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WHY WHATSAPP IS NO MORE A CONSENSUAL WAY OF SAYING WASSUP: A SAGA OF WHATSAPP PRIVACY POLICY UNDER INDIAN COMPETITION ACT

PORQUE O WHATSAPP NÃO É MAIS UMA FORMA CONSENSUAL DE DIZER WASSUP: UMA SAGA DA POLÍTICA DE PRIVACIDADE DO WHATSAPP SOB A LEI DA CONCORRÊNCIA INDIANA*

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Abstract: To date, Competition Commission of India's stand on privacy infringement and data-collection tactics of dominant companies remains abstruse. The argument intensified with unilateral change in WhatsApp's terms only applicable to Indian Users; they were mandated to share their data to continue using WhastApp.com. The empirical evidence shows that consumers are sensitive to privacy but would still continue to use the services which shows lack of effective choice and therefore free consent. The author defines consent by expounding on the Behavioral-economic concept of consumer inertia. The article explicates how consent gets vitiated by relying on: First, pre-installation is a form of tying Second, virtual shelf space impacts user traffic. The article discusses how CCI could have used the abrogated Personal Data-Protection law to route excessive data-collection tactics and privacy infringement by dominant entities within the parasol of competition. The article concludes by stating that consumer choice independently can be a sufficient theory of harm.

Keywords: Consent. Competition Law. Privacy. Data. Voluntary. Consumers.

Resumo: Até o momento, a posição da Comissão de Concorrência da Índia sobre violação de privacidade e táticas de coleta de dados das empresas dominantes permanece abstrusa. O argumento se intensificou com a mudança unilateral dos termos do WhatsApp aplicável apenas aos usuários indianos; eles foram mandatados a compartilhar seus dados para continuar usando WhastApp.com. As evidências empíricas mostram que os consumidores são sensíveis à privacidade, mas continuariam a utilizar os serviços, o que demonstra falta de escolha efetiva e, portanto, de livre consentimento. O autor define consentimento expondo sobre o conceito comportamental-econômico da inércia do consumidor. O artigo explica como o consentimento é viciado pela confiança no mesmo: Primeiro, a pré-instalação é uma forma de amarração Segundo, o espaço de prateleira virtual afeta o tráfego de usuários. O artigo discute como a CCI poderia ter usado a lei de proteção de dados pessoais revogada para encaminhar táticas excessivas de coleta de dados e

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violação da privacidade por entidades dominantes dentro do guarda-sol da concorrência. O artigo conclui afirmando que a escolha do consumidor de forma independente pode ser uma teoria de dano suficiente.

Palavras-chave: Consentimento. Lei de Concorrência. Privacidade. Dados. Voluntário. Consumidores.

1. Introduction

Recent years have seen an upsurge in the use of social platforms that connects humans across the world. One such application that has set the trend of closed human interaction is the internet based free messaging application: WhatsApp. WhatsApp was founded by two former yahoo employees in 2009 to make accessible an instant messaging application which worked through internet irrespective of the operating system, (Pahwa, 2021). It was an initiative to replace the much costlier SMS services which prevailed in the 2000's. The free subscription model adopted by WhatsApp in its initial years was an extension of the vision of its founders. The founders envisaged to not embrace a revenue model based on advertisements and instead opted for investors to fund their application (Pahwa, 2021).

Within two years of its launch, WhatsApp ranked amongst the top 20 applications on the App store and gained 200 million users across the world by 2013 (*Facebook/Whatsapp case,* 2021). (Iqbal, 2022) The vision which became a selling point for WhatsApp was to not collect data on the consumers and respect their privacy. WhatsApp built a reputation of a strong privacy advocate until 2014.

In 2014, WhatsApp's merger with Facebook was made official which drew immense criticism across the world. The European Commission fined Facebook in 2016 for providing misleading information regarding technical difficulties in merging WhatsApp's phone number with Facebooks profile id of the users. In 2016, an update was notified in WhatsApp's terms allowing Facebook and its affiliates to use WhatsApp user's data (*Facebook/Whatsapp case,* 2021). The sharing of data was subject to user control which allowed existing users to opt out of such update, but new users were subject to the changed terms and conditions automatically (*Facebook/Whatsapp case,* 2021).

The practice was condemned across jurisdictions owing to privacy concerns that were raised due to sharing of data across platforms. Additionally, the merger gave rise to a much-heightened debate on whether competition authorities should take cognizance of such privacy related matters arising from the market power of the entities under the competition lens.

The paper begins with the assumption that privacy as a non-price parameter of competition between enterprises must be brought within the Indian Competition Act (ICA).

India saw a splurge in the use of WhatsApp post its launch and remains the largest user base of WhatsApp in the world with over 400 million users as depicted in Figure 1. The above assumption becomes all the more pertinent with respect to Indian Competition Law due to various policy changes brought in the terms and conditions of WhatsApp exclusively applied to India's consumer base.

The author in the paper explores four-fold arguments; First, the updated privacy policy issued by WhatsApp which mandates the user to give up their data is an unfair condition and stems from its dominance in the communication service market and hence is abusive under Section 4(2)(a)(i) (Competition Act, India, 2002). Second, the alleged policy coupled with the market power of WhatsApp and its network effects reduces the choice of the consumer in the market of communication services and hence worsens consumer welfare. Third, the default in-built payment in WhatsApp creates a behavior bias in the minds of the users and impairs voluntary and effective consent by imposing them with a product. Resultantly, it would make consumers use the product that they ordinarily would not use. Fourth, the author shall try to develop a framework of what constitutes voluntary consent by routing it through data protection law and using that as basis to develop what constitutes consumer choice as a measure of consumer welfare under competition law.

2. METHODOLOGY

In this research study, a combination of quantitative and qualitative research method has been employed. The study has used quantitative approach where secondary data is required in order to understand the importance of privacy amongst the consumers. However, what constitutes consumer choice and consumer consent is substantially based on qualitative research method which is primarily doctrinal and analytical.

