



COMPETITION COMMISSION OF INDIA

Case No. 15 of 2020

In Re:

Harshita Chawla

Co-offiz, Ground Floor, Building No – 5,
Park End, Vikas Marg,
Preet Vihar, Delhi – 110092

Informant

And

WhatsApp Inc.

1601 Willow Road
Menlo Park, California 94025
United States of America

Opposite Party No. 1

Facebook Inc.

1601 Willow Road
Menlo Park, California 94025
United States of America

Opposite Party No. 2

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 26(2) of the Competition Act, 2002

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter the ‘Act’) by Ms. Harshita Chawla, (hereinafter, the ‘Informant’) against WhatsApp Inc. (hereinafter, ‘WhatsApp’) and Facebook Inc. (hereinafter, ‘Facebook’) alleging contravention of the provisions of Sections



4 of the Act. WhatsApp and Facebook are collectively referred to as the ‘Opposite Parties’ or the ‘OPs’.

Facts, as stated in the information

2. The Informant is stated to be a practicing advocate engaged in extensive legal research and advocacy in multiple fields affecting the society. The Informant has claimed that the present information has been filed to highlight the anti-competitive practices followed by platforms in Unified Payment Interface (UPI) market in India which affect participants/players in the said market, besides impacting individual customer/consumer in the long run.
3. WhatsApp (OP-1), launched in 2009, is an instant messaging application which provides a simple interface with no ads, allowing users to communicate with other WhatsApp users either in groups or individually. WhatsApp uses the Internet to send and receive text messages, images, audio or video content from one user to another. It further offers features like group chatting, voice messages and location sharing. To use this App, one simply needs a compatible smartphone/tablet/desktop with a sim card, an Internet connection and a phone number.
4. Facebook, Inc. (OP-2), a technology company based in United states of America, is a social networking platform that allows the users to connect with other Facebook users through posts, messages, likes, comments *etc.* Facebook is considered as one of the Big Five technology companies along with Microsoft, Amazon, Apple, and Google. In the year February 2014 Facebook, acquired WhatsApp for the purchase price of US\$19 billion and is thus the parent company of WhatsApp.
5. The Informant has alleged that Facebook backed WhatsApp, by using its dominance in the internet based instant messaging App, is bundling its messaging App with the payment option (WhatsApp Pay) thereby using such dominance to



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penetrate into the UPI enabled Digital Payments App Market. Moreover, by enabling automatic installation of WhatsApp Payments App in the WhatsApp Messaging App, Whatsapp is alleged to be taking advantage of its vast userbase to popularise its newly launched Whatsapp Pay App.

6. The Informant has further stated that UPI enabled Digital payment market deals with customer sensitive data and alleges that with the given volume of data, national security and data privacy can be compromised, if the anti-competitive activities of the OPs are left unchecked and unregulated, thereby leading to loss at a national level. Such data helps to understand the volumes of transactions, buying/purchasing behaviour of customers, popularity of sectors, *etc.* which are also crucial for shaping the domestic policies of our country.
7. The Informant states that Facebook works on attention-based advertising business model and is one of the most visited websites globally with an active user base of 2.37 billion active monthly users. Upon signing up, a user provides his/her personal details and data - which then gets frequently updated by such user over the years. On the basis of such data and the activities updated and posted by users, Facebook targets right audience at the right time with the right product. This is known as Targeted Advertising. The Informant claims that to replace the revenue earned from targeted advertisement with an ad-free service, they have to charge each user at least an amount equivalent to its current Average Revenue Per User (ARPU).
8. The Informant claims that the Facebook's acquisition strategy has always been focused on buying out its market competition which is evident from the multiple acquisitions it made in last few years that turned heads in the market. In addition to acquisition of WhatsApp, the most popular acquisition made by Facebook is that of Instagram, the popular photo-sharing application, for about \$1 billion in cash and stock in the year 2012. The Informant has also stated that through the acquisition of WhatsApp, Facebook is much closer to reaching billions of people, and with a market of that size, it is sure to find a way to eventually cash in. The



Informant also alleged that by acquiring its competitors, Facebook has made available a product portfolio made of Instagram, Messenger, WhatsApp, and Oculus, which are called the five pillars of its revenue-generating model thereby driving out healthy competitors from the market. The Informant has further submitted that by utilising the vast amount of personal data from its billions of active users and their activities, Facebook can customise advertisements to suit user situation and attract attention. This type of targeting is extremely beneficial for advertisers, who are willing to pay a premium to ensure that their products/services are advertised to right people at the right time. According to the Informant, OP-2 monetizes the user data, generates revenue and drives out healthy competition from the market.

9. In relation to WhatsApp's revenue model, the Informant has stated that WhatsApp does not charge a direct fee for its service to its users but it shares the data it collects automatically from the users on the WhatsApp with Facebook thereby aiding it in generating huge revenues through targeted advertisements. The Informant also claims that WhatsApp shares data with third parties permitted to interact with the users. Moreover, WhatsApp also has business application, which is currently free to download, which allows users to build their business profile along with important links to their website or Facebook page, set up auto responders, link their landline numbers with WhatsApp and can integrate the WhatsApp for Business application program interface (API) with their product offering. While there is no initial charge for the service, WhatsApp charges a fee if the business does not respond within 24hrs.
10. United Payments Interface (UPI), which was launched in 2016 with the aim of transforming India into a "less-cash" society, is an instant real-time payment system facilitating inter-bank transactions on a mobile platform. UPI was designed by National Payment Corporation of India (NPCI), which works like an email ID that the bank uses for each individual to transfer money through the Immediate



Payments Service (IMPS), which is faster than NEFT and works throughout the day. In other words, the UPI is a payments system, akin to plastic money, cheque, debit card, or a mobile wallet. The UPI system is interoperable between banks, which makes it unique and convenient for the users. It also caters to the “Peer to Peer” request which can be scheduled and paid as per requirement and convenience.”

11. The Informant highlighted various key features of UPI to emphasise that it is a unique product, different from the other systems of payment used by a consumer. For example, payments under UPI can be initiated by both, the sender (Pay) as well as the receiver (Collect); UPI is a mobile first platform which carries out transactions in a secure manner aligned with the extant RBI guidelines; payments can be done using Virtual Payment Address (VPA), Account Number & Indian Financial System Code (IFSC) *etc.*; payment uses 1-click 2-factor authentication *etc.*
12. The UPI works on a two/three/four party model. There can be maximum four entities consisting of two PSPs (Payment Service Providers) which will be acting as Interface Providers for the customers/merchants and two banks acting as Remitter & Beneficiary Bank. The role of the two PSPs is to facilitate the transactions; however, the debits and credits happen in the bank accounts. The UPI is designed for banks, as only a banking entity can directly interact with the UPI switch. However, there is a provision for non-banking entities to participate in the UPI ecosystem. Although such non-banking entities will have to partner with a banking entity (already enabled on UPI) and develop their own PSP. Such PSP's are known as third party applications. Many technology-based companies have ventured into the UPI ecosystem through this mode and have offered Third-Party App services. Users can access UPI payment facilities through such Third-Party Apps facilitating payments through UPI. These apps use UPI libraries and utilities to facilitate user registration, creation of VPA and provide payment services to the



users. Users are thus, not bound to use the app of their own bank and can instead choose the app of any bank or any Third-Party Apps facilitating payments through UPI. Google Pay, PhonePe, PayTM and BHIM are some of Third-Party Apps facilitating UPI payments. WhatsApp Pay also acts as a Third-Party App for facilitating payments between users.

