

### A. JUDICIAL PRONOUNCEMENTS

#### i. [Delhi High Court refused to stay CCI's probe on WhatsApp Privacy Policy Update 2021](#)<sup>1</sup>

[Order of the Hon'ble Delhi High Court dated August 25, 2022, in LPA 163/2021]

##### **Background:**

This appeal was filed before the division bench by WhatsApp ("Appellant"), against a single bench order declining to interfere with CCI's investigation into the 2021 privacy policy.

In 2021, the Competition Commission of India ("CCI") passed a suo moto order<sup>2</sup> directing an investigation into WhatsApp's new 2021 updated privacy policy for alleged abuse of dominance as per the Competition Act, 2002 ('Act'). CCI found WhatsApp to be dominant in the relevant market of 'Over the top (OTT) messaging apps through smartphones in India',

CCI duly noted that the users were not provided with a voluntary choice to object or rather opt-out of data sharing, unlike the 2016 WhatsApp privacy policy update. CCI concluded that such a "take-it-or-leave-it" policy amounts to an abuse of dominant position and is prima-facie in violation of section 4(2)(a)(i) of the Act which refers to the imposition of unfair terms and conditions.

Aggrieved with the order, WhatsApp approached Delhi High Court, where the Hon'ble Court refused to order a stay on CCI's order directing investigation against WhatsApp's new data privacy policy 2021. The single bench also observed that the pendency of another matter regarding WhatsApp Privacy Policy update before Hon'ble Supreme Court did not cause any hindrance to CCI's

jurisdiction, or that it must necessarily await the outcome of such proceedings.

##### **Conclusion:**

Hon'ble division bench observed that there was an existence of strong "lock-in effect" which rendered its users incapable of shifting to another platform despite being dissatisfied with the product. The division bench also dismissed the Appellant's contention on pendency of case before Supreme Court stating "The sphere of operation of both are vastly different. Neither this Court nor the Supreme Court are analysing the 2021 Policy through the prism of competition law."

#### ii. [NCLAT dismissed WhatsApp 2016 Policy Update Case](#)<sup>3</sup>

[Order of the Hon'ble NCLAT dated August 2, 2022, in Competition Appeal (AT) No. 13 of 2017]

##### **Background:**

The appellant, Shri Vinod Gupta had contended before CCI that WhatsApp, a popular messaging service, was abusing its dominant position under section 4 of the Act, by forcing users to share account and other information with WhatsApp's parent company Facebook, without admitting the exact nature of the disclosure to them, and further, indulging in predatory pricing by not charging any fees for its services.

CCI delineated the relevant market as 'the market for instant messaging services using consumer communication apps through smartphones in India'. In the relevant market, CCI observed that in India, a number of other players such as Apple, BlackBerry, Samsung and many others communication apps providers such as Hike, Viber, etc., provide communication services to consumers and are also active in market, but also observed that

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<sup>1</sup> Whatsapp LLC v. CCI, Facebook v. CCI, LPA 163/2021

<sup>2</sup> Whatsapp LLC v. CCI, W.P.(C) 4378/2021

<sup>3</sup> Shri Vinod Kumar Gupta v Competition Commission of India, Competition Appeal (AT) No. 13 of 2017

WhatsApp had more daily active users than any other communication apps in India. Therefore, WhatsApp was in a dominant position in relevant market for instant messaging services.

For the new 2016 Policy Update, it was pointed out by CCI that data sharing terms of the privacy policy of WhatsApp was used to improve the online advertisement and products experiences available on user's Facebook page. Moreover, WhatsApp provided the option to its users to 'opt out' of sharing user account information with Facebook within 30 days of agreeing to the updated terms of service and privacy policy.

Regarding allegation that WhatsApp indulged in predatory pricing by not charging any subscription fee from the users since January 2015, CCI observed that there were many other services providers who offered the same services for free of cost and that there are no significant costs which was preventing the users to switch from one consumer communication application to another. Therefore, even though WhatsApp appeared to be dominant in the relevant market, but the allegations of predatory pricing had no substance. Hence, no prima facie case of contravention of the provisions of section 4 was made out against WhatsApp.

### **Conclusion:**

The Hon'ble Tribunal upheld CCI's observation on WhatsApp being a dominant player in the relevant market. However, for the reasons such as the user's choice for "opting out"; no significant costs preventing the users to switch from one consumer communication App to another; and WhatsApp's responsibility for its end-to-end encrypted messaging, the Tribunal concluded that there were no unfair or discriminatory conditions

imposed by WhatsApp. Thus, the Appeal was dismissed.

### **iii. CCI dismissed Information against Maharashtra State Road Development Corporation Limited<sup>4</sup>**

[Order of the Hon'ble CCI dated August 24, 2022, in Case No. 24 of 2022]

### **Background:**

Informant was authorized representative of Xypex Products which was involved in manufacturing of Crystalline Durability Admixture ("CDA"), a waterproofing product. The informant had alleged that Maharashtra State Road Development Corporation Limited ("Corporation"), a corporation owned by Maharashtra State Road Development Corporation Limited, that mainly dealt with the properties partaking in projects and works under construction as vested with the State Government, to be abusing its dominance.

The informant pointed out that the corporation was indulging in discrimination and denial of market by including a mandatory qualifying criterion for informant, if it wished to be included in the Identified Vendors list. It was further alleged that the contractors who wished to execute different packages of the project by the corporation were duty-bound to source products from the vendors only included in the List and not from outside. The informant also alleged that the Penetron India Private Limited, Penetron International Limited Inc and Crystal Deep Seal Corporation Limited ("Opposite parties") who were involved in the same business were colluding among themselves to form a cartel to control the production and supply of such products.

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<sup>4</sup> Apaar Infratech Private Limited v Maharashtra State Road Development Corporation Limited, Case No. 24 of 2022

## COMPETITION MONTHLY (August 2022) DUA ASSOCIATES

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### **Conclusion:**

On the allegation pertaining to collusion, CCI concluded that opposite parties were not entities at the same stage of the production chain, but in fact had a vertical relationship in nature. Therefore, CCI rejected the allegations of cartelisation.

On the allegation of abuse of dominant position, the CCI dismissed the same, concluding that the Corporation did not hold any dominant position in the relevant market as, apart from the Corporation many public and private sector companies were present in the market.

*This update is intended merely as a concise compilation of recent developments. The information is general and should not be considered or relied on as legal advice.*

*For any further enquiries, please contact:*



Gautam Shahi [gautam@duaassociates.com](mailto:gautam@duaassociates.com)