3. RESULTS AND DISCUSSION

The study began with the assumption that privacy as a non-price parameter of competition must be brought under competition Law. One of the qualifiers through which privacy can be measured is consumer choice which manifests itself in the form of consumer consent. The study brings out how lack of consumer choice degrades consumer welfare in the form of reduced choices in the market. The study also focuses on how lack of voluntary consent hampers consumer choice and therefore degrade consumer welfare. The study concludes that consumer choice culminating through consumer consent must be used as a consumer welfare parameter to bring privacy concerns under competition law.

WhatsApp's updated policy in India

WhatsApp as a free instant messaging application gained momentum in India in 2010 and since then India remains the largest user base of WhatsApp with over 400 million subscribers in 2021 (Ahmed, 2021). It remains the most used platform for messaging services with approximately 70 percent of the population using WhatsApp followed by Facebook messenger which stands at 53 percent followed by skype at 29 percent. (Refer to Figure 5). In a survey conducted on 499 people, 99.8 percent people use WhatsApp as messaging services and for 53.9 percent people, WhatsApp is the most used social application.

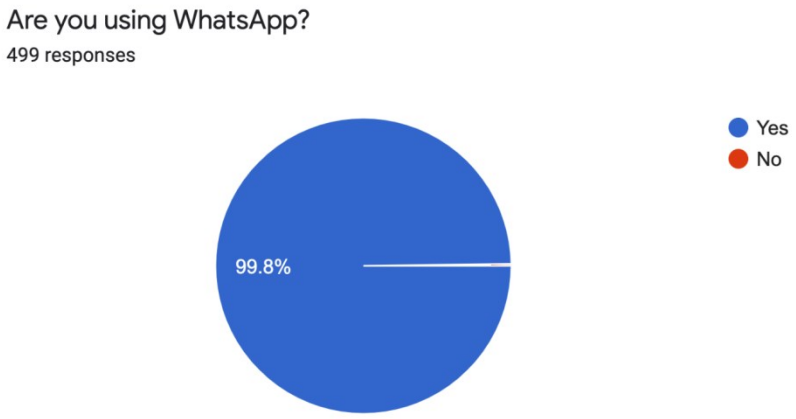

Figure1: Number of WhatsApp users in India.

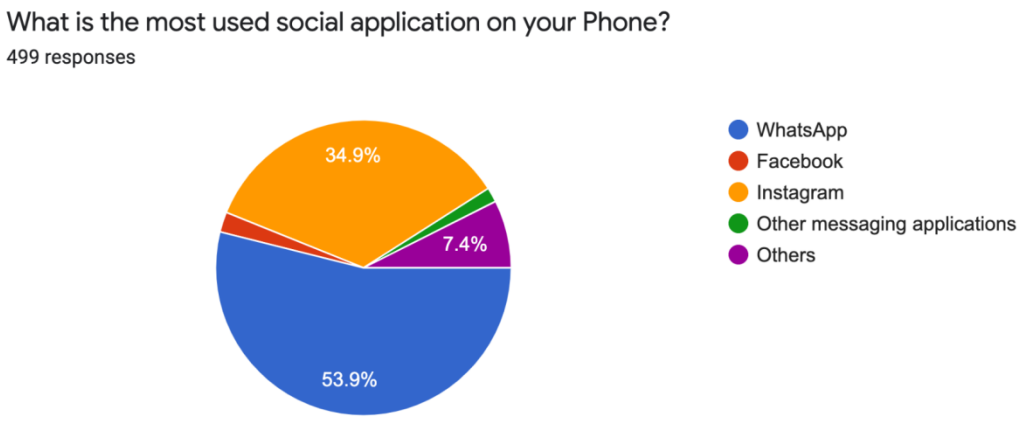

Figure 2: Most Used Social Network Application.

WhatsApp is the leading market player in the relevant market of instant free messaging application through smartphones in India (*Harshita Chawla v. CCI,* 2021). WhatsApp stint with Indian authorities dates back to 2016 post its first roll out of changed terms and condition affecting the privacy of consumers and multiple suits being filed across various courts. This part shall analyze the cases that were instituted against WhatsApp and will illustrate the stand taken by the authorities over privacy and consumer choice as a consumer harm under competition law. The *Karmanya Singh case* (*Karmanya Singh v. Union of India,* 2016*)* shall illustrate the shortfall of the Delhi High Court (HC) to take cognizance of WhatsApp's market power in imposition of such unfair conditions on the users, on the proposition of lack of specific law to deal with privacy. The *Vinod Kumar Gupta case (Vinod Kumar Gupta v. Whatsapp Inc., 2017)* shall illustrate the deficit understanding of CCI in evaluating WhatsApp's market power owing to network effects which helped WhatsApp in imposition of unfair conditions on the users. The case shall elaborate and contend the definition of voluntary consent as discussed by the CCI in its order and elucidate consumer choice as a consumer harm under Competition Law. The author shall rely on the European commission's decision of Facebook (*Facebook/Whatsapp case,* 2021) to support the above-mentioned argument. The *Harshita Chawla case* shall elaborate on the concept of consent and how far can it be considered free under competition law.

a. Karmanya Singh v Union of India: An Incomplete Judgment that Prolonged the Investigation.