13. The Informant claims that such Third-Party App (TPA) providers constantly strive to make their business more viable in the UPI ecosystem to sustain in the competing market with multiple market players. To become a part of the UPI ecosystem, a TPA (a non-banking entity) must comply with procedural guidelines, at the initial stage, to be able to ensure safety and security of transactional data at a national level. Even post entry, because of the existence of technology giants in the digital payments market, the TPAs are necessitated to invest huge amount of money and skill and devise strategies to be able to survive fierce competition and acquire customers. Some TPAs attract customers through various modes including but not limited to cash backs, vouchers, discount offers *etc.* The financial burden to incur the cost of customer acquisition, however, is borne by such TPAs out of their own pocket, from their marketing budget. Further, a TPA then has to work its way to not only ensure maintaining such customer base but also expanding it and at the same time such a TPA has to deploy strategies to cover the cost of customer acquisition through other modes to ensure it survives the competition in the market. Thus, a user acquisition cycle involves two stages. The first step involves adoption of the user and, second involves his/her continuous engagement. While incentives in the form of cash backs, discounts, etc. will continue to pour in for new users on the TPA UPI enabled Apps, it cannot be the only factor to drive such user's engagement indefinitely. Such TPAs will have to keep adding something new to keep the user engaged on its platform.
14. Besides, every TPA has to ensure compliances, adherence to restrictions and regulations and further investments and constant innovation to keep up with the



pace of its competitors and market demand. The Informant further submitted that since consumer payment in the digital payment arena is a low-margin game, the success of any TPA is completely defined by the scale of operations. Therefore, user-base forms one of the most significant factor driving competition among all market players.

15. The Informant has also provided the statistics related to the growth of the UPI in India. According to the Informant, UPI has recorded a roaring transactional value of 10.8 billion in the year 2019 in terms of volume. This amounts to 188 percent year-over-year increase. While in terms of value, UPI facilitated transactions worth Rs.18.36 trillion, an increase of 214 per cent from 2018. The Informant has claimed that UPI has established itself as the most preferred mode of payments. As per the newspaper reports relied upon by the Informant, UPI is perhaps the fastest product to hit 1 billion transactions-a-month in 2019 since its inception in August 2016. The Informant has further stated that besides being the most preferred method of payment, UPI has also become a crucial tool to achieve the financial goal of “less-cash” economy in India. Thus, control of such market in the hand of any monopolistic party (sic) and that too a foreign party like the OPs can have huge impact on the market, our country and the consumers.
16. The Informant has submitted that the services provided by the Opposite Parties are amenable to scrutiny under the Act even though such services are being offered without any monetary fee/charge. The Informant has proposed the following two relevant product markets:
 - a. *Market for internet-based messaging application through smartphones;* and
 - b. *Market for UPI enabled digital payment applications.*
17. The Informant has claimed that services provided by the internet-based messaging Apps through smartphones form a separate and distinct market and cannot be substituted or interchanged with the traditional electronic communication services



such as text messaging, voice calls, *etc.* that are provided by telecom service providers for reason of their prices, functionality and basic characteristics.

18. As regards the geographic market, the Informant has stated that as such the functionality of consumer communication apps through smartphones does not differ depending on the region or country concerned, either in terms of price, functionality or operating system. However, the competitive conditions, regulatory architecture and players may vary in different countries/regions. Since conditions for competition are homogenous in India, the geographic area of India has been proposed to be the relevant geographic market. Accordingly, the first relevant market has been proposed as the '*market for internet-based Messaging Apps through smartphones in India*'.
19. As regards the second relevant market *i.e.* the market for UPI enabled digital payment applications, the Informant has focused on both the application developers and application users. UPI is a separate product developed by NPCI which allows transfer of funds in the form of IMPS. It is a special ecosystem enabling instant transfer of funds, bringing several banking features under one roof and available throughout the day. Even a non-banking third party can participate in the said UPI Ecosystem partnering with a bank. Thus, the same constitutes a distinct and unique market as per the Informant, which cannot be substituted with any other mode of payment such as debit cards, credit cards, mobile wallets, mobile apps, net banking, electronic clearing services, National Electronics Funds Transfer System (NEFT), Real Time Gross Settlement (RTGS) or other similar means. Thus, as per the Informant, the relevant market for the purposes of the present issue shall be the '*market for UPI enabled Digital Payments Apps*'. As regards the geographic market, the Informant claimed that the UPI enabled Digital Payment System is unique to India and the conditions for competition are homogenous in India. Accordingly, the geographic area of India has been proposed as the relevant



geographic market. Thus, the second relevant market is the ‘*market for UPI enabled digital payment applications in India*’.

20. The Informant has submitted that WhatsApp is dominant in the market for internet-based instant messaging app through smartphones in India. The Informant has primarily relied upon the following factors, as enshrined under Section 19(4) of the Act, to allege dominance:

- a) *Market share*: The Informant has relied upon various newspaper reports to contend that WhatsApp is a market leader in the relevant market, where it continues to rank as the most sought-after and downloaded app, having millions of active users across India. The Informant has also referred to the data provided by Statista, which states that the number of daily active users of WhatsApp status in quarter 1 of the year 2017 was 175 million which rose to 500 million in the first quarter of 2019.
- b) *Size and resources of enterprise*: The Informant alleged that Facebook, which is the parent company of WhatsApp, is among the big five technology companies of the world and has been known to eliminate its competition in the market by buying out the competitors. The major revenue of the Opposite Parties is claimed to come from targeted advertisements and huge user data is alleged to be the biggest driving force behind it.
- c) *Size and importance of competitors*: The Informant has referred to Hootsuite survey according to which WhatsApp messenger holds first rank and Facebook holds second rank based on the ‘mobile application used by active users’ in January 2019 and holds the same position in January 2020 too. As against this, its competitors lag behind.
- d) *Dependence of consumers on the enterprise and countervailing buyer power*: The Informant claims that there exists no countervailing buyer power which



can effectively impact and constrain the market power of the OPs. The users are largely dependent upon WhatsApp for availing the internet based instant messaging services as there is absence of similar viable options. Further, even if a user chooses not to use WhatsApp and use some other app, due to significantly low usage of other apps in the market, the other users may not have the same app and thus such a user will still be constrained to use WhatsApp. The Informant, citing the Cambridge Analytica-Facebook scandal (WhatsApp being hit by Pegasus), stated that despite WhatsApp's data sharing policy being totally contrary to the applicable norms and regulations, the users have no option but to use these apps.

- e) *Vertical Integration of the enterprises or sales and service network:* The Informant has referred to the various acquisitions by Facebook such as Instagram, WhatsApp and Oculus and claimed that such acquisitions indicate Facebook's strategy of buying market competition. The Informant has also highlighted Facebook's plan to link WhatsApp, Instagram and Facebook as one encrypted system, which can create market monopoly.
- f) *Barriers to entry:* According to the Informant, WhatsApp enjoys economies of scale with an established huge user base in the Internet based instant messaging market which is a low margin game, but which finally allows it to capitalize on such enormous amounts of data thereby exponentially adding to their revenue and thus, creating more opportunities for themselves to expand and acquire more customers. The Informant has also stated that WhatsApp has access to large networks by consistently having large market shares thereby restricting the entry or expansion of other market participants in creating an active user base. Further, being the market leader, WhatsApp has monopoly of resources and power to create an enormous user base through targeted advertisements and large data capitalization creating further rapid opportunities for the



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Opposite Parties to grow and constantly keep new entrants at bay, discourages entry.

21. Based on the aforesaid, the Informant has alleged that WhatsApp enjoys an undisputed and unperturbed dominance in the '*market for internet based instant messaging apps on smartphones in India*'.

