IN THE HIGH COURT OF DELHI AT NEW DELHI

EXTRAORDINARY WRIT JURISDICTION

(IN THE MATTER OF PUBLIC INTEREST LITIGATION)

WRIT PETITION (CIVIL) NO. 1355 OF 2021

IN THE MATTER OF:

DR. SEEMA SINGH AND ORS. ...PETITIONERS

VERSUS

UNION OF INDIA AND ANR. ...RESPONDENTS

INDEX

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Date: 02 .06.2021
Place: New Delhi

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C). No. 1355 / 2021

IN THE MATTER OF:

DR. SEEMA SINGH & ANR. **...PETITIONER**

Versus

UNION OF & ANR. **...RESPONDENTS**

ADDITIONAL COUNTER AFFIDAVIT ON BEHALF OF MINISTRY OF ELECTRONICS & INFORMATION TECHNOLOGY (MeitY) - RESPONDENT NO.1

MOST RESPECTFULLY SHOWETH

1. That the answering deponent has already filed its counter affidavit dated 18/03/2021in response to the instant Writ Petition.

2. That the present additional affidavit is being filed to apprise and bring to the attention of this Hon'ble Court about the recent developments which have taken place involving the subject matter of this instant Writ Petition.

I. Decision dated 24/03/2021 of the Competition Commission of India

Suo Moto Case No. 01 of 2021: *In Re: Updated Terms of Service and Privacy Policy for WhatsApp User* Against: *WhatsApp LLC*, Opposite Party No. 1 and *Facebook, Inc.* 1 Opposite Party No. 2

3. The Hon'ble Commission held that WhatsApp has *prima facie* contravened the provisions of Section 4 of the Competition Act, 2002 through its exploitative and exclusionary conduct, in the garb of policy update. A thorough and detailed investigation is required to ascertain the full extent, scope and impact of data sharing through involuntary consent of users. It is thus obligatory that certain aspects of the *prima facie*opinion expressed by the Hon'ble Commission being highlighted below for the benefit of this Hon'ble Court:

> *Having considered the overarching terms and conditions of the new policy, the Commission is of prima facie opinion that the 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein, merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp. The Commission has also taken note of the submission of WhatsApp that 2021 Update does not expand WhatsApp's ability to share data with Facebook and the said update intends to provide users with further transparency about how WhatsApp collects, uses and shares data. The veracity of such claims would also be examined during the investigation by the DG. (para # 25)*
>
> *WhatsApp is the most widely used app for instant messaging in India. A communication network/platform gets more valuable as more users join it, thereby benefiting from network effects. The OTT messaging platforms not being interoperable, communication between two users is enabled only when both are registered on the same network. Thus,*

the value of a messaging app/platform increases for users with an increasing number of their friends and acquaintances joining the network. In India, the network effects have indubitably set in for WhatsApp, which undergird its position of strength and limit its substitutability with other functionally similar apps/platforms. This, in turn, causes a strong lock-in effect for users, switching to another platform for whom gets difficult and meaningless until all or most of their social contacts also switch to the same other platform. Users wishing to switch would have to convince their contacts to switch and these contacts would have to persuade their other contacts to switch. Thus, while it may be technically feasible to switch, the pronounced network effects of WhatsApp significantly circumscribe the usefulness of the same. (para # 26)

The Commission is of further opinion that users, as owners of their personalised data, are entitled to be informed about the extent, scope and precise purpose of sharing of such data by WhatsApp with other Facebook Companies. However, it appears from the Privacy Policy as well as Terms of Service (including the FAQs published by WhatsApp), that many of the information categories described therein are too broad, vague and unintelligible. For instance, information on how users "interact with others (including businesses)" is not clearly defined, what would constitute "service-related information", "mobile device information", "payments or business features", etc. are also undefined. It is also pertinent to note that at numerous places in the policy while illustrating the data to be collected, the list is indicative and not exhaustive due to usage of words like 'includes', 'such as',

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'For example', etc., which suggests that the scope of sharing may extend beyond the information categories that have been expressly mentioned in the policy. Such opacity, vagueness, open-endedness and incomplete disclosures hide the actual data cost that a user incurs for availing WhatsApp services. It is also not clear from the policy whether the historical data of users would also be shared with Facebook Companies and whether data would be shared in respect of those WhatsApp users also who are not present on other apps of Facebook i.e., Facebook, Instagram, etc. (para # 27)

Further, users are not likely to expect their personal data to be shared with third parties ordinarily except for the limited purpose of providing or improving WhatsApp's service. However, it appears from the wordings of the policy that the data sharing scheme is also intended to, inter alia, 'customise', 'personalise' and 'market' the offerings of other Facebook Companies. Under competitive market condition, users would have sovereign rights and control over decisions related to sharing of their personalised data. However, this is not the case with WhatsApp users and moreover, there appears to be no justifiable reason as to why users should not have any control or say over such cross-product processing of their data by way of voluntary consent, and not as a precondition for availing WhatsApp's services. (para # 28)

Thus, users are required to accept the unilaterally dictated 'take-it-or-leave-it' terms by a dominant messaging platform in their entirety, including the data sharing provisions therein, if they wish to avail their

service. Such "consent" cannot signify voluntary agreement to all the specific processing or use of personalised data, as provided in the present policy. Users have not been provided with appropriate granular choice, neither upfront nor in the fine prints, to object to or opt-out of specific data sharing terms, which prima facie appear to be unfair and unreasonable for the WhatsApp users. (para # 29)

On a careful and thoughtful consideration of the matter, the conduct of WhatsApp in sharing of users' personalised data with other Facebook Companies, in a manner that is neither fully transparent nor based on voluntary and specific user consent, appears prima facie unfair to users. The purpose of such sharing appears to be beyond users' reasonable and legitimate expectations regarding quality, security and other relevant aspects of the service for which they register on WhatsApp. (para # 30)

Data and data analytics have immense relevance for competitive performance of digital enterprises. Cross-linking and integration of user data can further strengthen dataadvantage besides safeguarding and reinforcing market power of dominant firms. For Facebook, the processing of data collected from WhatsApp can be a means to supplement the consumer profiling that it does through direct data collection on its platform, by allowing it to track users and their communication behaviour across a vast number of locations and devices outside Facebook platform. (para # 33)

In view of the foregoing, the Commission is of the considered opinion that WhatsApp has prima facie contravened the provisions of Section 4 of the Act through its exploitative and exclusionary conduct, as detailed in this order, in the garb of policy update. A thorough and detailed investigation isrequired to ascertain the full extent, scope and impact of data sharing through involuntary consent of users. (para # 34)

Accordingly, the Commission directs the Director General ('DG') to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order. (para # 35)

A true copy of the order is annexed herewith and marked as **Annexure R1/1**

II. Judgment of this Hon'ble Court in *WhatsApp LLC* v *Competition Commission of India & Anr.* [WP(C) 4378/2021] dated 22/04/2021, wherein the petitioner(s) (WhatsApp and Facebook) challenge the Impugned Order passed by the respondent no.1 on the ground that despite the judicial challenge to the 2021 Update pending before the Supreme Court and before this Court, the respondent no. 1 has wrongly taken suo moto action and passed the Impugned Order.

