead to various types of legal violations that may fall under multiple statutes such as data protection, consumer protection, competition laws, etc. That data protection law and competition law address distinct data-related concerns, and each serves a unique purpose. In terms of competition law, data has emerged as a critical parameter of market power as it enables data-driven enterprises to improve their services and provide zero-priced products to users. Further, enterprises possessing extensive data repositories may by leveraging the same create barriers to entry, exclude competitors & engage in discriminatory practices, thus stifling competition and reducing consumer welfare in the long run. Further, with respect pendency of similar data related issued before Hon'ble Supreme Court and Hon'ble Delhi High Court, the CCI relied on the judgments passed by the said courts in the writ petitions filed by the OPs and held that mere existence of parallel proceedings or the involvement of other authorities does not strip the CCI of its jurisdiction.

B. Abuse of Dominance

The CCI in its analysis held that Meta (through WhatsApp) has violated provisions of – Section 4(2)(a)(i) by imposing unfair conditions *vide* its 2021 Privacy Policy; Section 4(2)(C) by indulging in denial of market access in the relevant market of Online Display Advertising Market; and Section 4(2)(e) by leveraging its dominant position in the OTT Messaging Market to strengthen its position in Online Display Advertising Market.

Delineation of Relevant Market(s)

The CCI in its scrutiny analyzed anti-competitive conduct of Meta and WhatsApp in the relevant markets defined by the DG i.e., OTT Messaging Market and Online Display Advertising Market.

Delineation of OTT Messaging Market

The CCI held that OTT Messaging Market i.e., “*Market for OTT messaging apps through smartphones in India*” forms a distinct relevant market as compared to traditional SMS (Short Service Message). CCI noted that OTT messaging is an instant messaging service or online chat platform which is distinct from traditional SMS as it doesn't rely on telecom network's infrastructure and is functional on the internet-based data connection such as Wi-Fi or mobile data. Further, OTT messaging apps allows users to share images, videos, audio messages, GIFs, location etc. and provides features like voice call, video calls, online status indicators, last seen stamps etc and can also be accessed on various devices like mobile phones, desktops, laptops, tablets etc. CCI further noted that OTT messaging apps also differs from email services (in terms of style, speed and delivery), other proprietary apps such as Apple's FaceTime and iMessage (in terms of 'walled garden' effects, interoperability restrictions etc.) and other services like Discord, Koo, Slack etc. (in terms of characteristics and intended use). Therefore, based on unique features of OTT messaging apps, CCI defined the OTT Messaging Market as a distinct relevant market.

However, the OPs submitted that the relevant product market is to be broadly defined as “*market for user attention*” and the narrowest possible definition is “*consumer communication services*”. The OPs submitted that the narrowest market would not only include OTT messaging apps but also other consumer communication services like JioChat, Zoom, Skype, Signal, Telegram, Snapchat, SMS, MMS (Multimedia Messaging Services), RCS (Rich Communication Services), voice services, proprietary apps (such as FaceTime, iMessage and Google Messages) and email because each of them is substitutable for their intended use i.e. communication; however, the relevant geographic market should be defined globally.

The CCI rejected the aforesaid arguments of the OPs and noted that different digital services like social media platforms, streaming services, search engines etc. serve the different consumer needs and provide different functionalities. Therefore, they cannot be seen as competitors for user attention in a generalized manner. With respect to argument of OPs regarding global relevant geographic market, CCI noted that the relevant geographic

market cannot be defined global as the conditions of competition in the OTT messaging apps market are homogeneous within India and there exist a unique regulatory framework that impacts the operation of OTT messaging apps in India.

Delineation of Online Display Advertising Market

The CCI delineated a second relevant market – “*Market for online display advertising in India*” wherein Meta was found to be indulging in denial of market access and leveraging its dominant position it enjoys in the OTT Messaging Market. CCI in its delineation distinguished online advertising from offline advertising and distinguished online display advertising from online search advertising. CCI noted that offline advertising differs from online advertising in terms of purpose target audience, engagement, costs, monitoring capabilities etc. CCI noted that offline advertising is primarily used for creating brand awareness whereas online advertising is used to trigger a direct consumer response in the form of purchases or downloads. With respect to distinction between online display and online search advertising, CCI noted that both operate differently, and each serves a distinct purpose within the advertising ecosystem. CCI also referred to its previous order(s) wherein it has already dealt with the distinction between search and non-search (display) advertising markets and noted that based on the intrinsic characteristics of each of such markets, the intended use and pricing search and non-search advertising constitutes different relevant markets. Therefore, online display advertising was identified as a separate relevant market by CCI.