Allegations under Section 4 of the Act

22. The Informant has primarily made two sets of allegations, alleging contravention of various sub-sections of Section 4 of the Act emanating therefrom.
23. *Firstly*, it has been alleged that the users of WhatsApp automatically get the payment app owned by WhatsApp *i.e.* 'WhatsApp Pay' installed on their smartphones. This automatic installation of the Payment option into the Messenger App is nothing short of 'pre-installation' which is forced upon a user of the dominant product, WhatsApp messenger. This, as per the Informant leads to contravention of Section 4(2)(a)(i) of the Act as automatic installation of WhatsApp Pay on existing WhatsApp Messenger user's device amounts to imposition of unfair condition on the users/consumers.
24. The Informant further stated that there exist two separate markets for Internet based Messaging Apps on smartphones and for UPI enabled Digital Payments Apps and that there exists a sufficient consumer demand for use of these apps separately and independently. Thus, the conduct of WhatsApp amounts to bundling since the two products are offered as a package and are not available independent of each other, which contravenes Section 4(2)(d) of the Act. This bundling arrangement allegedly has an element of 'coercion' as WhatsApp enjoys a dominant position in the internet based instant messaging app market, having a pre-existing user base of more than 400 million monthly active users in India. A user who does not wish to install the Payments App but only the Messenger App does not have the option to



do so. Similarly, vice versa, a user who desires to only use WhatsApp Payment service will be mandatorily required to install the WhatsApp messenger.

25. Further, it has been alleged that such automatic installation also amounts to contravention of Section 4(2)(e) of the Act as the dominance of WhatsApp in Internet based instant messaging App market favours and protects it in the UPI enabled Digital Payments Applications Market. In the market for UPI enabled Digital Payments App, WhatsApp is fairly a new player as compared to the already existing giant players like Googlepay, PhonePe, Paytm, Mobikwik, *etc.* who all have spent considerable time and resources to achieve a significant market share. Thus, to be able to create its mark and establish a name in such a new market for any entrant would require huge investment of money, time and requisite skills. The OPs, however, made no such efforts and directly by-passed the competition by bundling its payment app with the messaging app, thereby causing huge adverse impact on market competition, market participants and ultimately the consumers who may no longer benefit from the market competition. Relying on a newspaper report, the Informant has also highlighted that WhatsApp's penetration in this market is growing exponentially as WhatsApp Pay Beta License for WhatsApp Pay has now been permitted for the user limit of 10 million from 1 million users.
26. *Secondly*, the Informant has alleged that the acquisition of WhatsApp, Instagram and Oculus by Facebook causes an adverse effect on the competition as these companies have huge data sets of users which they can use for their commercial advantage. The Informant has also referred to an ongoing federal lawsuit against Facebook on its anti-competitive activities of acquisition and driving out competition in United States of America. The Informant also referred to EU antitrust case against Facebook alleging access to more data and revenue by acquisition and blocking of competition with the expansion in new sectors. The Informant has also highlighted the fine imposed by Federal Trade Commission (FTC) on Facebook amounting to US\$5 billion for violation of consumer's privacy



by breaching data security and privacy laws. Reliance has been placed on various news articles to substantiate the foregoing facts.

27. Besides the aforesaid, the Informant has also made some miscellaneous allegations *e.g.* serious non-compliance of critical and mandatory procedural norms pertaining to data localisation and storage by the OPs, data privacy issues *etc.* Further, the Informant has alleged contravention of Section 4(2)(b)(ii) and 4(2)(c) of the Act, though no conduct has been specifically mentioned with regard to these sub-sections.
28. Based on the foregoing facts and allegations, the Informant has prayed for an investigation against WhatsApp under the Act and directions to the OPs to immediately cease and desist their anti-competitive operations of bundling the Internet based Instant Messaging App and UPI enabled Digital Payments Apps together. Further, the Informant has briefly sought interim relief asking the Commission to restrain abuse of dominance by WhatsApp, *vide* which it bundles its digital payment service with its messenger service. The Informant has averred that in case interim relief as sought is not granted, the Informant would suffer irreparable loss and injury.
29. The Commission considered the information in its ordinary meeting held on 06.05.2020 and decided to seek written comments/response from the Opposite Parties, *i.e.* WhatsApp and Facebook, on the information filed by the Informant. On 11.06.2020, WhatsApp and Facebook filed their separate responses to the Information filed by the Informant. On 30.06.2020, the Commission considered their responses and decided to pass an appropriate order in due course.

Submissions of Facebook

30. Facebook has submitted that it offers a broad range of innovative services that enable people to connect with each other, communicate with other users as well as



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larger groups, share with their friends, families, and wider communities, and discover meaningful and relevant content. It has been contended that while Facebook is the parent company of WhatsApp, they are separate and distinct companies. Besides challenging the locus of the Informant in filing the present information, Facebook has challenged its being arrayed as a proper party in this matter. It has been alleged that since the Informant has neither highlighted any allegations against Facebook, nor has prayed for any relief against it, Facebook should be deleted from the memorandum of parties.

31. As regards the locus, Facebook and WhatsApp both have alleged that the Informant does not have a *locus standi* to approach the Commission because neither she has claimed any injury nor has suffered invasion of her legal rights as a consumer. Relying on the recent ruling of the Hon'ble National Company Law Appellate Tribunal ('NCLAT') in *Samir Agarwal v. Competition Commission of India*, decision dated 29.05.2020, Facebook and WhatsApp have contended that a lawyer, such as the Informant, who has not even claimed any legal injury as a consumer or as a member of any consumer or trade association as a result of WhatsApp's conduct, does not have *locus standi* to approach the Commission, and the information deserves to be dismissed under the Act.
32. It has been submitted that the Informant is indulging in forum shopping as she is closely associated with a petitioner who has approached the Hon'ble Supreme Court of India raising the same core issues as those raised in the Information. Further, such apparent non-disclosure of the pending litigation by the Informant has been argued to be an evidence of the Informant's mala fide intent and unclean hands with which she has approached the Commission.
33. Facebook has also submitted that WhatsApp and Facebook are separate and distinct entities and any alleged strengths of Facebook cannot be attributed to WhatsApp. Facebook has also objected to the Informant's allegations regarding Facebook's previous acquisitions stating that such legitimate and legal acquisitions cannot be



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equated with abuse of dominance under Section 4 of the Act, more so when Facebook obtained all necessary approvals for the acquisitions referred to by the Informant. It further stated that mergers and acquisitions are essential for driving innovation, and developing products and services that adapt to consumer needs.

34. While denying the allegation pertaining to sharing of data and its misuse, Facebook stated that the Informant has falsely claimed that WhatsApp automatically shares WhatsApp Pay user data with Facebook for use in targeted advertisements. Facebook further submitted that this claim does not raise any competition concern and need not be looked into by the Commission.
35. As regards the Informant's reliance on cases against Facebook in other jurisdictions, Facebook stated that the Commission has held in the past that mere initiation of investigation by another competition authority does not necessarily warrant an action under the Act.
36. Based on the aforesaid averments, Facebook has specifically sought that its name be deleted from the memorandum of parties and also sought for dismissal of the information.

Submissions of WhatsApp

37. In its written submission dated 11.06.2020, WhatsApp has raised some preliminary issues along with its submissions on substantive issues. The preliminary objection regarding Informant's *locus* has already been detailed *supra* while stating Facebook's submissions, hence the same is not reproduced in detail herein for the sake of brevity.
38. WhatsApp further stated that the Informant has not provided any evidence in support of its allegations, and the matter deserves to be dismissed on this ground alone. While placing reliance on Hon'ble NCLAT's order in *Board of Control for*



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Cricket in India v. Competition Commission of India, COMPAT, Appeal No. 17 of 2013 decided on 23.02.2015, WhatsApp submitted that Informant has made allegations relying on unverified newspaper reports which lacks legal admissibility. Further, the information is stated to be premature, given that the full-release version of WhatsApp Pay, which would enable all users in India to access the WhatsApp Pay feature, has not been launched. WhatsApp Pay is currently in beta version and limited to serving less than 1% of users of the WhatsApp application in India.