4. The Ld. Single judge of this Hon'ble Court while dismissing the petitions filed by the Petitioner upheld the *prima facie* opinion of the Competition Commission (Respondent No.1) and has stated in his judgment:

It cannot, therefore, be said that the issues raised by the respondent no. 1 are beyond its jurisdiction under the Act or that there is a total lack of jurisdiction in the respondent no.1. In fact, this has not even been pleaded by the petitioner(s) before this Court. (para # 21)

Though some of the issues may substantively be in issue before the Supreme Court and this Court in the above-referred petitions, in my opinion, there cannot be an inviolable rule, nor is one pleaded by the petitioner(s), that merely because an issue may be pending before the Supreme Court or before the High Court, the Commission would get divested of the jurisdiction that it otherwise possesses under the Act. (para # 23)

In the present case, the issue as to whether the 2016 Update/2021 Update announced by WhatsApp in any manner infringes upon the Right of Privacy of the users guaranteed under Article 21 of the Constitution of India is pending adjudication before the Supreme Court and this Court. The question regarding the 2016 Update/2021 Update not giving an option to opt-out is also an issue before the Supreme Court and this Court. However, the same cannot necessarily mean that during the pendency of those petitions, the respondent no.1 is completely denuded of the jurisdiction vested in it under the Competition Act, 2002 or that it must necessarily await the outcome of such proceedings. Therefore, it is not a question of lack of jurisdiction of the respondent no. 1, but rather one of prudence and discretion. (para # 28)

It must be remembered that any finding by the respondent no. 1 on any of the issues would always be subject to the findings of the Supreme Court or of this Court in the above-mentioned petitions and would be binding on the respondent no. 1. Such is the case in every proceeding before the respondent no. 1. Nevertheless, while such issues are being determined by the Supreme Court or by the High Court, it cannot be stated that the respondent no.1 has to necessarily await the outcome of such proceedings before acting further under its own jurisdiction. The respondent no.1 has to proceed within its own jurisdiction, applying the law as it stands presently. In this regard, I may only note the submission of the learned ASG appearing for the respondent no. 1 that the scope ofinquiry before the respondent no. 1 is not confined only to the issues raised before the Supreme Court or before this Court, but is much vaster in nature. (para # 29)

This is so, as mere pendency of a reference before the larger bench does not denude the other courts of their jurisdiction to decide on the lis before them. Similarly, merely because of the pendency of the above proceedings before the Supreme Court and before this Court, the respondent no. 1 cannot be said to be bound to necessarily hold its hands and not exercise the jurisdiction otherwise vested in it under the statute.Maybe, it would have been prudent for the respondent no.1 to have awaited the outcome of the above-referred petitions before the Supreme Court and before this Court, however, merely for its decision not to wait, the Impugned Order cannot be said to be without

jurisdiction or so perverse so as to warrant to be quashed by this Court in exercise of its extra-ordinary jurisdiction.(para # 33)

I may also note that the challenge to the WhatsApp 2021 Update has been raised before the Supreme Court only in form of applications being filed by the petitioner and intervener therein. It is not stated by the petitioner(s) herein if the Supreme Court has taken cognizance of these applications or passed any order thereon. As far as the petitions before this Court are concerned, the same are also at a preliminary stage. The petitioner(s) instead of filing any application in these petitions (before the Supreme Court or before this Court) seeking appropriate clarification/relief, have filed an independent challenge to the Impugned Order. The same, in my opinion, is not sustainable. (para # 34)

As far as the submission of Facebook on its impleadment in the investigation is concerned, the same is only stated to be rejected. A reading of the Impugned Order passed by the respondent no.1 itselfshows that Facebook shall be an integral part of such investigation and the allegations in relation to sharing of data by Whatsapp with Facebook would necessarily require the presence of Facebook in such an investigation. (para # 36)

A true copy of the judgment is annexed herewith and marked as **Annexure R1/2**

5. That aggrieved by the order of the Ld. Single judge, the Petitioner has filed appeals before this Hon'ble Court [LPA 163/2021]: *WhatsApp LLC* v

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Competition Commission of India & Anr. and [LPA 164/2021]: *Facebook Inc.* v *Competition Commission of India & Anr.*Both these appeals are pending adjudication before this Hon'ble Court.

6. That it is very much evident from the above that the *prima facie* opinion of the Competition Commission of India dated 24.03.2021 in Suo Moto Case No. 01 of 2021: *In Re: Updated Terms of Service and Privacy Policy for WhatsApp User*against the opposite parties, namely *WhatsApp LLC* and *Facebook Inc.* stand. Further, the investigation report from the Director General of the Commission, which is to be submitted within a period of 60 days from the receipt of said order is currently being awaited.

7. That the Respondent No.1 craves leave of this Hon'ble Court to place on record the investigation report as and when released by the Director General of the Commission for the consideration of this Hon'ble Court.

IV. Communication dated 18/05/2021 issued to WhatsApp by the Respondent No.1

8. That the said communication referred to the proposed amendment in the WhatsApp Privacy Policy (2021) and recent FAQ by WhatsApp conveying deferral of the WhatsApp new privacy policy beyond 15th May, 2021. It highlighted the users concern in no uncertain terms by referring to :

> *The deferral of the privacy policy beyond 15th May 2021 does not absolve WhatsApp from respecting the values of informational privacy, data security and user choice for Indian users. The changes to the*

Privacy Policy and the manner of introducing these changes including in FAQ undermines these sacrosanct values and harms the rights and interests of Indian citizens. As you are doubtlessly aware, many Indian citizens depend on WhatsApp to communicate in everyday life. It is not just problematic, but also irresponsible, for WhatsApp to leverage this position to impose unfair terms and conditions on Indian users,particularly those that discriminate against Indian users vis-à-vis users in Europe.

The Government of India reiterates that the unilateral changes to the WhatsApp Privacy Policy undermine the privacy, autonomy and freedom of choice of Indian citizens. Not only does Indian statutory law reflect this position currently, but upcoming laws like the Personal Data Protection Bill, currently pending in Parliament, reassert these fundamental building blocks of a free and fair digital India. In this context, the "all-or-nothing" / limited functionality leading to complete withdrawal of service" approach adopted by WhatsApp takes away meaningful choice from Indian users and undermines the spirit of the landmark judgment of the Supreme Court of India in Puttaswamy. It treats Indian citizens differently from their European counterparts.