WhatsApp came under the scrutiny for the first time in India when it rolled out its new privacy policy in 2016 and mandated permission of the existing consumers to share data across various Facebook companies. The case was instituted in the Delhi HC under the writ jurisdiction under Article 226 (*Karmanya Singh v. Union of India,* 2016*)* of the Indian Constitution on the ground that the updated privacy policy mandates the user to share its data across the platforms and this updated policy infringes right to privacy. The case was disposed of on the grounds that the legal status of right to privacy as a fundamental right was still to be decided and therefore it was not amenable to writ jurisdiction (*Karmanya Singh v. Union of India,* 2016*)*. Secondly, the bench was of the opinion that the consumers always have a choice to delete their accounts on WhatsApp in which case no data shall be shared and therefore the rolled privacy policy is not mandatory for the consumers (*Karmanya Singh v. Union of India,* 2016*)*. Thirdly, unless there is no current statute or regulation that deals with OTT services, the same is not amenable to writ jurisdiction. Moreover, since OTT falls under the domain of Information Technology Act, 2000 which yet does not have a designated section regulating them, the same cannot be decided unless the department of technology comes up with a definite law (*Karmanya Singh v. Union of India,* 2016*)*. The case is pending before the Supreme court, meanwhile the status of right to privacy has been settled in the *Puttaswamy judgement (K.S. Puttaswamy v. Union of India, 2017)* which has declared right to privacy as a fundamental right.

The judgment of *Karmanya Singh v. Union of India* (*Karmanya Singh v. Union of India,* 2016*)* can be criticized on the ground that it failed to evaluate the market power of WhatsApp, prevailing network effects, and switching cost of users before concluding that there exists consumer choice to delete the account. The Delhi HC did not consider that sharing of data across platforms as a precondition to using WhatsApp services amounts to imposition of unfair conditions, which stems from WhatsApp's dominance in the market of communication services. Had the Delhi HC evaluated these aspects, the CCI might not have waited till *Suo Moto Case no. 1 of 2021(In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users Suo Moto, 2021)* to launch a DG Investigation in the matter and perhaps, WhatsApp would not have been able to roll out a privacy policy update that mandates users' consent for sharing of data with Facebook-affiliated companies, exclusively in India. The aforesaid case will be analyzed in the latter part of this section.

b. Vinod Kumar Gupta v WhatsApp Inc.: A step closer towards realizing market power yet farther from ensuring consumer welfare

After *Karmanya Singh v UOI* (*Karmanya Singh v. Union of India,* 2016*),* the updated privacy policy was again challenged but this time before the CCI, alleging abuse of dominant position. Significant to the case, the updated terms and conditions offered to users, allowed WhatsApp to share the data with Facebook. The existing consumers to WhatsApp had an option to opt out of such updated terms and conditions within thirty days but the same opt out provision was not available to the new users of WhatsApp (*Vinod Kumar Gupta v. Whatsapp Inc.,* 2017). The allegation of the abuse was based on the contention that the usage of WhatsApp was made contingent upon the consenting to sharing of data with Facebook-affiliated companies. The CCI agreed that WhatsApp was dominant in the '*market for instant messaging services using consumer communication application'* but dismissed the alleged abuse on the grounds that the consumers are not compelled to sign up for the updated terms and conditions as they have an option to completely delete their accounts, in which case their data shall not be shared (*Vinod Kumar Gupta v. Whatsapp Inc.,* 2017).

The stance taken by the CCI in this case is similar to that taken by the Delhi HC in *Karmanya Singh* case; this demonstrates a similar pattern in thinking of Indian judicial authorities. Both the authorities considered consumer consent as voluntary in a case where users had an option to opt out by deleting their accounts. The consent was categorized as voluntary owing to consumer's choice to switch to an alternative in case of disagreement with the updated terms and conditions (*Vinod Kumar Gupta v. Whatsapp Inc.,* 2017).

The CCI or the Delhi HC for that matter, failed to take into consideration two aspects: First, WhatsApp's imposition of unfair condition leads to excessive data collection and as a result, exploitation of consumers. WhatsApp subjected its services to consent from users to share their data with Facebook-affiliated companies. Under Section 4, there is no sub-provision dedicated to excessive pricing but cases related to such an abuse are dealt under Section 4(2)(a) (Competition Act (India), 2002) which deals with unfair conditions as well as unfair pricing. For accessing WhatsApp's services, users pay in data rather than paying in money. Resultantly, as a dominant entity can charge excessive prices for its services, the dominant entity dealing in data can collect data disproportionately and excessively from consumers. In either case, the conduct of the dominant entity can be categorized as exploitative abuse in so far it is directed against consumers (Gebicka and Heinemann, 2020; OECD, 2020). The commonality in exploitative practices is ability

to act independently of consumers who in a rather competitive market, would have switched to other services when being exposed to excessive conditions. In *Vinod Kumar Gupta v WhatsApp* (*Vinod Kumar Gupta v. Whatsapp Inc.,* 2017), though the CCI arrived at a conclusion that WhatsApp is dominant, it failed to account that WhatsApp is exercising its dominant position to excessively collect data from consumers. Moreover, the fact that consumers are succumbing to sharing their data rather than switching to alternatives, demonstrates consumers' reliance which is making them susceptible to excessive data collection by WhatsApp ultimately leading to their exploitation (Gebicka and Heinemann, 2020; OECD, 2020).

Second, CCI failed to recognize consumer choice as a measure of consumer welfare. WhatsApp made the use of services conditional on the user agreeing to share their data to other services of the undertaking without giving the user sufficient choice as to how and for what purpose the data is being processed. Moreover, if a consumer decides not to share the data, the existing consumers had the option to opt out but the new users could not gain access to WhatsApp.com without sharing the data. This was problematic since WhatsApp was dominant in the relevant market and therefore consumers lacked the effective choice to switch away from WhatsApp. The CCI failed to take into account the network effects and asymmetry of information between WhatsApp (Gebicka and Heinemann, 2020) and the Indian users which plays heavily on the minds of the consumers while making choices thereby dissuading consumers to exercise their consent voluntary. The concept of voluntary consent as defined by CCI in this case could be argued to mean, that consumers choice to delete their account and switch to an alternative in case of their disagreement with updated terms (*Vinod Kumar Gupta v. Whatsapp Inc.,* 2017). (*Vinod Kumar Gupta v. Whatsapp Inc.,* 2017) Further, upon finding of voluntary consent, authorities dismissed the case. The authorities meaning of "voluntary" can be conflicted by the data that proves that 83.6 percent (Figure 3) users are not okay with WhatsApp sharing their data as a mandate to use WhatsApp services, however 72.7 percent (Figure 4) users would still continue using WhatsApp irrespective which indicates WhatsApp's market power and consent of the users being vitiated because of this market power. Hence, the lack of choice in the market of instant messaging application of consumer communication services compelled the consumers to consent to such unfair condition.