39. WhatsApp submitted that the Informant has incorrectly defined the relevant market to be, the *'market for internet based instant messaging apps in India'* whereas WhatsApp operates in a much broader market under *'market for user attention'*. It has been stated that WhatsApp application competes broadly with all digital products and services that seek to capture user attention through innumerable different services or functionalities, such as social networking, messaging, gaming, content viewing and sharing, photo and video sharing, or music, amongst many others. Further, most of these services in this market are free for the users who frequently multi-home between service providers who operate to garner the user attention. Accordingly, the relevant market cannot be limited to a specific mode of engagement like instant messaging.
40. As regards dominance, WhatsApp claimed that it does not enjoy a dominant position in the market proposed by it or even in the narrow market proposed by the Informant. The assessment of the Informant, it has been argued, does not meet the test for dominance under the Act as the Informant has failed to provide any comparative analysis to demonstrate that WhatsApp acts independent of competitive constraints from other messaging applications active in India such as Google Hangouts, iMessage, Viber, Hike, Zoom, Skype, Telegram, or Truecaller, or SMS services offered by every telecommunications operator in India. Moreover,



details of other messaging or communication applications and their numbers other than WhatsApp, which is critical for dominance assessment, has not been provided.

41. In relation to dominance assessment based on market shares, WhatsApp has claimed market shares are static, fixed at a point in time, and thus do not adequately reflect the realities of competition in this industry where share swings substantially over short periods, successful entry occurs frequently, demand (user preferences) change very quickly, and there is significant multi-homing by consumers. Therefore, in such a market, a snapshot of historical market shares or share of usage does not by itself accurately reflect the market power of a firm. Further, it has been submitted that the competitors in this market include large established global companies, recent new entrants who have quickly gained popularity, as well as local Indian competitors, who will all continue to exert significant competitive constraints on WhatsApp. Thus, WhatsApp is not dominant, irrespective of the way the relevant market is defined.
42. Further, WhatsApp has denied all allegations of abuse raised by the Informant. As regards Section 4(2)(a)(i) of the Act, WhatsApp has submitted that to constitute an abuse, it must be demonstrated that WhatsApp Pay has imposed itself upon users of the WhatsApp messenger application, who have no choice but to submit to using WhatsApp Pay. However, there is no imposition or element of coercion as users retain full discretion on whether to register for or use WhatsApp Pay. To register for WhatsApp Pay, users accept a separate terms of service agreement and privacy policy. Users register for WhatsApp Pay separately by providing additional information and undertaking various steps to link their bank account, as is required for all UPI linked payments. No user can send or receive funds through WhatsApp Pay without taking these voluntary steps to enter into these separate terms of service and registering for the WhatsApp Pay feature. WhatsApp Pay remains disabled until it is manually set up by a user and WhatsApp's other non-payment features remain uncompromised in terms of functionality and quality, irrespective



of it being pre-installed. It has also been submitted that even if users were to activate the payments feature, users in India, can and do multi-home between various applications, and the launch of WhatsApp Pay is pro-competitive by providing users an additional feature to make payments as all UPI-based payment features are inter-operable.

43. As regards leveraging, WhatsApp has claimed that contravention of Section 4(2)(e) of the Act, requires a dominant enterprise to have *used* its dominant position in one relevant market to enter into, or protect, another relevant market. Further, leveraging to constitute abuse can only be said to have occurred when an enterprise undertakes some restrictive or abusive conduct. The Informant has failed to establish the necessary elements of a leveraging claim as the users retain full discretion and optionality in choosing whether to use WhatsApp Pay; therefore, the Informant cannot demonstrate that WhatsApp has actively restricted or imposed obligations on users to do anything. Rather, WhatsApp simply offers users WhatsApp Pay as a feature, should they choose to use it. There is no restrictive or abusive conduct or any “use” of an alleged dominant position as required under Section 4(2)(e) of the Competition Act. In addition, WhatsApp has averred that a close associational link between two markets under scrutiny must be established for a leveraging allegation to be sustained under Indian competition law. Without such a link, it would not be necessary to demonstrate dominance in any segment to prove that an abuse has occurred, and the strategy in question could be replicated by any competitor who would not need particular market power to affect this strategy. For example, any instant messaging application can introduce a payment feature and, therefore, it is not by virtue of any alleged dominant position of WhatsApp that WhatsApp has been able to introduce the payment feature. Accordingly, dominance has nothing to do with entry into the alleged market for UPI-enabled digital payment applications in India.



44. In relation to the allegation of bundling of WhatsApp Pay with WhatsApp messenger app under Section 4(2)(d) of the Act, it has been argued at the outset that since WhatsApp pay is only in the beta phase, it cannot be even said to exist as a separate product. It has been stated that the allegation of bundling is without merit and does not satisfy the conditions of bundling as understood in the antitrust context. *Firstly*, it has been submitted that the WhatsApp application and the payments feature are not separate products, rather it is an additional feature, whose commercial launch is subject to approval by NPCI. WhatsApp's "product" is the WhatsApp application, which has over time added a number of new features, including voice messaging, video calling, image and document sharing, among others. WhatsApp Pay is an additional feature that will become part of the WhatsApp service when the full release version of WhatsApp Pay is launched. The mere fact that WhatsApp offers multiple features on its application does not make them separate products and therefore, the Informant fails to satisfy the requirement that there be two separate products. *Secondly*, it has been stated there is no insistence or coercion for the use of WhatsApp Pay. Neither the users are required to register for or use WhatsApp's payment feature in order to use the WhatsApp messenger service nor the use of WhatsApp messenger service is conditional upon the usage of its payments feature. Further, there is no anti-competitive effect of offering WhatsApp Payment app along with WhatsApp messaging service.
45. As regards the other miscellaneous allegations such as non-compliance with data localization norms and two factor authentication requirements etc., WhatsApp has stated that these do not raise competition concerns and ought not to be examined under the Act. Moreover, the allegation that WhatsApp automatically shares WhatsApp Pay user data with Facebook to be used in targeted advertisements are unfounded and deserve to be dismissed.
46. In view of the aforesaid submissions, WhatsApp has prayed that the information be set aside and the case be closed under Section 26(2) of the Act.



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Analysis of the Commission

47. At the outset, the Commission notes that besides substantive objections to the allegations made by the Informant, both the Opposite Parties have raised a preliminary objection to the *locus* of the Informant in filing the present information, placing reliance on the recent decision of the Hon'ble National Company Law Appellate Tribunal (hereinafter, 'NCLAT') in *Samir Agarwal vs. Competition Commission of India* [Competition Appeal (AT) No.11 of 2019 decided on 29.05.2020] (hereinafter, '*Samir Agarwal case*'). The argument made by them is two-pronged—*firstly*, the Informant is not an aggrieved party as she has not claimed any injury or has not suffered invasion of her legal rights as a consumer or beneficiary of healthy competitive practice to have a *locus standi* to file the present information. *Secondly*, the Informant has indulged in forum shopping as she is closely associated with a petitioner who has approached the Hon'ble Supreme Court of India by filing a petition against WhatsApp and Facebook recently and this apparent non-disclosure of the pending litigation reveals the *mala fide* intent of the Informant and the unclean hands with which she has approached the Commission.
48. The Commission finds it imperative to deal with the twin arguments before delving into the merits of the present case.
49. As regards the first issue that the Informant is not an aggrieved party, the Commission observes that given the scheme of the Act, this ground is misconceived.
50. The Preamble to the Act unequivocally voices the ethos with which the Act was enacted, keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in



markets, in India, and for matters connected therewith or incidental thereto. Clearly, the Act has been conceived to follow an inquisitorial system wherein the Commission is expected to investigate cases involving competition issues *in rem*, rather than acting as a mere arbiter to ascertain facts and determine rights *in personam* arising out of rival claims between parties. Further, many a time, even though a case filed by an aggrieved party may appear to be a case *in personam*, underlying it is a larger question of market distortion. The mere fact that a case has been filed by an aggrieved party under the Competition Act, does not take away its character of being a case *in rem* involving a larger question of fair and competitive markets.