A true copy of the communication issued by the Respondent No.1 to the Respondent No. 1 is annexed herewith and marked as **Annexure R1/3**

9. That the aforesaid communication reiterated that the Proposed WhatsApp policy (2021) that is in violation with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data

or Information) Rules, 2011 (SPDI Rules) and the Respondent No.1 sought withdrawal of the proposed changes in privacy policy for India in its entirety.

10. That in response to the aforesaid communication dated 18/05/2021, WhatsApp submitted its response vide letter dated 22/05/2021 enclosing its Preliminary Affidavit which it has already filed before this Hon'ble Court being the Respondent No. 2.

V. The current practice of WhatsApp:

11. That it is humbly submitted that WhatsApp being Respondent No.2 is indulging in anti-users practices by obtaining "trick consent" from the users for its updated privacy policy. It is submitted that millions of WhatsApp existing users, those who have not accepted the updated 2021 privacy policy are being bombarded with notifications on everyday basis:

- *The privacy and security of their personal messages and calls does not change. They are protected by end-to-end encryption, and What App and Facebook cannot read or listen to them.*
- *The update does not expand WhatsApp's ability to share their da a with Facebook.*
- *The changes to the Privacy Policy are related to optional business features on WhatsApp, and provide further transparency abo it how we collect and use data.*

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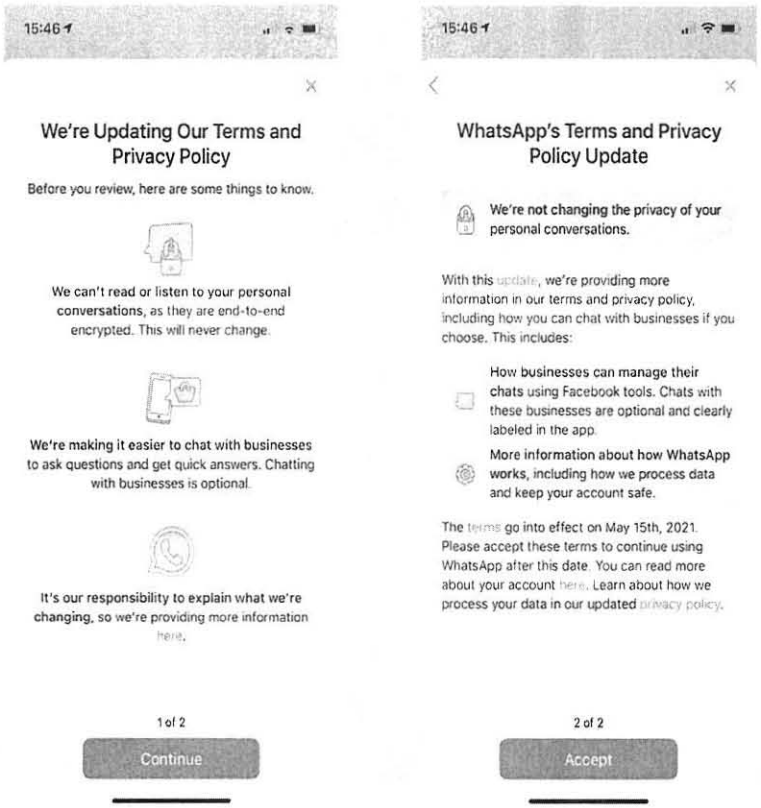

A true copy of a notification/screen shot is annexed herewith and marked as **Annexure R1/4**

12. That it is submitted that the Respondent No.2 has unleashed its digital prowess to the unsuspecting existing users and would like to force them to accept the updated 2021 privacy policy by flashing such notifications at a regular intervals. The game plan is very clear, i.e., to transfer the entire existing user base committed to updated 2021 privacy policy before the Personal Data Protection (PDP) Bill becomes the law.

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13. That it is humbly submitted that the current notifications as being pushed by the Respondent No.2 on its users whether existing or new is against the very grain of *prima facie* opinion of the Competition Commission of India's order dated 24/03/2021.

14. That in view of the aforesaid factual and legal matrix, it is prayed that the during the pending adjudication of this petition, in the interest of justice, interim directions may be issued to the Respondent No.2 to:

(a) desist from any actionof "pushing notifications" onto existing users related to updated 2021 privacy policy;

(b) place on record the number of times such notifications, as on date,being pushed on everyday basis and what is the conversion rate, i.e. notification to acceptance of updated 2021 privacy policy

It is prayed accordingly.

DR. S. SATHYANARAYANAN
Scientist 'D'
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

DEPONENT

VERIFICATION:

Verified at New Delhi on this 02 day of June, 2021 that the contents of the above affidavit are true and correct to my knowledge based on the official records and no part of it is false and nothing material has been concealed there from.

DEPONENT

DR. S. SATHYANARAYANAN
Scientist 'D'
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

Annexure R1/1

COMPETITION COMMISSION OF INDIA

Suo Moto Case No. 01 of 2021

***In Re*: Updated Terms of Service and Privacy Policy for WhatsApp Users**

Against:

WhatsApp LLC
1601 Willow Road, Menlo Park
California 94025, USA **Opposite Party No. 1**

Facebook, Inc.
1 Hacker Way, Menlo Park
California 94025, USA **Opposite Party No. 2**

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 26(1) of the Competition Act, 2002

1. Recently, it has been reported in various media reports[1] that WhatsApp Inc. ('**WhatsApp**') has updated its privacy policy and terms of service for WhatsApp users. It was *inter alia* reported that the new policy makes it mandatory for the users to accept the terms and conditions in order to retain their WhatsApp account information and provides as to how it will share personalised user information with Facebook Inc. ('**Facebook**') and its subsidiaries. Hereinafter, WhatsApp and Facebook are together referred to as the '**Opposite Parties**'.

[1] https://www.business-standard.com/article/companies/whatsapp-mandates-data-sharing-with-facebook-in-updated-privacy-policy-121010601431_1.html;

https://economictimes.indiatimes.com/magazines/panache/whatsapp-updates-privacy-policy-makes-data-sharing-with-facebook-mandatory/articleshow/80135267.cms, *etc.*

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2. It is observed that since early January 2021, WhatsApp users started receiving notification from WhatsApp informing them about the new changes in WhatsApp's terms of service and privacy policies. The text of such notification, as reported in media, is as follows:

> *WhatsApp is updating its terms and privacy policy.*
>
> *Key updates include more information about:*
> - *WhatsApp's service and how we process your data.*
> - *How businesses can use Facebook hosted services to store and manage their WhatsApp chats.*
> - *How we partner with Facebook to offer integrations across the Facebook Company Products*
>
> *By tapping AGREE, you accept the new terms and privacy policy, which take effect on February 8, 2021. After this date, you will need to accept these updates to continue using WhatsApp. You can also visit the Help Center if you would prefer to delete your account and would like more information.*

3. Thus, the above notification suggests that in order to be able to use the services of WhatsApp, from 08.02.2021 onwards, users will have to mandatorily accept the new terms and policy in their entirety including the terms with respect to sharing of their data across all the information categories with other Facebook Companies. As per previous privacy policy(ies) dated 25.08.2016 and 19.12.2019, existing users had an option to choose whether they wanted to share their WhatsApp data with Facebook. However, with the latest update, every WhatsApp user has to mandatorily agree to such data sharing with Facebook.