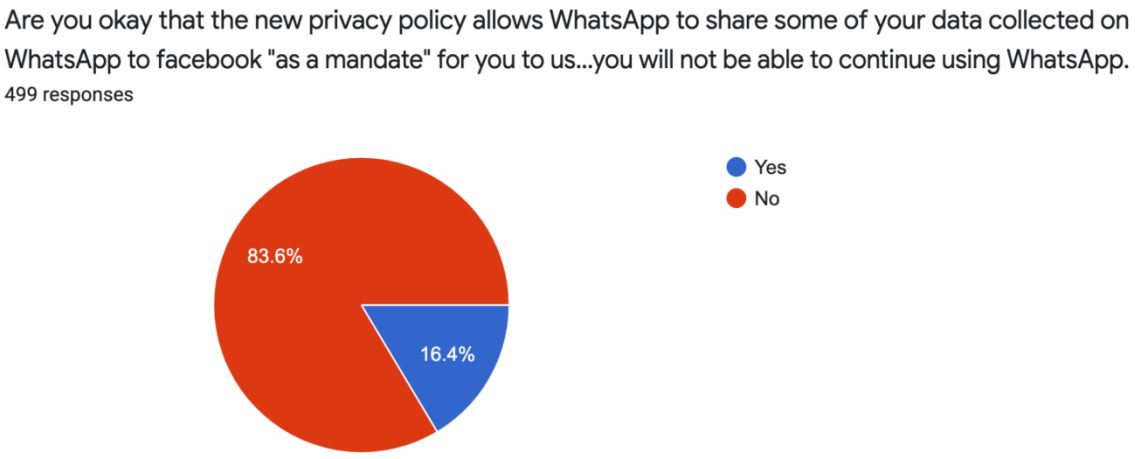

Figure Mos3. Population perception on change in privacy policy.

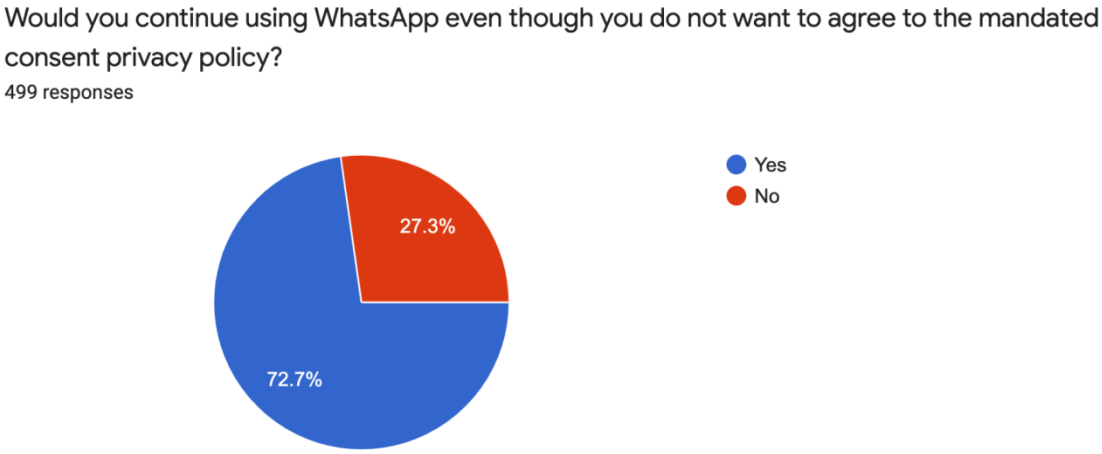

Figure 4. Population Perception on Privacy Policy: A Privacy Paradox.

Figure 3 demonstrates that 83 percent of users who are dissatisfied with WhatsApp mandating collection of their data are despite using the application. As a part of the first argument, the author contends that WhatsApp has been able to stick with such mandatory condition owing to its market power. Further, Figure 4 suggests that 72.7 percent would not switch even if WhatsApp never changes its privacy policy. The apparent reason for this seems to be network effects. Apparently, WhatsApp is well-aware of this consumer inertia which makes competition intervention even more relevant..

Intriguingly *Bundeskartellamt* is one of the competition authorities that has taken an overarching cognizance of privacy issues raised by Facebook. The *Bundeskartellamt* brought the anti-competitive practices of Facebook through its data collection tactics under the head of 'Consumer choice' abuse and exploitative business terms. The arguments that the author intends to put forth were already regarded by the *Bundeskartellamt* in the case against Facebook. The *Bundeskartellamt* was of the view that the data collection practices of Facebook are a part of default settings to sign up for Facebook and since Facebook is dominant in the market of social networking, the consumers lack voluntary consent in the form of consumer choice to opt out, regarding the manner and the amount of data collected on them. *Bundeskartellamt* defined voluntary consent as a consent where users don't have to give up their data as a prerequisite to signing up for Facebook services. Consumer choice has been interpreted to mean the ability of the users to deny integration or transmission of their data across platforms and still being allowed to use the services. The consumer welfare was affected due to lack of choice which amounted to abuse of dominance. Furthermore, *Bundeskartellamt* also categorized the practice of Facebook as exploitative since the users lack effective bargaining power vis a vis a dominant entity and hence are forced to agree to their unilateral terms and conditions. *Bundeskartellamt* ventured into the civil law to include privacy considerations raised through data accumulation under the competition scrutiny (*Administrative proceedings against Facebook Inc.*, 2019).