51. The role of the Commission as an overarching market regulator also finds its foundational footing in the amendments introduced in the Act, *vide* the Competition (Amendment) Act, 2007, whereby and whereunder the provisions of Section 19 (1) (a) were amended substituting the words “receipt of a complaint” with “receipt of any information”. This amendment clearly reflected the legislative intention of emphasizing the inquisitorial nature of the proceedings of the Commission. Further, there are several other amendments, as also the other provisions of the Act, which reverberate this inquisitorial scheme. Illustratively, the nature of powers conferred upon the Commission under Section 27, on a finding of a contravention under Section 3 or 4 of the Act, demonstrates the larger perspective of correcting the market by modifying the conduct of erring entity(ies). The Competition (Amendment) Act, 2007 omitted the power of the Commission to *award compensation to parties in accordance with the provisions contained in Section 34* which earlier existed under the Act. Further, Section 28 empowers the Commission to direct division of an enterprise enjoying a dominant position to ensure that such enterprise does not abuse its dominant position, even without a finding of a contravention. Also, under Section 35, the words ‘*complainant or defendant*’ were substituted by the words ‘*person or an enterprise*’ through the Competition (Amendment) Act, 2007 signifying the intent of the legislature to



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depart from an approach to cases guided by adversarial adjudication. This approach is also evident from the powers available to the Commission to direct investigation and hold inquiries even against persons or entities, who were not party to the information, but who are also suspected to be involved in an anti-competitive conduct. When passing an order under Section 26(1) of the Act, the direction of the Commission is to investigate ‘*into the matter*’ which is significant and advances the inquisitorial regime under the Act. All these provisions and subsequent amendments points towards the inquisitorial system being envisaged under the Act.

52. The Hon’ble Supreme Court of India had occasion to examine the scheme of the Act in detail in the case of *Competition Commission of India vs. Steel Authority of India Ltd. (SAIL)*, Civil Appeal No. 7779 of 2010 decided on 09.09.2010 [hereinafter, ‘*SAIL judgment*’], wherein the Hon’ble Court specifically noted that the Commission discharges inquisitorial, regulatory as well as adjudicatory functions. Further, the role of the Commission as a market regulator was highlighted in detail by the Hon’ble Supreme Court.

53. Guided by the legislative mandate and observations made by the Hon’ble Supreme Court, the Commission while dealing with a similar preliminary objection to the *locus* of the Informant in Case No. 97 of 2013 [*Reliance Agency And Chemists and Druggists Association of Baroda & Others*] decided on 04.01.2018, held as under:

83. The proceedings before the Commission are inquisitorial in nature and as such, the locus of the Informant is not as relevant in deciding whether the case filed before the Commission should be entertained or not. As long as the matter reported to the Commission involves anti-competitive issues falling within the ambit of the Act, the Commission is mandated to proceed with the matter. Further, it may be noted that as per the scheme of the Act, it is not necessary that there must be an informant to initiate an inquiry or investigation. The Commission is entitled to even proceed suo motu or on any



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reference being made by the Central Government or State Government or any Statutory Authority. Thus, the Commission is more concerned with the facts and allegations highlighted in the information rather than the locus of the person who provided such information.

84. The purpose of the Act is to prevent practices having an adverse effect on competition in India, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets. Towards that end, the Commission is more concerned with the fair functioning of the market and the motives with which the informant has come to the Commission is subservient to that objective. [...]

54. Further, in Case No. 05 of 2018 [*XYZ (Informants identities' confidential) And Indian Oil Corporation Ltd. And Ors.*], decided on 04.07.2018, the Commission, while comparing the mandate given to it under the Act *vis-a-vis* the mandate of a sectoral regulator, observed as under:

34. On the other hand, the Commission has the power to take action, on its own or upon information provided, to identify any possible anti-competitive conduct in the market. Hence, the powers and duties of the Commission are much wider. The proceedings before the Commission are inquisitorial in nature and targeted toward overall market correction and subsequent effects which may or may not be confined to a specific sector. Therefore, any decision by PNGRB upon a lis between the parties will be a decision granting relief in personam as opposed to a ruling/ action by the Commission which is a decision in rem, intended to achieve market correction. The role of the two, the Board and the Commission are, thus, different in



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spirit. The Board, under the PNGRB Act, aims at resolving the disputes between the parties upon a complaint filed by an aggrieved party. Juxtaposed to this, the Commission aims to regulate the market and penalise the market player that is engaging in anti-competitive conduct/practice.

55. The judgment of erstwhile Hon'ble Competition Appellate Tribunal (hereinafter, 'COMPAT'), in *Surendra Prasad vs. Competition Commission of India and others* in Appeal No. 43 of 2014, decided on 15.09.2015, follows the ideology laid down by the Hon'ble Supreme Court in the *SAIL* judgment and lends strength to the approach followed by the Commission in its subsequent orders, as is evident from the following excerpts:

22. *It is significant to note that Parliament has neither prescribed any qualification for the person who wants to file an information under Section 19(1)(a) nor prescribed any condition which must be fulfilled before an information can be filed under that section. There is nothing in the plain language of Sections 18 and 19 read with Section 26(1) from which it can be inferred that the Commission has the power to reject the prayer for an investigation into the allegations involving violation of Sections 3 and 4 only on the ground that the informant does not have personal interest in the matter or he appears to be acting at the behest of someone else. As a matter of fact, the Commission has been vested with the power to suo moto take cognizance of any alleged contravention of Section 3(1) or Section 3(4) of the Act and hold an inquiry. This necessarily implies that the Commission is not required to wait for receipt of a reference from the Central or the State Government or a statutory authority or a formal information by someone for exercising power under Section 19(1) read with Section 26(1) of the Act. In a given*



case, the Commission may not act upon an information filed under Section 19(1)(a) but may suo moto take cognizance of the facts constituting violation of Section 3(1) or Section 3(4) of the Act and direct an investigation. The Commission may also take cognizance of the reports appearing in print or electronic media or even anonymous complaint/representation suggesting violation of Sections 3 and 4 of the Act and issue direction for investigation under Section 26(1). The only limitation on the exercise of that power is that the Commission should feel prima facie satisfied that there exist a prima facie case for ordering into the allegation of violation of Sections 3(1) or 4(1) of the Act.

56. The aforesaid leads to an inevitable conclusion that the Informant need not necessarily be an aggrieved party to file a case before the Commission. Neither the Act specifies any such requirement explicitly, nor the same can be implicitly read into the provisions which clearly point towards the inquisitorial system envisaged by the Parliament. Further, it is because of the inquisitorial scheme of the Act, that the Commission in appropriate cases, defends its orders in higher forums, regardless of the fact as to who brought such case before it, which is not a normal feature in adversarial proceedings. Moreover, given that there are divergent decisions of the Hon'ble Appellate forum on the question of *locus* of the Informant, it may not be appropriate for the Opposite Parties to challenge the maintainability of the information filed by the Informant, based on the observation in the case of *Samir Agarwal* case alone.
57. Coming to the second leg of the argument, *i.e.* that the Informant has indulged in forum shopping being closely associated with a petitioner who has approached the Hon'ble Supreme Court against WhatsApp and Facebook and this apparent non-disclosure reveals the *mala fide* intent and unclean hands with which the Informant has approached the Commission. The Commission notes that though on first blush



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this argument looks attractive, it may not be factually correct and is legally untenable, given the scheme of the Act.