4. Earlier, in 2017, the Commission, while examining the allegations made by the Informant in respect of the privacy policy of WhatsApp in Case No. 99 of 2016 titled as *Vinod Kumar Gupta AND WhatsApp Inc.* ('**Vinod Gupta Case**'), noted that WhatsApp had provided an option to its users to 'opt out' of sharing user account information with 'Facebook' within 30 days of agreeing to the updated terms of service and privacy policy.

5. Having considered the media reports and the potential impact of the Policy and Terms for WhatsApp users and market, the Commission, in its ordinary meeting held on 19.01.2021, decided to take *suo moto* cognisance of the matter. In the said meeting, the Commission deemed it appropriate to seek response from both WhatsApp and Facebook on certain queries, as specified in the order dated 19.01.2021. Pursuant to the said directions, WhatsApp filed confidential version of its response on 03.02.2021. The Commission in its meeting held on 11.02.2021 considered the same and observed that the same is not in accord with Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (the, '**General Regulations**') whereby and whereunder a party seeking confidentiality has to make an application setting out cogent reasons for seeking such treatment along with confidential and non-confidential versions of the information provided and document(s) sought to be filed. The Commission further observed that the response filed by WhatsApp is also not in compliance with Regulation 11 of General Regulations as the same is not signed in terms of the provisions contained therein. In view of the above, WhatsApp was directed to submit its response in compliance with the observations made in this order latest by 25.02.2021. The Commission further observed that despite clear directions in the order dated 19.01.2021 passed by the Commission, Facebook neither responded to the queries raised by the Commission nor moved any application seeking extension of time to comply with the requisitions made by the Commission. In these circumstances, the Commission directed Facebook to submit its response to the queries mentioned in the order dated 19.01.2021 without any delay and in any event latest by 25.02.2021.

6. WhatsApp and Facebook responded to the said directions of the Commission *vide* separate e-mails dated 25.02.2021.

7. Facebook has *inter alia* submitted that "….*While Facebook is the parent company of WhatsApp, Facebook and WhatsApp are separate and distinct legal entities. It is WhatsApp (not Facebook) that offers and operates WhatsApp's instant messaging service that is the subject of the Hon'ble Commission's Order. Specifically, the 2021 Update is in relation to the Terms of Service and Privacy Policy of the messaging service offered by WhatsApp. In light of the above, Facebook humbly submits that it should not*

be arrayed as a party to these proceedings, and WhatsApp is the appropriate entity to provide the Hon'ble Commission with the information sought….". The Commission has given careful consideration to the response filed by Facebook and notes that the same is not only evasive but is in clear non-compliance with the directions issued by the Commission *vide* its order dated 19.01.2021. As one of the avowed objectives of the key updates included more information about *inter alia* as to how WhatsApp *partners* with Facebook to offer integrations across the Facebook Company Products, it is surprising that Facebook instead of providing its response thereon, as sought by the Commission, is trying to evade its comments. Facebook is a direct and immediate beneficiary of the new updates and in these circumstances, it is egregious that Facebook is feigning ignorance about the potential impact of the updates altogether and avoiding from providing its perspective thereon. In these circumstances, Facebook is proper party in the present matter and its presence is required for effective and complete determination of the issues involved in the present matter. Accordingly, the issue of deletion of its name from array of parties does not arise and the request of Facebook in this regard is rejected.

8. As far as WhatsApp is concerned, it filed public version of its response dated 03.02.2021 *vide* its submission dated 25.02.2021. In relation to compliance with Regulation 11 of the General Regulations, it has been submitted that "….*Section 35 of the Competition Act, 2002 (Competition Act) allows an enterprise to authorize legal practitioners to present its case before the Hon'ble Commission. This is also consistent with the Hon'ble Commission's past practice in allowing companies to file, plead and appear through their authorized legal representatives who have also been allowed to sign the written submissions on behalf of their client*….". It has been further submitted that "…..*requiring companies to sign every submission, responses, pleadings, etc. to be filed before the Hon'ble Commission is a cumbersome obligation and may result in a delay of proceedings before the Hon'ble Commission. To avoid any such delay, WhatsApp has authorized its legal representatives to act, appear, plead, and file before the Hon'ble Commission on its behalf, in relation to proceedings in the captioned matter*…". For the *reasons set out above, WhatsApp requested the Commission to accept its response and other submissions filed on behalf of WhatsApp, in accordance with Section 35 of*

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the Competition Act and the General Regulations". An authorization letter dated 22.02.2021 was also enclosed along with the letter dated 25.02.2021. WhatsApp also filed certain additional submissions detailing the progress in the various proceedings against the update in terms of service and privacy policy before multiple fora as well as the introduction of in-app notifications by WhatsApp to inform its users about the same.

9. The Commission has gone through the response of WhatsApp also and is constrained to note that despite an opportunity having been granted by the Commission, WhatsApp has not only failed to comply with the directions of the Commission but has also taken the pleas which are *ex facie* untenable. In this regard, the Commission notes that the reference to the provisions of Section 35 of the Act by WhatsApp is thoroughly misplaced. This provision deals with appearance of parties before the Commission. It does not deal with signing of pleadings. In this regard, reference has already been made to the provisions of Regulation 11 of the General Regulations which *inter alia* provides for signing of replies which are filed pursuant to the directions of the Commission. For felicity of reference, the same is excerpted below:

> *Signing of information or reference. –*
>
> *11 (1) An information or a reference or a reply to a notice or direction issued by the*
>
> *Commission shall be signed by–*
>
> *(a) the individual himself or herself, including a sole proprietor of a proprietorship firm;*
>
> *(b) the Karta in the case of a Hindu Undivided Family (HUF);*
>
> *(c) the Managing Director and in his or her absence, any Director, duly authorized by the board of directors in the case of a company,*
>
> *(d) the President or the Secretary in the case of an association or society or similar body or the person so authorized by the legal instrument that created the association or the society or the body;*
>
> *(e) a partner in the case of a partnership firm;*
>
> *(f) the chief executive officer in the case of a co-operative society or local authority;*

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(g) in the case of any other person, by that person or by some person duly authorized to act on his behalf.

(2) A reference shall be signed and authenticated by an officer not below the rank of a Joint Secretary to the Government of India or equivalent in the State Government or the Chief Executive Officer of the Statutory Authority if the same has been received from the Central Government or State Government or Statutory Authority.