The author argues that the issue of network effects leading to entrenched dominance of WhatsApp which was used to garner apparent "voluntary consent" of the consumers was a sufficient cause of action under competition law. The *Bundeskartellamt* relied on civil law to route competition concerns raised through data accumulation, similarly CCI could have also referred to the Indian Civil law i.e. Indian Contract Act, 1872 (*Administrative proceedings against Facebook Inc.*, 2019). The CCI could also have routed competition concerns raised by WhatsApp by using Section 23 (Indian Contract Act, 1872) or Section 16 (Indian Contract Act, 1872) of the Indian Contract Act which targets consent being vitiated due to lack of bargaining power or through undue influence.[†]

[†] If the entity exploiting the consumers was dominant, it was sufficient that consumers lacked effective choice to bargain and hence could have been brought under the head of consumer choice abuse under Section 4 of the ICA.

c. Harshita Chawla v WhatsApp Inc.: Consumers Pay at the Expense of using WhatsApp.

Indian authorities might have failed to address anticompetitive concerns but WhatsApp has certainly not failed to expand and introduce new line of business. No longer than its merger with Facebook, WhatsApp launched WhatsApp Business which allowed businesses to integrate their systems with the customers and send them notifications automatically and auto-reply the queries and update them of the shipping information. Along with this, WhatsApp has also introduced and integrated WhatsApp-pay which is an inbuilt payment mechanism through which customers will be able to send payment to the businesses in India.

Even though the privacy concerns raised in the aforementioned case remained unsettled, another challenge was brought before the CCI. In the case of *Harshita Chawla v. WhatsApp* (*Harshita Chawla v. CCI,* 2021), the practice of tying WhatsApp-Pay with WhatsApp was contended on two grounds: potential exploitative effect insofar WhatsApp-Pay was pre-installed in WhatsApp application and potential exclusionary effect since WhatsApp can use its dominant position in the OTT market to leverage in market for UPI digital payment application. The CCI dismissed these contentions by stating that consumers are not exploited as, even though WhatsApp-Pay is pre-installed, they will have to sign up separately for accessing its services. It was further stated that mere existence of application on the phone does not necessarily mean that the consumers have to effectuate a transaction through it. The CCI could have looked at the case from the lens of exploitative and exclusionary effects in the relevant market. The author in the next part shall illustrate the concept of consumer inertia to elucidate the exploitative and exclusionary effects produced in the market due to the presence of defaults.

d. Pre-Installation as a form of Tying:

WhatsApp is deriving benefit from consumer inertia by tying WhatsApp-Pay with WhatsApp (*Jefferson Parish Hosp. Dist. v. Hyde,* 1984). The CCI failed to observe that the decision of consumers pertaining to choice of payment application is compromised owing to the presence of the tied product. This phenomenon is called as consumer inertia which means the inability or the obliviousness of a consumer to make an active choice to change the status quo or switch suppliers even if there is sufficient competition in the market (Vengas, 2018). In the presence of consumer inertia, dominant entities can exploit consumers by offering their services as default. Consumer

inertia is more likely be exploited in markets where services are free and instead of price the consumers are charged their data to access those services.

As opposed to traditional market, in digital market, the consumers usually do not have to pay extra to get the benefit of tied product. For instance, a consumer can download WhatsApp at zero price and access WhatsApp-Pay which will have come along tied with WhatsApp. Seemingly, WhatsApp tied its payment services to become a default option for its users. Scholars have explained default as the positioning of choices that induces consumers to choose a set of options presented as status quo (Cheng, 2018). When a user opens WhatsApp, by default it sees WhatsApp-pay as a payment application and therefore this presence nudges consumers to opt for such payment application at the exclusion of others. This default space on WhatsApp is a form of own content bias that induces consumers in favour of WhatsApp-Pay. This default presence cannot be akin to coercion which is essential for the anti-competitive harm of tying since these defaults are not themselves forceful but the author argues that this soft nudge in the form of the default in itself is anti-competitive when done by a firm with market power (Cheng, 2018). The presence of WhatsApp-Pay in WhatsApp acts as a soft nudge enticing consumers to opt for the default payment application at the exclusion of others.

e. Virtual Shelf Space impacts user traffic

Slotting allowance is a fee charged by supermarkets to place the product of the manufacturer on the shelf. The behavioral economics concept of 'defaults' largely impacts the competition for virtual shelf space (Cheng, 2018). Based on the literature by Cecilia (Yixi) Cheng in the article titled "Competition for Defaults: The Fight for Virtual Shelf Space" (Cheng, 2018) the competition amongst firms in digital markets is not only confined to price or quality but instead the companies are competing for default options. In the virtual shelf space, default positions are those which receive maximum eye balls or attention when displayed on the screen. The disadvantage of not being a default option or not being in the visible space can be illustrated by the google shopping case (*Google and Alphabet v. Commission (Google Shopping),* 2021). In the google shopping case moving the first general search result from first rank to third rank reduced the traffic by 50 percent which was further reduced to 85 percent when it was moved to the tenth rank on the same page (*Google and Alphabet v. Commission (Google Shopping),* 2021).

When the screen gets further trimmed for instance over mobile phones, the fight for virtual shelf gets more aggressive. Behavioral economics suggest that defaults can often determine the

outcome even though the switching cost is not too high (Stucke, 2012). The outcome becomes all the more problematic when there is a default on a dominant platform which allows these platforms to favour their own products. For instance, google and google maps or amazon and the private label brands on Amazon (Stucke, 2012).