58. The OPs have highlighted that on 28.02.2020, a public interest litigation (PIL) petition, *Good Governance Chambers vs. National Payments Corporation of India and others*, W.P. (C) No. 427 of 2020, was filed before the Hon'ble Supreme Court, identifying both WhatsApp and Facebook as respondents. The OPs have tried to draw some linkages between the Informant in the present matter and the Petitioner in the PIL filed before the Hon'ble Supreme Court. Further, the Opposite Parties have stated that the Informant has approached the 'Commission with unclean hands, to the extent the Informant deliberately suppressed and withheld from the Commission material information on other pending litigation apparently initiated by the Informant and/or those in close association'.
59. The Commission observes that the objection related to Informant's intent has been examined by the Commission as well as erstwhile Hon'ble COMPAT in various cases in the past. The observations made in all such cases have been succinctly covered in the ensuing paragraphs.
60. In Case No. 65/2014, 71/2014, 72/2014 & 68/2015 [*Alis Medical Store & Ors. And Gujarat Federation of Chemists and Druggists Association & Ors.*] decided on 12.07.2018, the Commission, while dealing with the objection with regard to multiple filings by the same informant, held as under:

96. *Though the Commission does not encourage filing of multiple information(s) filed by any person on the same cause of action, a person is not barred from approaching the Commission if the conduct, which has been found to be in contravention, continues to exist despite directions of the Commission. The Commission has to focus on the fair functioning of the market and any motive with which the Informant might have approached the Commission is subservient*



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to that objective. However, considering that the informations in the four cases have been clubbed and investigated together and also being disposed of vide this common order, the objection of the OPs is only academic.

(emphasis supplied)

61. Similar views were reflected in Case No. C-87/2009/DGIR [*Vedant Biosciences And Chemists and Druggists Association of Baroda*] decided on 15.01.2019, the Commission observed as under:

52. *The Commission observes that the object of the Act is to prevent practices having an adverse effect on competition in India, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets. Towards that end, the Commission is more concerned with the fair functioning of the market and the underlying intent of the Informant in approaching the Commission is secondary to that objective. Thus, though it may be factually correct that a political rivalry between rival factions may have played a role leading to a revelation of the alleged anticompetitive conduct in the present matter; however, as long as such revelation is based on cogent evidence, the information/case cannot be quashed for want of benign motive. While the Commission does not encourage sham/pretentious information filed to settle scores between the parties, however, if there is merit in the anti-competitive conduct being reported to the Commission, the bonafide/locus/motive of an informant will become subservient to the duty of the Commission to ensure fair functioning of the markets.*

[...]

(emphasis supplied)



62. Yet again, in Case No. 64 of 2014 [*Madhya Pradesh Chemists and Distributors Federation (MPCDF) And Madhya Pradesh Chemists and Druggist Association (MPCDA) & Others*] decided on 03.06.2019, the Commission discarded the claim of the opposite parties with regard to mala-fide intention of the informant in that matter. The relevant observations are excerpted below:

112. The Commission deems it fit to deal with the common contention of OP-1 and OP-11 regarding the mala-fide intention of the Informant in filing the information. In this regard, the Commission notes that the Informant is a mere information provider and, as long as the allegations contained in the information are established by evidence brought on record/collected by the DG during investigation and further assessed by the Commission, the locus/ credentials of the Informant is subservient.

63. At this stage, the Commission also notes that similar issue, of relevance of the intent of the informant, was examined by COMPAT in *Surendra Prasad vs. Competition Commission of India and others* in Appeal No. 43 of 2014, decided on 15.09.2015. The relevant excerpts of this judgment have already been reproduced earlier, suffice to say that while dealing with the question of ‘*whether the appellant should be non-suited on the ground that he had not approached the Commission with clean hands and that he has been representing and espousing the cause of M/s. B.S.N. Joshi & Sons Ltd.*’, the erstwhile Hon’ble COMPAT answered in negative. Thus, erstwhile Hon’ble COMPAT affirmed that the fact that the informant did not approach the Commission with clean hands is inconsequential as far as the maintainability of the information under the Act is concerned. The Commission further notes that where the Informant approaches the Commission with unclean hands or bases its case on incorrect facts or evidence, there are adequate provisions under the Act, to deal with such instances. However, to suggest



that such a fact would lead to dismissal of an otherwise maintainable information, would be stretching the argument too far.

64. As regards the non-disclosure, the Commission observes that *vide* Competition Commission of India (General) Amendment Regulations, 2019 dated 20.11.2019, Regulation 10 of the Competition Commission of India (General) Regulations, 2009, was amended so as to require the following disclosure from the informants:

“(da) Details of litigation or dispute pending between the informant and parties before any court, tribunal, statutory authority or arbitrator in respect of the subject matter of information.”

65. The aforesaid amendment requires disclosure regarding pending dispute/litigation between the informant and parties. Apparently, the Informant in the present case and the petitioner in the PIL filed before the Hon’ble Supreme Court are not the same. The OPs have tried to draw some linkages, which, in the view of the Commission, are not relevant to the facts of the present matter given the inquisitorial scheme of the Act. More so, when such a disclosure being a technical requirement, and not a factum leading to dismissal of an information, the assertion of the OPs that the ‘*Commission should not consider the present Information on the ground of the Informant’s unclean hands alone*’ is not tenable.
66. Based on the aforesaid, the Commission rejects the preliminary objection of the OPs as regards the *locus* of the Informant. Any interpretation contrary to the expressive legislative mandate and judicial pronouncements, as elucidated in the aforesaid paras, may not be appropriate.
67. Having dealt with the preliminary objection, the Commission will now deal with the merits of the case. The Informant has alleged that WhatsApp and Facebook are abusing their dominant position under Section 4 of the Act. Specifically, the Informant has alleged contravention of Sections 4(2)(a)(i), 4(2)(d) and 4(2)(e) of



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the Act, by these OPs, besides a brief mention of 4(2)(b)(ii) and 4(2)(c). Primarily, the Informant has alleged that WhatsApp has abused its dominance in the ‘*market for internet-based messaging application through smartphones*’, to manipulate another market *i.e.* ‘*market for UPI enabled digital payment applications*’ in its favour. This, as per the Informant, has distorted fair competition in the latter market for the existing players and has foreclosed the said market to potential entrants.

68. For examining the allegations pertaining to Section 4 of the Act, delineation of the relevant market is essential to ascertain dominance and for analyzing the alleged abusive conduct of the OPs.
69. The Informant has proposed two relevant product markets as mentioned in para 16 *supra*. The first market has been proposed as ‘*market for internet-based messaging application through smartphones*’. WhatsApp on the other hand has claimed that it competes in an overall broader ‘*market for user attention*’.
70. The Commission observes that WhatsApp and Facebook are third-party apps broadly providing internet-based consumer communications services. Consumer communications services can be sub-segmented based on different parameters *e.g.* on the basis of functionality, some apps enable real-time communication in various forms, such as voice and multimedia messaging, video chat, group chat, voice call, sharing of location, *etc.*, while others provide services such as communication with a wider set of people in an impersonal setting such as sharing status and posts. Further, while some consumer communications apps are proprietary in nature, *i.e.* available on only one operating system such as FaceTime and iMessage service available on Apple’s iPhones, while others operate as over-the-top (‘OTT’) apps offered for download on multiple operating systems, *e.g.* WhatsApp and Facebook are available on a variety of mobile operating systems, including iOS, Android, Windows Phone *etc.* Furthermore, the segmentation can also be based on whether a set of consumer communications apps are available for all types of devices, or only for particular type(s) of device *e.g.* while Facebook is available on



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smartphones as well as PCs, WhatsApp essentially is a smartphone app. Having said that the Commission is cognizant of the peculiar features which these consumer communication apps possess, where for some functions they may appear substitutable while not so for others, making it all the more challenging to compartmentalize them into water-tight categories. Thus, it is important to identify the primary or most dominant feature(s) of an app to categorise it into a particular relevant market.