(3) Without prejudice to the provisions of this regulation, the counsel may also append his or her signature to the information or reference as the case may be.

10. From the above, it is manifestly clear that the replies have to be filed in accordance with the stipulations made in the aforesaid regulations. No doubt, in terms of Regulation 11(3) of the General Regulations, the counsel may also append his signature but that does not absolve the parties from complying with the requirements of Regulation 11(1) as the facts are required to be verified by the concerned companies/ enterprises/ individuals *etc.* only. From the response of WhatsApp itself, it is evident that it *"...has authorized its legal representatives to act, appear, plead, and file before the Hon'ble Commission on its behalf, in relation to proceedings in the captioned matter"*. The authorization is conspicuously silent about *signing* of pleadings. The Commission finds the contention of WhatsApp that compliance with such requirement is a "cumbersome obligation" and "may result in a delay of proceedings before the Hon'ble Commission", as rather egregious and being inconsistent with the General Regulations. The past instance alluded by WhatsApp is of no consequence when the legal requirement is crystal clear. In this regard, the Secretariat is directed to ensure that in future no such pleadings should be accepted which are not signed as per the provisions of General Regulations. To avoid any further delay in the matter, the Commission proceeds to consider the submissions of WhatsApp in the interest of justice with a direction to comply with the requirements of General Regulations immediately and any delay in this regard would be construed as continuing non-cooperation with attendant consequences.

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11. WhatsApp has also made a preliminary objection and submitted that its current Terms of Service and Privacy Policy as well as the proposed update in the same (the, '**2021 Update**') fall within the purview of the information technology law framework and these issues are currently *sub judice* before various courts and other fora in India. It has also been averred that the examination of the 2021 Update by courts and the Government of India is not merely limited to data protection/ privacy laws but extends to assessing more broadly whether the 2021 Update is in conformity with principles of fairness, public policy and national security considerations. Furthermore, WhatsApp has averred that the questions set out in the Commission's order are *sub judice* and therefore, the Commission should not look into the same set of issues. WhatsApp has relied on the decision of the Hon'ble Supreme Court in *Competition Commission of India* v. *Bharti Airtel Limited and others, (2019) 2 SCC 521,* and stated that the said decision emphasized the need to maintain comity between decisions of different authorities on the same issues and held that the Commission should only exercise jurisdiction after the proceedings before the sectoral regulator had concluded and attained finality. WhatsApp has also relied on the decision of Hon'ble High Court of Bombay in *Star India Private Limited* v. *Competition Commission of India, 2019 SCC OnLine Bom 3038* and decision of the Commission in *Jitesh Maheshwari v. National Stock Exchange of India Limited, Case No. 47 of 2018.*

12. WhatsApp has also averred that the Commission has previously, in *Vinod Kumar Gupta* case, assessed the Terms of Service and Privacy Policy as updated in 2016, and regarded the allegations raised against data sharing related to the Information Technology Act (IT Act) and data protection/ privacy laws, and held that allegations of breach of the Information Technology Act do not fall within its purview. WhatsApp has also relied on the decisions of the Commission in *Harshita Chawla* v. *WhatsApp Inc., Case No. 15 of 2020* ('**Harshita Chawla case**') as well as *XYZ* v. *Alphabet Inc., Case No. 07 of 2020* to contend that issues related to data localization and data sharing need not be looked in under the Competition law.

13. In relation to the above mentioned contentions of WhatsApp, the Commission is of the view that the judgments relied by WhatsApp have no relevance to the issues arising in the present proceedings and its plea is misplaced and erroneous. The judgment of the Hon'ble Supreme Court in *Bharti Airtel Case* has no application to the facts of the present case as the thrust of the said decision was to maintain 'comity' between the sectoral regulator (*i.e.* TRAI, in the said case) and the market regulator (*i.e*. the CCI). WhatsApp has failed to point out any proceedings on the subject matter which a sectoral regulator is seized of. Needless to add, the Commission is examining the policy update from the perspective of competition lens in ascertaining as to whether such policy updates have any competition concerns which are in violation of the provisions of Section 4 of the Act. Further, the Commission is of the considered view that in a data driven ecosystem, the competition law needs to examine whether the excessive data collection and the extent to which such collected data is subsequently put to use or otherwise shared, have anti-competitive implications, which require anti-trust scrutiny. The reliance of WhatsApp on *Vinod Kumar Gupta* and other cases is also misplaced as the Commission has only observed that breach of the Information Technology Act does not fall within its purview. However, in digital markets, unreasonable data collection and sharing thereof, may grant competitive advantage to the dominant players and may result in exploitative as well as exclusionary effects, which is a subject matter of examination under competition law. It is trite to mention that the provisions of the Act are in addition to and not in derogation of the provisions of any other law, as declared under Section 62 of the Act.

14. WhatsApp has averred that 2021 Update has not yet been implemented and its implementation has been postponed to 15.05.2021. It has been submitted that abuse of dominance is a post-facto analysis and the Commission in *Harshita Chawla* case (*supra*) held that since WhatsApp Pay had only been launched in the beta version, its actual conduct was yet to manifest in the market and therefore, the allegation of abuse of dominance was premature. Based on the same, WhatsApp has submitted that taking *Suo moto* cognizance of the 2021 Update is premature. In this regard, the Commission is of the view that the plea is misdirected. In the present case, WhatsApp has already

announced its privacy policy and terms of service and, as such, the conduct has already taken place which can be appropriately examined within the purview of Section 4 of the Act. The deadline fixed by WhatsApp, *i.e.* 15.05.2021 is for acceptance of such updated terms by the users failing which they would not have full functionality of WhatsApp. Thus, in nutshell, the conduct has already occurred, and the time has started running for the users to comply therewith. Pursuant to such policy updates, the users are already getting prompts for acceptance of updated terms and giving of consent thereto by the users, are reflective of the fact that the actionable conduct has already taken place which can be examined by the Commission within the framework of Section 4 of the Act. In this regard, it is also pertinent to mention the provisions of Section 33 of the Act, which empower the Commission to intervene even in respect of acts which are in contravention of the provisions of Sections 3/4/6 of the Act *if such acts are about to be committed*. A plain reading of the long title to the Act also makes it beyond any pale of doubt that the Commission is obligated to '*prevent*' practices having adverse effect on competition. In view of the foregoing, the plea is legally untenable and unsustainable.

15. After addressing the abovementioned procedural issues/preliminary objection(s), the Commission now proceeds to examine the issues on merit to *prima facie* assess whether the Opposite Parties have violated provisions of Section 4 of the Act.

16. Before adverting to the examination of issues on merit, it would be appropriate to note, in brief, the response submitted by WhatsApp, in response to the clarifications sought by the Commission:

16.1 The primary aim of the 2021 Update is twofold: (i) to provide users with further transparency about how WhatsApp collects, uses and shares data; and (ii) to inform users about how optional business messaging features work when certain business messaging features become available to them.