Assessment of Dominance in the OTT Messaging Market

The CCI in its analysis found Meta group operating through WhatsApp is dominant in the OTT Messaging Market and that its presence is further strengthened due to presence of Facebook Messenger in the same market. The CCI while analyzing the dominance of Meta referred to market shares of OTT messaging apps in terms of their Daily Active Users (“DAU”) and Monthly Active Users (“MAU”) data, presence of network effects, switching costs, entry barriers, dependence of the consumers, vertical integration of the enterprises and size, resources and economic power of the enterprise and the competitors.

With respect to market shares in terms of DAU and MAU, CCI noted that DAU and MAU of Meta’s WhatsApp and Facebook Messenger is significantly high as compared to the rivals – Snap Chat, Viber, ShareChat, JioChat, Hike, BlackBerry, Line etc. which indicates a strong market position enjoyed by Meta. CCI noted that WhatsApp and Facebook Messenger have maintained high levels of DAUs and MAUs since 2016 indicating unassailable position and competitive strength enjoyed over rivals. The OPs contended that the market shares in terms of MAU and DAU cannot be relied as the data of WhatsApp biggest rivals Telegram and Signal has not been provided. In this regard, CCI referred to download data of these apps and noted that the same was significantly low as compared to WhatsApp indicating towards a low DAU and MAU figures. In addition to DAU and MAU data, CCI also referred to the ratio of DAU to MAU that provides insights as to how frequently users engage with the platform within a given month. CCI noted that the said ratio for WhatsApp is higher as compared to its rivals, which indicates that users interact more frequently on WhatsApp.

Further, CCI also noted that strong network effects in the OTT Messaging Market create a ‘lock-in’ effects and thus, results in high entry barriers. It noted that when a dominant user base (such as WhatsApp) is involved, users face significant switching costs and other functional issues whilst attempting to migrate to a new platform. CCI noted that when a messaging app reaches a critical size, the strong network effects make it challenging for other competitors to gain a foothold in the market as new users are likely to choose the largest network where most of their contacts are already present while existing users are reluctant to switch to a smaller network. In this regard, CCI noted that consistently high figures of DAU and MAU of WhatsApp and Facebook Messenger indicates presence of direct network effects. It noted that despite the announcement of 2021 Privacy Policy in January 2021, the user base of WhatsApp did not suffer any decline and kept increasing. With respect to size and resources, CCI noted that Meta’s vast financial resources allow it to outspend its rivals in areas such as research and development, marketing, and acquisitions which gives Meta a competitive edge. CCI also noted that Facebook, Instagram, Facebook Messenger, and WhatsApp belong to the Meta group which provides access to huge resources including User data. Therefore, Meta group enjoys a dominant position in the OTT Messaging Market in India.

Assessment of Abuse of Dominance by OPs

Imposition of unfair condition under Section 4(2)(a)(i) of the Competition Act

Section 4(2)(a)(i) of the Competition Act prohibits a dominant enterprise from imposing unfair condition(s) or price in the purchase or sale of goods or services. In this regard, CCI noted that 2021 Privacy Policy update by WhatsApp on a '*take-it-or-leave-it*' basis amounts to an imposition of unfair condition under Section 4(2)(a)(i) of the Competition Act, as it compels all users to accept expanded data collection terms and sharing of data within Meta's platforms without any option or alternative to the Users.

CCI noted that the mandatory acceptance of terms of 2021 Privacy Policy has compelled all those users to accept these terms who had chosen to opt-out of the 2016 update of the privacy policy and that such arbitrary change is unfair because it undermines users' trust and deprives them of their right to decide. Therefore, absence of an 'opt-out' mechanism makes 2021 Privacy Policy one-sided and exploitative. With respect to the conduct of dominant firms like WhatsApp, CCI noted that such "*take-it-or-leave-it*" is concerning because network effects make switching to alternative platforms impractical and costly. Also, in relation to sharing various types of data collected by WhatsApp with Meta, CCI observed that such practices serve as both a driver of market power and a barrier to entry, making it difficult for rivals to enter or expand in the market.

