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## **Indian Antitrust Authority Sanctions Meta's WhatsApp for Privacy Policy Update**

## INTRODUCTION

The Competition Commission of India (CCI), in its order dated 18 November 2024 (Order)<sup>1</sup>, has imposed a penalty of INR 213.14 crore (~USD 25 million) on Meta Platforms, Inc. (Meta) for abusing its dominant position in the market for Over-the-Top (OTT) messaging apps through smartphones in India (OTT Messaging Market) by way of the following:

- (i) imposition of unfair conditions through WhatsApp LLC's (WhatsApp) 2021 policy update;
- (ii) denial of market access in the online display advertising market (Online Advertising Market); and
- (iii) leveraging dominance in the OTT Messaging Market to protect its position in the Online Advertising Market.

The CCI also imposed the following behavioral remedies on WhatsApp / Meta:

- (i) WhatsApp is prohibited from sharing user data with other Meta companies or Meta company products for advertising purposes for five years from the date of the Order; and
- (ii) WhatsApp is allowed to share data for purposes other than advertising, subject to the following conditions:
  - a. WhatsApp's policy should explain in detail the user data shared with other Meta companies or Meta company products while also specifying the purpose of data sharing and linking each type of data to its corresponding purpose;
  - b. sharing of user data with other Meta companies or Meta company products for purposes other than for providing WhatsApp's services shall not be a condition for users to access WhatsApp's services in India; and

- c. where data is shared for purposes other than for providing WhatsApp's services, all users in India will be provided with the choice to:

- manage data sharing through an opt-out option prominently displayed through an in-app notification; and
- review and modify their choice with respect to data sharing through a prominent tab in WhatsApp settings.

All future policy updates are also required to comply with the above requirements.

Further, after the completion of five years from the date of receipt of the Order, the conditions captured above at #(ii)(b) to #(ii)(c) shall continue to apply for sharing of data for advertising purposes.

WhatsApp / Meta is required to comply with the above requirements within three months from the date of receipt of the Order and also furnish a compliance report with the CCI on the same.

This Order also marks the first instance where the framework of the Commission of India (Determination of Monetary Penalty) Guidelines, 2024 has been relied upon to determine the quantum of penalty.

## FACTUAL BACKGROUND

WhatsApp introduced an update to its privacy policy and terms of service (Privacy Policy) on 4 January 2021 which was notified to its users through an in-application notice from 5 January 2021. Users were required to accept the Privacy Policy to continue using WhatsApp beyond 8 February 2021, a deadline which was later extended to 15 May 2021.

On 7 May 2021, WhatsApp clarified that no accounts would be deleted if the update was

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<sup>1</sup> In Re: Updated Terms of Service and Privacy Policy for WhatsApp users, Order dated 18 November 2024 in Suo

Motu Case No. 01 of 2021 with Case No. 05 of 2021 and Case No. 30 of 2021.

not accepted, however certain users had already accepted the update by then.

The CCI initiated an inquiry following the updates to the Privacy Policy and receipt of two complaints (i.e. informations). On 24 March 2021, the CCI passed a *prima facie* order directing the office of the Director General (DG) to investigate the matter. The DG submitted its report to the CCI on 12 January 2023 (DG Report). The Order was passed post receipt of the DG Report and Meta / WhatsApp's objections to the same.

After the CCI issued its *prima facie* order, WhatsApp also challenged the proceedings by approaching the Delhi High Court, arguing that the CCI lacked jurisdiction. However, a single-judge bench of the Delhi High Court dismissed WhatsApp's petition. WhatsApp then filed an appeal before the division bench of the Delhi High Court, which was also dismissed. Subsequently, WhatsApp appealed to the Supreme Court, where the CCI's jurisdiction in the matter was upheld once again.

## FINDINGS ON MARKET DEFINITIONS AND UNFAIR CONDITIONS

### (i) Market delineation: OTT Messaging Market

The CCI found WhatsApp to be a dominant player in the OTT Messaging Market. The CCI reached this conclusion by first recognizing that OTT messaging platforms, such as WhatsApp, are distinct from traditional electronic communication services (such as, text messaging and voice calls); applications which incorporate messaging as part of a broader suite of functions; and advanced communication platforms. This distinction arises from, inter alia, differences in infrastructure, usage-based limitations, and novel features such as group-chat capabilities and the absence of restrictions on message lengths.