16.2 2016 Update allowed existing users the option to opt-out of sharing their WhatsApp account information with Facebook Companies for ads and product experiences purposes. WhatsApp is continuing to honour the 2016 opt-out for anyone who had chosen it, and the most recent updates do not change that. If anyone who has

previously opted out agrees to the 2021 Update, WhatsApp will acknowledge their agreement to the 2021 Update and also continue to honour the 2016 opt-out.

16.3 Privacy of personal messaging is integral to the growth and vision of WhatsApp. This commitment to keeping WhatsApp a safe and protected place where people can connect privately has not changed. WhatsApp cannot see users' personal conversations with friends and family because they are protected by end-to-end encryption.

16.4 2021 Update does not expand WhatsApp's ability to share data with Facebook and does not impact the privacy of personal messages of WhatsApp users with their friends and family.

16.5 The 2021 Update provides more specifics on how WhatsApp works with businesses that use Facebook or third parties to manage their communications with users on WhatsApp. Even for users who choose to interact with a business on WhatsApp, the implications of such data sharing are minimal.

17. In light of its averments, WhatsApp has submitted that the 2021 Update raises no concerns from a competition perspective. 2021 Update aims to provide greater transparency by further explaining the collection, usage and sharing of data which users had consented to under the 2016 Update and to inform users about how optional business messaging features work when certain business messaging features become available to them. Therefore, WhatsApp has requested the Commission to refrain from initiating an investigation into WhatsApp's 2021 Update.

18. After briefly reproducing the averments made by WhatsApp, now the Commission would examine the issue on merit. It is noted that Section 4 of the Act proscribes abuse of dominance by an entity commanding dominant position in relevant market. Thus, delineation of relevant market is essential to define the boundaries of the market to ascertain dominance and for analysing the alleged abusive conduct. Recently, the Commission had an occasion to examine the relevant market in the context of business practices of WhatsApp and Facebook in *Harshita Chawla case* wherein an Information was filed before the Commission alleging *inter alia* contravention of the provisions of Section 4 of the Act against WhatsApp and Facebook for abusing their dominant

position in launching their payment app services. While noting that WhatsApp operates in the '*market for Over-The-Top (OTT) messaging apps through smartphones in India*, the Commission made the following observations while delineating the relevant market in the said matter:

> *"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 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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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.

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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."

19. Further, in relation to the dominance of WhatsApp in the *market for OTT messaging apps through smartphones in India,* the Commission in *Harshita Chawla* case noted that:

"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."

20. Based on the above, the Commission concluded that WhatsApp is dominant in the relevant market for OTT messaging apps through smartphones in India. As such, in light of the said holding of the Commission in *Harshita Chawla* case, there is no occasion to separately and independently examine the issue of relevant market and dominance of WhatsApp therein, when there is no change in the market construct or structure since the passing of the said order in August, 2020 and announcing of the new policy by WhatsApp on January 04, 2021 – which itself seems to emanate out of the entrenched dominant position of WhatsApp in the said relevant market, as detailed in this order. The Commission has also taken note of the recent developments wherein the competing apps, *i.e. Signal* and *Telecom* witnessed a surge in downloads after the policy announcement by WhatsApp. However, apparently this has not resulted in any significant loss of users for WhatsApp. Further, as elaborated in detail in succeeding paras, the network effects working in favour of WhatsApp reinforces its position of strength and limit its substitutability with other functionally similar apps/platforms.

21. The Commission has perused the previous privacy policies of WhatsApp dated 25.08.2016 as well as 19.12.2019 wherein the existing users were provided with an option to choose not to have their WhatsApp account information shared with Facebook. The relevant excerpt is as follows:

> ***The choices you have. If you are an existing user, you can choose not to have your WhatsApp account information shared with Facebook to improve your Facebook ads and products experiences. Existing users who accept our updated Terms and Privacy Policy will have an additional 30 days to make this choice by going to Settings > Account***

22. However, it is evident from the latest policy statement published on WhatsApp website (as extracted in para 2), and as has been widely reported by media, this choice is no longer available to users under the new policy. This implies that data of users, including that of those who are not users of any other service within the Facebook family of companies, will now be shared across Facebook Companies. Simply put, it appears that consent to sharing and integration of user data with other Facebook Companies for a range of purposes including marketing and advertising, has been made a precondition for availing WhatsApp service.

23. In this regard, it is pertinent to note that in *Vinod Gupta* case (*supra)*, it was alleged that by mandating users to agree with its terms of service and privacy policy as updated in August, 2016, WhatsApp has been sharing information/ data of its users with 'Facebook' which in turn was being used by 'Facebook' for targeted advertisements, in contravention of the provisions of Section 4 of the Act. While closing the matter, the Commission pertinently noted that WhatsApp provided its users an option "*…to 'opt out' of sharing user account information with 'Facebook' within 30 days of agreeing to the updated terms of service and privacy policy"*. However, no such option has been granted to the users under the present policy update.

24. Thus, in *Vinod Gupta* case (*supra),* the fact that WhatsApp provided an option to its users to 'opt out' of sharing user account information with 'Facebook' within 30 days of agreeing to the updated terms of service and privacy policy was a critical consideration in deciding against the alleged contravention by WhatsApp. As against this, the new privacy policy has *removed* the 'opt out' option given to the users and the users have now to mandatorily agree to sharing of their personalised data by WhatsApp with Facebook Companies and *further* the policy envisages data collection which

appears to be unduly expansive and disproportionate. This is borne from the fact that it seeks to capture, amongst others, transactions and payments data; data related to battery level, signal strength, app version, mobile operator, ISP, language and time zone, device operation information, service related information and identifiers *etc*.; location information of the user even if the user does not use location related features besides sharing information with Facebook on how user interacts with others (including businesses) when using WhatsApp services. All such data collected by WhatsApp would be shared with Facebook Companies for various usages envisaged in the policy. The Commission also took note of the submission of WhatsApp that it would continue to honour the 'opt-out' option exercised by users during 2016 Update; however, the 2021 Update do not create any carveout for such users who opted for not sharing their information with Facebook.

25. Having considered the overarching terms and conditions of the new policy, the Commission is of *prima facie* opinion that the 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein, merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp. The Commission has also taken note of the submission of WhatsApp that 2021 Update does not expand WhatsApp's ability to share data with Facebook and the said update intends to provide users with further transparency about how WhatsApp collects, uses and shares data. The veracity of such claims would also be examined during the investigation by the DG.