The presence of WhatsApp-pay in WhatsApp as a default illustrates how WhatsApp is leveraging its dominant position as a vertical competitor to exploit consumer inertia. India has the highest number of WhatsApp users in the world accounting for 487 million users (Bhat, 2022). Most of the users use WhatsApp through phones and therefore the screen gets further trimmed and hence the visibility gets further strained and importance of default increases further (Stucke, 2012). When a user opens WhatsApp, by default it sees WhatsApp-pay as a payment application and therefore this presence nudges consumers to opt for such payment application. This harm need not necessarily fall under the defined category of abuses but can be a separate category of conduct. For instance, in the google shopping case self-preferencing or own content bias was introduced as a separate theory of harm. It was contended by Google that this theory of harm doesn't fit within the contours of defined categories under abuse of dominance (*Google and Alphabet v. Commission (Google Shopping),* 2021). However, the commission held that it is not new to infer that use of dominant position to establish dominance in other market constitutes an abuse irrespective of the name given to it. Additionally, the commission held that it is not necessary to prove that the other comparison shopping websites have ceased to exist, it is sufficient if the conduct is capable of having such effect or likely to have such effect. Secondly, it is relevant that absent this conduct the other competitors' ability to compete would have been fiercer (*Google and Alphabet v. Commission (Google Shopping),* 2021). Analogously, the CCI need not have proved actual exclusion of the UPI enabled payment applications from the market instead, it was sufficient to prove that it could likely have that effect in the relevant market.

The European Commission in the Windows Media Player case (*Microsoft Corp. v. Commission of European Communities,* 2007) held that the existence of defaults can foreclose competition and hence must be considered as a relevant evidence while determining abuse (Stucke, 2012; OECD, 2016). CCI failed to recognize the importance of defaults in industries with network effects and qualified by user visibility.

Suo Moto Investigation: What changed?

Recently WhatsApp again came under the scrutiny of CCI with its updated privacy policy which was made mandatory for the users to accept, failing which their accounts shall be discontinued. The mandatory signing up was only made applicable within the constricts of India which has made Indian authorities to question its weak data protection laws (*In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users Suo Moto,* 2021). The European Union swirled a series of suits against Facebook for its devour of privacy over time and with strong GDPR (Williams and Kamra, 2021) in place, Facebook and WhatsApp did not roll out its mandatory privacy policy in the EU. The CCI has made some preliminary remarks in the suo moto case brought against WhatsApp.

In the *suo moto* case, the CCI decided to order an investigation on the ground that the conduct of WhatsApp pertaining to data collection and usage could have anticompetitive implications, leading to exploitative and exclusionary effects. The CCI observed that WhatsApp held a dominant position in the market for OTT messaging applications and owing to network effects, the switching of consumers to other applications is implausible. According to the CCI, WhatsApp through modifying its privacy policy seemed to have imposed a precondition upon the usage of its services, as per which the users have to priorly consent for sharing and integration of data with Facebook companies. Further, the CCI has found WhatsApp's collection and usage of data as unduly expansive and disproportionate. It appeared to the CCI that the actions of WhatsApp violate Section 4 (2)(a) (*In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users Suo Moto,* 2021) which deals with the imposition of unfair conditions upon sale or purchase of goods or services. In particular, the conduct of WhatsApp in sharing users' personalized data with other Facebook companies was found *unfair* due to lack of transparency and voluntary consent. At present, the DG is investigating the matter against the backdrop of the WhatsApp privacy policy.

The investigation was ordered at the same time when the discussion of the abrogated Personal Data Protection Bill ("Bill") was ongoing. The concerns raised in the order coincide with several objectives of the abrogated Bill, stemming questions related to the *future* of WhatsApp privacy policy in India such as Whether WhatsApp conduct will be scrutinized under the Bill upon its enforcement? Whether the CCI's jurisdiction will be in a tussle with the Data Protection Authority ("DPA"). In this part, these questions are analyzed by delving into the similarity between the privacy considerations of the order and provisions of the abrogated Bill followed by the

potential jurisdictional tussle that might arise between the CCI and the DPA that was proposed in the abrogated bill.

Analogy

Interestingly, the concerns raised by the CCI are analogous to privacy and data considerations that can be traced in the now abrogated Personal Data Protection Bill, 2019 ("Bill"). As opposed to the Act, the application of the Bill was considerably wider as it applied to any processing of personal data (The Personal data Protection Bill (India) (Abrogated), 2019) The term "processing" as defined in the Bill referred to the collection and usage of personal data which in turn meant data that can lead to identification of a natural person (The Personal data Protection Bill (India) (Abrogated), 2019). In its order, the CCI has stated that WhatsApp collects and shares identifiers and other data such as location information of the users to Facebook companies. Further, owing to the volume of personal data being processed by WhatsApp, it would have had to apply for registration upon Bill's enforcement (The Personal Data Protection Bill (India) (Abrogated), 2019). Therefore, it is likely that the data-related activities of WhatsApp would have fallen under the ambit of the abrogated Bill.

Moreover, the actions for which WhatsApp's conduct was found unfair are profoundly similar to actions that the Bill prohibited. For instance, the CCI found the policy unfair because it failed to specify the purpose of data collection and its usage. The same could be traced to Section 4 of the abrogated Bill which imposes an obligation on the processing of data i.e., "*No personal data shall be processed by any person, except for any specific, clear and lawful purpose"* (The Personal data Protection Bill (India) (Abrogated), 2019). The magnitude of specificity and clarity that this provision seeks could be construed from the subsequent provisions of the abrogated Bill. Section 7 of the Bill required information relating to entities with whom the personal data is shared shall be provided to the users (The Personal data Protection Bill (India) (Abrogated), 2019). However, with regard to this, WhatsApp in its privacy policy merely states that the user data it collects is shared with other 'Meta companies'. WhatsApp seemed to have used open-ended terminologies such as 'other companies' on multiple occasions and the same was also pointed out by the CCI in its order. Due to open-endedness, the CCI concluded that users are not specifically informed and resultantly, they would not be able to ascertain actual data cost associated with their usage. Apart from the ground of open-endedness, the CCI found the policy unfair because it imposed precondition upon the users who would have to give prior consent for sharing data with Facebook companies. Section 11

of the abrogated Bill stated that the usage of any service shall not be made conditional upon the processing of personal data not necessary for that purpose. If the Bill would have been enforced and if WhatsApp would have failed to prove the necessity for sharing the user data as demanded by the said provision, it would have been penalized under the provisions of the Bill.