71. WhatsApp is primarily an Over-The-Top (OTT) messaging App, linked to a smartphone device and mobile number, which has features of communicating personally, both one-to-one or group. It uses the internet to send and receive text messages, images, audio or video content, sharing of location *etc.* from one user to another as opposed to the mobile network used for traditional texting/SMSing.
72. Facebook, on the other hand, is a social networking app which connects many users simultaneously. The users can post text, photos and multimedia which is visible to all those other users whom they have agreed to be their 'friend' or with a different privacy setting, with any other user. Users can also use various embedded apps, join common-interest groups, receive notifications of their Facebook friends' activities *etc.*
73. Thus, even within the OTT consumer communication services market, services provided by OTT service providers may not be substitutable. One of the economic tools widely used by competition authorities for gauging substitutability and for defining relevant market in traditional markets is the SSNIP (Small but Significant Non-transitory Increase in Price) Test. However, given that 'price' is the most significant consideration for application of SSNIP Test, it may be difficult to contextualise substitutability from SSNIP point of view for OTT communication Apps as they do not levy monetary charge on the users.



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74. Notwithstanding the above, from a simple functional substitutability point of view, WhatsApp and Facebook fall in different markets as the services provided by them do not appear to be functionally substitutable. The Commission, therefore, does not find the broad market, *i.e.* ‘market for user attention’, proposed by WhatsApp to be the relevant product market for the purposes of assessment in the present case.
75. Taking into consideration these features and the different parameters cited *supra*, yet not being overly influenced by strict compartmentalisation, the Commission is of the view that the relevant product market in which WhatsApp operates is the ‘*market for Over-The-Top (OTT) messaging apps through smartphones*’. The Commission observes that though in terms of nomenclature this relevant product market appears different from the one proposed by the Informant, it largely covers the same set of players and competition dynamics.
76. As regards the geographic market, the Commission agrees with the Informant that the functionality of OTT messaging apps through smartphones does not differ depending upon the region or country concerned, either in terms of price, functionality or operating system. However, the competitive conditions, regulatory architecture and players may vary in different countries/regions. Since conditions for competition are homogenous in India, the geographic area of India has been taken as the relevant geographic market for the purposes of assessment. Accordingly, the first relevant market would be ‘*market for Over-The-Top (OTT) messaging apps through smartphones in India*’.
77. The Informant has alleged that WhatsApp is dominant in this market and has leveraged such dominance to take advantage in another market *i.e.* ‘*market for UPI enabled digital payment applications in India*’.
78. The UPI enabled Digital Payment Apps also work as third-party apps (not the banking entities) enabling instant transfer of funds (in the form of IMPS) between users having subscribed to the Apps on their smartphones and having access to



internet. This is a new technology infrastructure that existing bank apps can integrate with, in order to facilitate easy transfer of funds and other monetary transactions between two people in a secure and convenient manner. Further, these UPI enabled Digital Payment Apps, *e.g.* PayTM, Google Pay, Phone Pe *etc.*, allow several value-added features besides traditional transfer of funds, such as integrating payment for utilities, mobile bills, purchasing train tickets, air tickets, movie tickets and thus, provide services which are distinct and which may not be substituted with any other mode of payment such as debit cards, credit cards, net banking, *etc.* Thus, the Commission agrees with the Informant that the second relevant market for assessing the allegations of the Informant would be '*market for UPI enabled Digital Payments Apps in India*'.

79. The Informant has claimed that WhatsApp holds a dominant position in the first relevant market based on the various parameters provided under section 19(4) of the Act. WhatsApp has primarily objected to such claims by proposing a broader relevant market, which would automatically lead to dilution of WhatsApp's market power. Further, WhatsApp has also objected to the reliance placed by the Informant on newspaper reports to demonstrate the huge user base WhatsApp, along with its group entities, possess. Facebook has averred that it is a distinct entity and while assessing WhatsApp's dominance, any alleged strengths of Facebook cannot be attributed to WhatsApp.
80. At the outset, the Commission observes that Facebook and WhatsApp are group entities and though they may operate in separate relevant markets, their strengths can be attributed to each-others' positioning in the respective markets in which they operate. Thus, as per the scheme of Section 4 of the Act, WhatsApp's market position has been assessed keeping in consideration its affiliation to Facebook and several other group entities (*e.g.* Instagram) which are part of the same group.



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81. In the relevant market delineated by the Commission, *i.e.* ‘market for OTT messaging apps through smartphones in India’, the major OTT messaging Apps appear to be WhatsApp, Facebook Messenger, Hike, WeChat, SnapChat *etc.* The Informant has primarily relied on absolute number of users to submit that WhatsApp had a high market share in the relevant market.
82. The data provided by the Informant on market shares has been primarily taken from ‘Digital 2020’ reports published by ‘We are Social’ in partnership with ‘Hootsuite’, a social media management system, and the said report claims to have taken data from various sources, including GlobalWebIndex, Statista, GSMA Intelligence, App Annie, SimilarWeb and Locowise.
83. While it may not be easy to ascertain the denominator or the market size to calculate precise market shares in this particular market as most consumers are using multiple apps for messaging at the same time, the data relied upon by the Informant gives some indication of the most used Apps and most used messaging OTT Apps based on the percentage of internet users aged between 16 and 64 in January 2020.
84. Such data shows that WhatsApp messenger is the most widely used app for social messaging, followed by Facebook Messenger in the relevant market delineated by the Commission *supra*. Further, it is way ahead of other messaging apps like Snapchat, WeChat *etc.* showing its relative strength. Given that WhatsApp messenger and Facebook Messenger are owned by the same group, they do not seem to be constrained by each other, rather adding on to their combined strength as a group. Moreover, WhatsApp Messenger works on direct network effects where an increase in usage of a particular platform leads to a direct increase in the value for other users—and the value of a platform to a new user will depend on the number of existing users on that platform. Thus, given its popularity and wide usage, for one-to-one as well as group communications and its distinct and unique features, WhatsApp seems to be dominant.



85. The Commission is cognizant that the data relied upon by the Informant cannot be said to be free from infirmities and is based on global usage or users. However, in the absence of concrete data/information available in the Indian context other than the subjective information on popularity of WhatsApp, the Commission is of the view that these trends and results can be used as a proxy. More so, these trends appear to be intuitively in sync with the information available in public domain, which though does not confirm market share/strength of WhatsApp in any quantitative terms, nevertheless point towards its dominance.
86. Further, with respect to the dependence of consumers on the enterprise and countervailing buyer power, WhatsApp undeniably has the advantage of reaping the benefits of network effect. Network effect in turn ensures that customers do not switch to other platforms easily unless there is a new competitor entering the market with an altogether disruptive technology. Moreover, lack of interoperability between platforms is another concern, as a result of which customers may be unwilling to incur switching costs, despite the same being primarily psychological.
87. As regards the barriers to entry, they may arise indirectly as a result of the networks effects enjoyed by the dominant player in the market, *i.e.* WhatsApp, in the present case. Since networks effects lead to increased switching costs, new players may be disincentivized from entering the market.
88. Thus, in view of the aforementioned factors, the Commission *prima facie* finds WhatsApp to be dominant in the first relevant market *i.e.* 'market for OTT messaging apps through smartphones in India'.
89. With regard to abusive conduct, the Informant's main allegations stem from the pre-installation of WhatsApp's payment app *namely* 'WhatsApp Pay' on its users' smartphones embedded within the WhatsApp messenger app. This automatic



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installation of the Payment option into the Messenger App is alleged to have resulted in the contravention of following provisions:

- i. Section 4(2)(a)(i), as such pre-installation amounts to imposition of unfair term/condition on the user by a dominant entity *i.e.* WhatsApp messenger;
- ii. Section 4(2)(d), as the conduct of WhatsApp amounts to bundling of its messaging services with the UPI enabled Digital Payments Apps; and
- iii. Section 4(2)(e), as such pre-installation also amounts to leveraging of dominance by WhatsApp in first relevant market to favour and protect another relevant market.

90. The Commission observes that the aforesaid allegations of the Informant are in the nature of both exploitative as well as exclusionary abuses flowing from the same conduct. On the exploitative side, the Informant is aggrieved that the users of WhatsApp Messenger have been imposed with another App 'WhatsApp Pay' to which they did not subscribe or download [Section 4(2)(a)(i)] and since these two apps operate in two different markets, the tying of the latter with the former is anti-competitive [Section 4(2)(d)]. On the exclusionary side, it has been alleged that this conduct distorts another market *i.e.* 'market for UPI enabled digital payment applications in India'.