26. WhatsApp is the most widely used app for instant messaging in India. A communication network/platform gets more valuable as more users join it, thereby benefiting from network effects. The OTT messaging platforms not being interoperable, communication between two users is enabled only when both are registered on the same network. Thus, the value of a messaging app/platform increases for users with an increasing number of their friends and acquaintances joining the network. In India, the network effects have indubitably set in for WhatsApp, which undergird its position of strength and limit its substitutability with other functionally similar apps/platforms. This, in turn, causes a

strong lock-in effect for users, switching to another platform for whom gets difficult and meaningless until all or most of their social contacts also switch to the same other platform. Users wishing to switch would have to convince their contacts to switch and these contacts would have to persuade their other contacts to switch. Thus, while it may be technically feasible to switch, the pronounced network effects of WhatsApp significantly circumscribe the usefulness of the same. The network effects have been reflected when despite increase in downloads of the competing apps like *Signal* and *Telegram*, user base of WhatsApp apparently did not suffer any significant loss. As pointed out in *Harshita Chawla* case (*supra),* the second largest player in terms of market share in the relevant market of instant messaging and thus the next sizeable alternative available to users is Facebook Messenger, which too is a Facebook Group company. Thus, the conduct of WhatsApp/ Facebook under consideration merits detailed scrutiny.

27. The Commission is of further opinion that users, as owners of their personalised data, are entitled to be informed about the extent, scope and precise purpose of sharing of such data by WhatsApp with other Facebook Companies. However, it appears from the Privacy Policy as well as Terms of Service (including the FAQs published by WhatsApp), that many of the information categories described therein are too broad, vague and unintelligible. For instance, information on how users "interact with others (including businesses)" is not clearly defined, what would constitute "service-related information", "mobile device information", "payments or business features", *etc.* are also undefined. It is also pertinent to note that at numerous places in the policy while illustrating the data to be collected, the list is indicative and not exhaustive due to usage of words like '*includes*', '*such as*', '*For example*', *etc*., which suggests that the scope of sharing may extend beyond the information categories that have been expressly mentioned in the policy. Such opacity, vagueness, open-endedness and incomplete disclosures hide the actual data cost that a user incurs for availing WhatsApp services. It is also not clear from the policy whether the historical data of users would also be shared with Facebook Companies and whether data would be shared in respect of those WhatsApp users also who are not present on other apps of Facebook *i.e.,* Facebook, Instagram, *etc.*

28. Further, users are not likely to expect their personal data to be shared with third parties ordinarily except for the limited purpose of providing or improving WhatsApp's service. However, it appears from the wordings of the policy that the data sharing scheme is also intended to, *inter alia,* '*customise*', '*personalise*' and '*market*' the offerings of other Facebook Companies. Under competitive market condition, users would have sovereign rights and control over decisions related to sharing of their personalised data. However, this is not the case with WhatsApp users and moreover, there appears to be no justifiable reason as to why users should not have any control or say over such cross-product processing of their data by way of voluntary consent, and not as a precondition for availing WhatsApp's services.

29. As pointed out previously, users earlier had such control over sharing of their personal data with Facebook, in terms of an 'opt-out' provision available for 30 days in the previous policy updates. However, the same has not been made available to users this time. Thus, users are required to accept the unilaterally dictated 'take-it-or-leave-it' terms by a dominant messaging platform in their entirety, including the data sharing provisions therein, if they wish to avail their service. Such "consent" cannot signify voluntary agreement to all the specific processing or use of personalised data, as provided in the present policy. Users have not been provided with appropriate granular choice, neither upfront nor in the fine prints, to object to or opt-out of specific data sharing terms, which *prima facie* appear to be unfair and unreasonable for the WhatsApp users.

30. On a careful and thoughtful consideration of the matter, the conduct of WhatsApp in sharing of users' personalised data with other Facebook Companies, in a manner that is neither fully transparent nor based on voluntary and specific user consent, appears *prima facie* unfair to users. The purpose of such sharing appears to be beyond users' reasonable and legitimate expectations regarding quality, security and other relevant aspects of the service for which they register on WhatsApp. One of the stated purposes of data sharing *viz.* targeted ad offerings on other Facebook products rather indicates the intended use being that of building user profiles through cross-linking of data

collected across services. Such data concentration may itself raise competition concerns where it is perceived as a competitive advantage. The impugned conduct of data-sharing by WhatsApp with Facebook apparently amounts to degradation of non-price parameters of competition *viz.* quality which result in objective detriment to consumers, without any acceptable justification. Such conduct *prima facie* amounts to imposition of unfair terms and conditions upon the users of WhatsApp messaging app, in violation of the provisions of Section 4(2)(a)(i) of the Act.

31. Given the pronounced network effects it enjoys, and the absence of any credible competitor in the instant messaging market in India, WhatsApp appears to be in a position to compromise quality in terms of protection of individualised data and can deem it unnecessary to even retain the user-friendly alternatives such as 'opt-out' choices, without the fear of erosion of its user base. Moreover, the users who do not wish to continue with WhatsApp may have to lose their historical data as porting such data from WhatsApp to other competing apps is not only a cumbersome and time consuming process but, as already explained, network effects make it difficult for the users to switch apps. This would enhance and accentuate switching costs for the users who may want to shift to alternatives due to the policy changes.

32. Today's consumers value non-price parameters of services viz. quality, customer service, innovation, *etc.* as equally if not more important as price. The competitors in the market also compete on the basis of such non-price parameters. Reduction in consumer data protection and loss of control over their personalised data by the users can be taken as reduction in quality under the antitrust law. Lower data protection by a dominant firm can lead to not only exploitation of consumers but can also have exclusionary effects as WhatsApp/Facebook would be able to further entrench/reinforce their position and leverage themselves in neighbouring or even in unrelated markets such as display advertising market, resulting in insurmountable entry barriers for new entrants.

33. Data and data analytics have immense relevance for competitive performance of digital enterprises. Cross-linking and integration of user data can further strengthen data

advantage besides safeguarding and reinforcing market power of dominant firms. For Facebook, the processing of data collected from WhatsApp can be a means to supplement the consumer profiling that it does through direct data collection on its platform, by allowing it to track users and their communication behaviour across a vast number of locations and devices outside Facebook platform. Therefore, the impugned data sharing provision may have exclusionary effects also in the display advertising market which has the potential to undermine the competitive process and creates further barriers to market entry besides leveraging, in violation of the provisions of Section 4(2)(c) and (e) of the Act. As per the 2021 update to the privacy policy, a business may give third-party service provider such as Facebook access to its communications to send, store, read, manage, or otherwise process them for the business. It may be possible that Facebook will condition provision of such services to businesses with a requirement for using the data collected by them. The DG may also investigate these aspects during its investigation.

34. In view of the foregoing, the Commission is of the considered opinion that WhatsApp has *prima facie* contravened the provisions of Section 4 of the Act through its exploitative and exclusionary conduct, as detailed in this order, in the garb of policy update. A thorough and detailed investigation is required to ascertain the full extent, scope and impact of data sharing through involuntary consent of users.