The incumbent order demonstrates that Section 4(2)(a) of the Act which prohibits the imposition of unfair condition has turned out to be of wide amplitude inasmuch as it has covered Sections 4, 7 and 11 of the abrogated Bill as observed above. The conjoint reading of Sections 4(2)(a) and 18 of the Act suggests that the CCI is responsible for ensuring that the interests of consumers are protected. It can be construed from the order that in the eyes of the CCI, privacy and data-related concerns are part of consumer interests.

The fact that the CCI pointed out similar concerns as were present in the abrogated Bill is captivating. This means that the privacy interests that the legislature intends to protect were accounted for by the CCI. Seemingly, in order to safeguard consumer interests, the CCI has unknowingly applied the aforementioned provisions of the Bill. The order being preliminary in nature, the in-depth investigation was absent. However, during the course of the investigation, the CCI can take a cue from other provisions of the abrogated Bill as well. For instance, Section 11 of the abrogated Bill in a manner, lays down the ingredients of consent. The provision bases validity of consent on multiple conditions such as, *inter alia*, (i) it shall be made through an affirmative action meaningful in the context and (ii) it shall be capable of being withdrawn with the same ease with which it was given. The CCI should interpret Section 4(2)(a) of the Act and find consent obtained without affirmative action or in absence of a comparable option of withdrawal as unfair. The CCI could have used the provisions of the Bill as a reference to ascertain whether given data-related conduct is unfair.

The Suo Moto investigation expounded the premise on which the author based its first argument. The investigation relied on the unilateral change in privacy policy by WhatsApp which mandated the consumers to allow WhatsApp to share their data across platforms if they wish to continue using WhatsApp.com services. The conclusion of contract with WhatsApp.com was subject to acceptance of supplementary conditions by the users in the form of giving up their privacy and allowing WhatsApp to collect as much data on the users which had no connection with the main services provided by WhatsApp and hence infringed Section 4(2)(b)(d) (Competition Act (India), 2002). The excessive data being collected on the users and compromise on privacy of the

consumer has no added benefit to the consumers in the form of better services or better product and hence there is no correlation of privacy infringement and excessive data collection with the main communication services. Prior to the merger of WhatsApp with Facebook, WhatsApp functioned efficaciously without collecting data on users. It was one of the reasons it was able to breakthrough in the communication services market with such ease. The Suo Moto case against WhatsApp can be used as an opportunity by the CCI to not only find WhatsApp conduct abusive but to also uphold and ensure consumer welfare.

4. CONCLUSION

Choice/Consent: A new choice for competition law analysis

Consumer Choice under Competition law in India has always been at the foreground but has yet not garnered enough attention in terms of an individual sufficient theory of harm. The central feature in establishing abuse under section 4 of the ICA revolves around the concept of choice which is expressed in the form of switching. Consumer choice is what forms the basis for the determination of the relevant market. Relevant market is the market which constitutes products that consumers think are substitutable. The question is whether the consumers have a choice to choose products by adjacent suppliers in the same market. Once the relevant market is determined, the question CCI seems to answer in applying Section 4 is to actually see whether the consumer has a choice in switching to a different alterative product if it is not happy with what the dominant firm has to offer (Nihoul, 2016). Once this is established the CCI goes on to prove if the dominant entity has actually hindered the ability of the consumers to choose or switch. If the answer is in affirmative, the entity is held to be abusing its dominant position in the market. The discussion exhibits that irrespective of the various theories of harm under Section 4, consumer choice remains central to its determination, even though the use of the term explicitly may be absent.

CCI has delivered judgements that may not have specifically brought consumer choice at the forefront but did cursorily based its premise on that. In the case of Matrimony.com v Google the CCI held that the by prominently displaying Commercial flight options with link to google specialized flight services denies the user of additional choices and therefore is an unfair imposition of conditions in contravention of Section 4(2)(a)(i) (Competition Act (India), 2002). The CCI explained that the lack of choice exists since maximum consumer traffic is received by the top

search results which in this case is diverted to the specialized google flight services due to Google leveraging its position in the general search engine market. The consumers do not receive the most relevant results but the ones manipulated by google which essentially hampers their freedom of choice to choose amongst the most relevant results. The premise of lack of user choice was based on manipulation by google. Google exploited the consumer inertia which hampers their ability to go beyond what is displayed on the top of the search results. The placement acts as a soft nudge to induce consumers to move their eye balls to google flight search services which may or may not be the most relevant for the consumer.

In the case of *Vinod Kumar Gupta (Vinod Kumar Gupta v. Whatsapp Inc., 2017)* the CCI analyzed consumer choice in the form of an "opt out provision". The consumer choice manifested itself in the form of an "explicit consent" since existing consumers had the choice to opt out of the updated terms and conditions. The other aspect of choice identified by CCI was in the form of an implicit consent wherein the consumers had the option to delete their accounts if they did not want to sign up for updated terms and conditions. The implicit consent was also made applicable to the new users, for whom the only option was to agree to the terms and conditions if they wanted to access the original services.

In the *Harshita Chawla case* (*Harshita Chawla v. CCI,* 2021), CCI again based its entire premise on the existence of user choice. In this case, the user choice was in the form of "explicit consent" since the use of WhatsApp was not made dependent on users using WhatsApp-pay. Moreover, the users had to explicitly consent by signing up for WhatsApp-Pay.

The CCI has time and again used user choice to establish competitiveness in the markets. However, none of the case give a clear understanding of how and when user choice either as "implicit or explicit consent "would be free, effective and voluntary. The scenario becomes more complex when these embargos are placed by entities qualified by network effects, asymmetry of Information, access to big data and market share. These entities are not only indispensable to the economy but also become stakeholders of constitutional rights of the individuals which includes right to privacy.