91. As regards Section 4(2)(a)(i), the Commission does not find much merit in the allegation of the Informant as mere existence of an App on the smartphone does not necessarily convert into transaction/usage. As highlighted by WhatsApp in its written submissions, to enable WhatsApp payment, the user has to separately register for it which necessarily requires the users to accept terms of the service agreement and privacy policy. Such registration requires providing additional information and undertaking additional steps to link their bank account, as per the NPCI laid down framework for UPI digital payment apps. As such, no transaction



can be completed without the user taking these necessary voluntary steps. Incorporating the payment option in the messaging app does not seem to influence a consumer's choice when it comes to exercising their preference in terms of app usage, particularly since there seems to be a strong likelihood of a *status quo* bias operating in favour of the incumbents, at present. WhatsApp has also categorically ensured, in its written statement, that the users will continue to have full discretion whether to use WhatsApp Pay app or not, which implies that the users will have an option to use any other payment apps which might already have been downloaded on their smartphones. Thus, in the absence of any explicit or implicit imposition which takes away this discretion, the mere integration does not seem to contravene Section 4(2)(a)(i) of the Act.

92. As regards the allegation under Section 4(2)(d) of the Act, the Commission observes that though the Informant has used the word 'bundling', the nature of such allegation is more akin to 'tying' as understood in the antitrust context generally. While 'tying' refers to a practice whereby the seller of a product or service ('tying product') requires the buyers to also purchase another separate product or service ('tied product'), which essentially is the allegation of the Informant; 'bundling' typically means that the two products are sold by the seller in a fixed proportion as a bundled package at a particular price.
93. The economic literature, as well as the decisions by other competition authorities, has laid down certain conditions which need to be fulfilled to conclude a case of tying. Such conditions are (i) the tying and tied products are two separate products; (ii) the entity concerned is dominant in the market for the tying product; (iii) the customers or consumer does not have a choice to only obtain the tying product without the tied product; and (iv) the tying is capable of restricting/foreclosing competition in the market.
94. WhatsApp, in its submissions dated 11.06.2020, has submitted that none of these conditions are met. It has been stated that WhatsApp Pay is not a separate product,



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but only a value-added feature to the WhatsApp messenger service; thus, first condition is not met. Also, WhatsApp is not dominant and since there is no compulsion on the users to necessarily use WhatsApp Pay in order to use WhatsApp messenger service, the second and third conditions are also not met. Lastly, it has been stated by WhatsApp that there is no anti-competitive effect of offering WhatsApp Pay.

95. The Commission does not fully agree with the submissions of WhatsApp in this regard. Clearly WhatsApp Messenger and WhatsApp Pay are two distinct products with different functionalities, they are in fact in two separate relevant markets, as has been elucidated by the Commission *supra*. It has also been *prima facie* held above that WhatsApp is the dominant player in the relevant market, i.e. '*market for OTT messaging apps through smartphones in India*'. Thus, the first two conditions seem to have been met in the present case, and to this extent, the Commission does not agree with the submissions made by WhatsApp.
96. On the third condition, *i.e.* whether there is any compulsion/coercion on the users to necessarily purchase/use the tied product in order to use the tying product, the Commission observes that WhatsApp has submitted that '*WhatsApp users do not "automatically" or "mandatorily" have to use the WhatsApp Pay feature, but rather retain full discretion on whether or not to use WhatsApp and the WhatsApp Pay feature*'. While WhatsApp Pay is embedded in WhatsApp messenger app when it is downloaded by users on their smartphones, the consumers are at freewill to use WhatsApp Pay or any other UPI enabled digital payments app in India to make instant interbank transfers. Installation of the WhatsApp messenger does not appear to explicitly mandate/coerce the user to use WhatsApp Pay exclusively or to influence the consumer choice implicitly in any other manner, at present. Thus, the third condition does not seem to have been established.
97. Lastly, as regards the fourth condition, *i.e.* the actual or likely impact of installation on competition in the market for tied product, the Commission observes that at



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present, the UPI digital payments market consists of various established players *e.g.* Google Pay, PayTM, Phone Pe, Amazon Pay *etc.* which are backed by big companies/investors. In an already evolving market, these players seem to be vigorously competing, as is evident from offers/discounts/incentives offered by them to their users, apparent from the newspaper reports relied upon by the Informant. In such a market, to perceive that WhatsApp Pay will automatically get a considerable market share only on the basis of its pre-installation seems implausible. Besides, the Commission also observes that WhatsApp Pay had got approvals to act as a payment app in India in February 2020 in beta version, and only recently, it seems to have complied with the data localisation norms stipulated by NPCI to operate fully. Thus, its actual conduct is yet to manifest in the market. Also, as stated by WhatsApp, the number of users being served under the beta version is limited to less than 1% of its users in India. To that extent, the Commission tends to agree with WhatsApp that this allegation is premature. Accordingly, the fourth condition also does not seem to have been met.

98. For the foregoing reasons, the Commission is of the view that the allegation of the Informant under Section 4(2)(d) of the Act is not made out.
99. As regards the allegation of leveraging, the Commission does not agree with the Informant for reasons cited *supra* while dealing with the allegation under Section 4(2)(d) of the Act. The Informant has contended that WhatsApp will leverage its dominance in the upstream market to have a competitive edge over the existing competitors. The Informant also seems to be distressed by the fact that while the other existing players spent considerable resources to establish themselves in the UPI enabled digital payment app market, WhatsApp will get users on its platter without making any efforts. The apprehensions of the Informant, according to Commission, does not really hold much merit. As stated above, the UPI market is quite established with renowned players competing vigorously. In such a market, it seems implausible that WhatsApp Pay will automatically garner a market share



merely on account of its pre-installation. More so, given the fact that WhatsApp ecosystem does not involve paid services as such for normal users, it seems unlikely that the consumer traffic will be diverted by WhatsApp using its strength in the messenger market. Thus, this allegation under Section 4(2)(e) of the Act also does not seem to be made out.

100. Besides the aforesaid allegations, the Informant has also alleged misuse of data by the OPs, comprising Facebook as the parent entity and WhatsApp and other group entities acquired by it, to their commercial advantage at the cost of causing an adverse effect on the competition. The Informant has also referred to some ongoing litigations against Facebook on its anti-competitive activities and driving out competition in the US and EU. The Informant has specifically highlighted the issue of using consumer sensitive data by the OPs to their commercial advantage through targeted advertising. The OPs have submitted that the Informant has falsely claimed that WhatsApp automatically shares WhatsApp Pay user data with Facebook for use in targeted advertisements and that this claim does not raise any competition concern and need not be looked into by the Commission.
101. The Commission observes that Facebook and WhatsApp undeniably deal with customer sensitive data which is amenable to misuse and may raise potential antitrust concerns among other data protection issues. However, in the present case, the Informant has only alleged that WhatsApp/Facebook have access to data which they are using for doing targeted advertising. There is neither any concrete allegation, nor any specific information to support the competition concern of the Informant. In the absence thereof, there is nothing on record which the Commission can examine.
102. The Informant has also claimed that WhatsApp is in serious non-compliance of critical and mandatory procedural norms pertaining to data localisation and storage. The Informant has also raised concerns with data security. These, in the considered



view of the Commission, do not seem to raise any competition concern and as such may not need any further scrutiny by it.

103. Based on the aforesaid, the Commission does not find alleged contravention of the provisions of Section 4 of the Act against WhatsApp or Facebook being made out. In view of the foregoing, the Commission is of the opinion that there exists no *prima facie* case of contravention and the information filed is directed to be closed under Section 26(2) of the Act.
104. The Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 18-08-2020