Denial of Market Access under Section 4(2)(c) and leveraging of dominance under Section 4(2)(e) of the Competition Act

The CCI in its analysis concluded that Meta's practice of sharing data across platforms (such as from WhatsApp to Meta) results in two key issues – *firstly*, denial of market access to advertisers in the Online Display Advertising Market and, *secondly*, leveraging of its dominance in the OTT Messaging Market to secure and strengthen its position in the Online Display Advertising Market. CCI noted that Meta's dominance through WhatsApp in the OTT Messaging Market enables it to collect extensive user data, which is then shared across its ecosystem or platforms, including its display advertising services on Facebook & Instagram. By combining and utilizing this data, Meta can offer highly targeted ads, a capability that competitors in the display advertising market struggle to match due to their limited access to similar data. Therefore, the same accords Meta an unfair advantage and creates a denial of market access for its rivals who cannot effectively compete for advertisers.

CCI noted that by leveraging user data from WhatsApp, Meta strengthens its position in the Online Display Advertising Market by enhancing the effectiveness of advertising campaigns. By using aggregated data, Meta enables advertisers to target specific consumer segments more efficiently, leading to more personalized ads and improved engagement. In view of the same, CCI concluded that sharing of WhatsApp users' data between Meta companies for purposes other than providing WhatsApp Service creates an entry barrier for the rivals of Meta and thus, results in denial of market access in the display advertisement market in contravention of Section 4(2)(c) and 4(2)(e) of the Competition Act.

Penalty and Remedies

The CCI found WhatsApp's "*take-it-or-leave-it*" policy an imposition of unfair condition, and without the option to opt-out Meta had undermined the users' autonomy and constituted an abuse of dominant position and, accordingly, imposed a penalty of INR 213.14 Crore upon Meta for abuse of dominance and violation of Section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Competition Act. A penalty was imposed upon Meta as WhatsApp does not maintain stand-alone financial statements and its assets and turnover are included in the financial statement of Meta.

In addition to penalty, CCI also issued a 'cease-and-desist' order and directed Meta and WhatsApp to implement following mentioned remedies:

1. WhatsApp will not share user data with other Meta entities for advertising purposes for five years from the date of the CCI order. After the expiry of five years, the remedies provided for purposes other than advertising to apply *mutatis mutandis* in respect of such sharing of data for advertising purposes.
2. With respect to sharing of WhatsApp user data for purposes other than advertising, CCI directed that:
 - a) WhatsApp to update its policy to provide a detailed explanation of the user data shared with Meta Companies or Meta Company Products, specifying the purposes for each type of data and linking it to its corresponding purpose.

- b) Sharing of data collected on WhatsApp for purposes unrelated to WhatsApp services cannot be made a condition for users to access the app in India.
- c) All users (including those who accepted the 2021 update), must be given the choice to manage such data sharing through an opt-out option prominently displayed via an in-app notification, along with clear settings tab to review and modify their data-sharing preferences.

In addition to above, CCI directed that all future policy updates must comply with the aforesaid requirements.

Interestingly, WhatsApp has also faced regulatory concerns around its 2021 Privacy Policy. In one such instance, in September 2021, Ireland's data regulator fined WhatsApp GBP 225 million for failing to meet transparency requirements under the General Data Protection Regulation (GDPR); which has been appealed by WhatsApp. The Competition Watchdog's order on WhatsApp is being widely perceived as a strong message to social media and e-commerce platforms about the critical importance of sharing of data of the users, safeguarding user privacy and ensuring informed consent. The CCI Order signals a trend of heightened regulatory scrutiny that could influence global tech giants to align their practices with India's evolving anti-trust regime and data protection standards that could have definite implications for monetization of data, design user experiences, and compliance with stricter regulatory regimes by leading corporates. One of the likely implications for the digital companies involved in cross-pollinating user data across their platforms, will most likely be reassessment of their existing policies regarding data mining and sharing and would like to re-align their practices with the CCI's order, than to face imposition of penalties and risk losing a significant number of customers. For smaller tech-companies, this may probably also provide an opportunity to increase their foothold in the OTT and online advertising space.

Authors:

Aditya Bhardwaj, Partner



Rinki Singh, Senior Associate



Disclaimer: The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

ABOUT DENTONS

Across over 80 countries, Dentons helps you grow, protect, operate and finance your organization by providing uniquely global and deeply local legal solutions. Polycentric, purpose-driven and committed to inclusion, diversity, equity and sustainability, we focus on what matters most to you.

[dentons.com](https://www.dentons.com)