The preamble appended to Competition law states that the goal of competition law is to protect the interest of the consumers (Competition Act (India), 2002). In a data driven economy where prices are charged in the form of data, and data is the cost that consumers pay to access the services, privacy becomes the interest of the consumers that competition law must seek to protect.

One of the ways through which privacy can be integrated in the competition law regime is by working closely with personal data protection law. If an entity dominant under section 4 of the ICA violates the provisions of data protection law, it should be considered as grounds of abuse. Migrating into data protection law to expand grounds of abuse under ICA does more good than bad. It also clarifies the scope of consent under consumer choice that can be used to establish if the consumers are being subjected to unfair conditions due to the lack of effective and voluntary consent.

Consumer choice and consent go hand in hand under the data protection regime. A consumer is said to have a choice when it consents to the manner in which its data is accumulated processed and used. Section 11 (The Personal data Protection Bill (India) (Abrogated), 2019) of the abrogated data protection bill proceeded to define consent of the data principal while accumulating or collecting data on him. Section 11(2)(a) (The Personal data Protection Bill (India) (Abrogated), 2019) defined consent to be valid if it is free as per Section 14 of the Indian contract Act. Consent is free when it has been given but for the existence of coercion. The various stints of WhatsApp in India might not qualify under the definition of physical coercion but can be classified as a form of soft mental nudging. The *Harshita Chawla case* (*Harshita Chawla v. CCI,* 2021) represented how WhatsApp-pay is being forcefully shown as a default option to the consumers acting as a soft nudge tilting them to choose it over other more relevant options in the relevant market of UPI enabled payment applications. The author defines it as forceful because it is not the most relevant option a consumer would prefer on merits. Hence the consent is not free after all as per the Indian Contract act and therefore would have fallen foul under the abrogated Data Protection Law. If this practice is committed by an entity dominant in the market and it can do so independent of market forces such ground should be considered a relevant ground for abuse. Section 11(2)(e) (The Personal data Protection Bill (India) (Abrogated), 2019) defines consent to be valid if the data principal indicates it through an affirmative action. The meaning of affirmative under the Black's law dictionary is something which is declared positively (General Data Protection Regulation EU, 2016). Furthermore Section 11(2)(e) (The Personal data Protection Bill (India) (Abrogated), 2019) defines consent to be valid if it can be withdrawn with the ease it was given. The updated terms and conditions by WhatsApp in 2021 which mandated the consumers to give up their data to use the services of WhatsApp.com, the consent was not affirmatively given. It was as a result of the mandate placed upon consumers by WhatsApp, if they wish to continue using the services. Moreover, the

capability of the consumers to withdraw their consent was met with the option of permanently deleting their accounts on WhatsApp and hence the ease of withdrawal was absent in this particular case. Drawing parallels on what constitutes voluntary and effective consent from the data protection law, it can be used to determine if the consent is voluntary and effective under the competition law by the CCI. If the consent does not meet the criteria of being free under the data protection law and the entity taking away the consent is dominant in the market, it should form a ground for abuse under section 4 of the ICA.

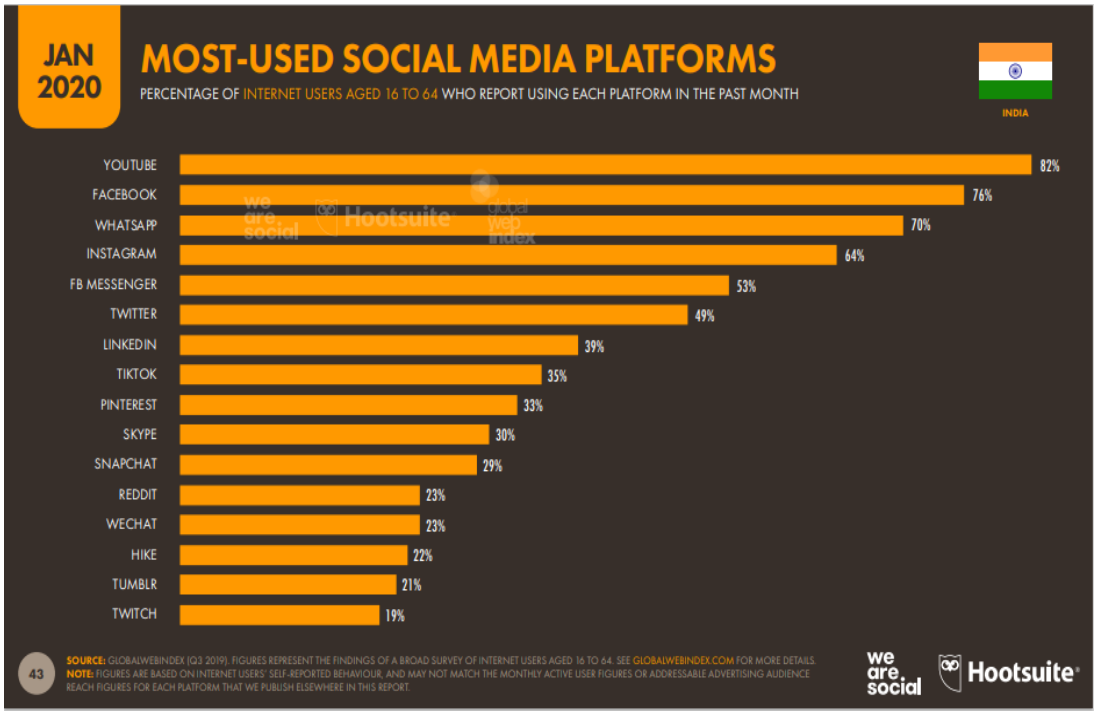

Figure 5. Most Used Social Media Platforms in India.

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