After defining the OTT Messaging Market, the CCI observed that WhatsApp holds a dominant position therein due to several factors, including its consistently high market share in terms of daily active users and monthly active users, comparatively high download figures,

vertical integration with Meta, and strong network effects that drives further adoption by new users and the lock-in of existing users.

### (ii) Abuse of dominance through the imposition of unfair conditions

After establishing WhatsApp's dominance in the OTT Messaging Market, the CCI observed that WhatsApp had unilaterally imposed unfair conditions on its users through the mandatory adoption of its Privacy Policy.

Per the CCI, a comparative analysis of the data collected by WhatsApp and its competitors indicated that the range of user information collected by WhatsApp was not necessary for delivering instant messaging services. Further, the imposition violated users' legitimate expectations regarding how their data would be collected and used, while also denying users the option to opt out of the Privacy Policy. The absence of an opt-out mechanism amounted to imposition of one-sided and exploitative terms.

The CCI further noted that WhatsApp did not offer Indian users certain rights available to users in the European Union, such as the right to access, rectify, port and erase user information. While WhatsApp argued that disallowing opt-outs was standard industry practice, the CCI rejected this justification, emphasizing that such practices cannot be permitted for a dominant player.

### (iii) Abuse of dominance through denial of market access and leveraging in the Online Advertising Market

The CCI observed that Meta operated in the Online Advertising Market in India. Online display advertising was found to be a separate relevant market owing to its distinct purpose, cost-effectiveness, conversion tracking capabilities, advertisement models, and targeting strategies.

While the CCI did not find Meta to be dominant in the Online Advertising Market, it noted that such dominance was not necessary as: (i) Meta through

WhatsApp is dominant in the OTT Messaging Market and (ii) the concerns in the Online Advertising Market flowed from WhatsApp's dominance in the OTT Messaging Market.

The CCI observed that data sharing among its platforms provided Meta with extensive user data, enabling more effective user profiling and improved targeted advertising. This enhanced targeting allowed advertisers to reach consumers more efficiently, increasing the likelihood of successful conversions.

The CCI noted that this data aggregation emboldened Meta's position which was fundamental for effective online display advertising. Further, the imposition of the Privacy Policy in the OTT Messaging Market provided Meta with a substantial competitive advantage which could ultimately result in creating 'lock-in' effects by deepening user and advertiser dependence on Meta's ecosystem. Such dependence would result in denying market access to rivals.

Consequently, the CCI concluded that Meta engaged in both denial of market access in the Online Advertising Market and leveraging its dominance in the OTT Messaging Market through WhatsApp's Privacy Policy to strengthen its position in the Online Advertising Market.

Based on the above, the CCI imposed monetary penalties and behavioural remedies on WhatsApp / Meta.

## CONCLUSION

The CCI's decision against Meta signifies a convergence of competition law and data privacy principles, highlighting how the

interplay of these disciplines can address modern anticompetitive concerns in digital markets. By incorporating data protection considerations into its analysis and remedies, the Order marks a shift in regulatory thinking, with potential implications for enforcement frameworks worldwide. However, the decision raises critical questions, including the legality and enforceability of prohibiting data usage for advertising even with user consent—a challenge that will likely be tested in judicial review.

In addition, the CCI's approach appears to resonate with the precedent set by the German Federal Cartel Office in its 2019 Facebook decision, which pioneered the recognition of data exploitation as a form of abuse of dominance. As such, this decision will set the stage for complex legal debates on the limits of regulatory intervention in platform ecosystems.

Relatedly, investigations are ongoing against several domestic and global tech players, including Google for its practices in the smart TV operating system market, Apple for its app store payment policies, and Amazon and Flipkart for entering alleged anticompetitive agreements. These investigations are expected to conclude in the coming year. With this Order and the digital competition law bill still under deliberation, the rigor of these investigations and the impact of the resulting decisions are likely to serve as a crucial foundation for the CCI to ensure preparedness when the digital competition law is eventually enacted.

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