35. Accordingly, the Commission directs the Director General ('DG') to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order.

36. Both the Opposite Parties have also sought an opportunity to make oral submissions on its response in a hearing before the Commission. It this regard, it is suffice to note that a three judges Bench of the Hon'ble Supreme Court through its judgment in *Competition Commission of India* v. *Steel Authority of India Ltd*., Civil Appeal No. 7779 of 2010 decided on September 09, 2010 has already settled the issue by holding that "…*Neither any statutory duty is cast on the Commission to issue notice or grant*

hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter."

37. Lastly, it is noted that WhatsApp has filed its submissions dated 03.02.2021 in two versions *viz.* confidential as well as non-confidential (filed on 25.02.2021). The confidential versions were kept separately during the pendency of the proceedings. The DG, however, shall be at liberty to examine the confidentiality claims as per law. Further, it is made clear that no confidentiality claim shall be available in so far as the information/ data that might have been used/referred to in this order for the purposes of the Act in terms of the provisions contained in Section 57 thereof.

38. It is also made clear that nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

39. The Secretary is directed to send a copy of this order alongwith the material available on record to the DG forthwith and also to take steps in terms of the direction contained in para 10 of this order for ensuring strict compliance with the General Regulations and to issue a suitable public notice in this regard for future guidance.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 24 / 03 / 2021

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Annexure R1/2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 13.04.2021
Date of Decision : 22.04.2021

\+ **W.P.(C) 4378/2021 & CM 13336/2021**

WHATSAPP LLC ..... Petitioner

Through Mr.Harish Salve and Mr.Amit Sibal, Sr. Advocates with Mr.Tejas Karia, Mr.Shashank Mishra, Ms.Nitika Dwivedi, Mr.Aasish Somasi, Advs

versus

COMPETITION COMMISSION OF INDIA & ANR. ..... Respondents

Through Mr.Aman Lekhi, Sr. Adv. and ASG, Mr.Samar Bansal, Mr.Anirudh Bakhru, Mr.Ritwiz Rishabh, Mr.Ujjwal Sinha, Ms.Mehak Huria, Mr.Aniket Seth, Ms.Shikha Sandhu, Ms.Devahuti Pathak, Ms.Harsheen Madan Palli, Mr.Sachin Mishra, Advs for R-1. Mr.Yaman Verma, Mr.Pavit Singh Katoch, Mr.Shyamal Anand, Advs. for R-2.

\+ **W.P.(C) 4407/2021 & CM 13490/2021**

FACEBOOK INC ..... Petitioner

Through Mr.Mukul Rohatgi, Sr. Adv. with Mr.Naval S. Chopra, Mr.Gauhar Mirza, Mr.Shantanu Mathur, Advs.

versus

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COMPETITION COMMISSION OF INDIA & ANR.

..... Respondents

Through Mr.Aman Lekhi, Sr. Adv. and ASG, Mr.Samar Bansal, Mr.Anirudh Bakhru, Mr.Ritwiz Rishabh, Mr.Ujjwal Sinha, Ms.Mehak Huria, Mr.Aniket Seth, Ms.Shikha Sandhu, Ms.Devahuti Pathak, Ms.Harsheen Madan Palli, Mr.Sachin Mishra, Advs for R-1.
Mr.Varun Pathak, Ms.Mitali Daryani, Ms.Madhavi Singh, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed challenging the order dated 24.03.2021 passed by the respondent no.1 under Section 26(1) of the Competition Act, 2002 (hereinafter referred to as the 'Act'), forming a *prima facie* opinion of the violation of Section 4 of the Act by the petitioners, and directing the Director General of the respondent no.1 to cause an investigation to be made into the WhatsApp 2021 Update to its Terms and Privacy Policy.

2. The petitioner in W.P.(C) No.4378/2021 is providing software based application for sending and receiving variety of media texts, photos and videos, calls etc. by using the internet. It was acquired by the respondent no.2 (petitioner in W.P.(C) No.4407/2021) in the year 2014. It is claimed that WhatsApp is used by more than a billion users throughout the world and over 400 million users in India.

3. It is stated that prior to 25.08.2016, the Agreement between WhatsApp and its users was governed by the Terms of Service and Privacy Policy dated July, 2012. On 25.08.2016, WhatsApp updated its Terms and Services of Privacy Policy (hereinafter referred to as the '2016 Update'). It is claimed that WhatsApp users prior to the 2016 Update were given a one-time opportunity to 'opt-out' of Facebook using their WhatsApp account information. The users who joined WhatsApp after the release of 2016 Update, however, were not offered this 'opt-out' option.

4. The 2016 Update was challenged in a Public Interest Litigation, being W.P.(C) 7663/2016 titled ***Karmanya Singh Sareen & Anr. vs. Union of India & Ors.***, before this Court. This Court by its judgment dated 23.09.2016, was pleased to dispose of the petition with the following observations and directions:-

> *"20. Having regard to the complete security and protection of privacy provided by the Respondent No.2 initially while launching "WhatsApp" and keeping in view that the issue relating to the existence of an individual's right of privacy as a distinct basis of a cause of action is yet to be decided by a larger Bench of the Supreme Court [vide K.S. Puttaswamy (supra)], we consider it appropriate to issue the following directions to protect the interest of the users of "WhatsApp":*
>
> > *i) If the users opt for completely deleting "WhatsApp" account before 25.09.2016, the information/data/details of such users should be deleted completely from "WhatsApp" servers and the same shall not be shared with the "Facebook" or any one of its group companies.*
> >
> > *ii) So far as the users who opt to remain in "WhatsApp" are concerned, the existing information/data/details of such*

users upto 25.09.2016 shall not be shared with "Facebook" or any one of its group companies.

iii) The respondent Nos.1 and 5 shall consider the issues regarding the functioning of the Internet Messaging Applications like "WhatsApp" and take an appropriate decision at the earliest as to whether it is feasible to bring the same under the statutory regulatory framework."

5. The above judgment has been challenged by the petitioner in the referred petition before the Supreme Court in SLP(C) No.804/2017, however, no interim order has been passed therein and the petition remains pending for adjudication.

6. On 4th January, 2021, WhatsApp announced that it was updating the Terms of Service and Privacy Policy (hereinafter referred to as '2021 Update').

7. It is claimed by WhatsApp that the 2021 Update does not in any manner negate the choice of the user made under the 2016 Update and that it is applicable only to the users who had 'opted-in' to the 2016 Update as also the users who joined WhatsApp services after the 2016 Update agreeing to those terms. It is further asserted that the 2021 Update is aimed at providing users with further transparency about how WhatsApp collects, uses and shares data and to inform the users about how optional business messaging features work when certain business messaging features become available to them. It is further asserted that 2021 Update does not expand WhatsApp's ability to share data with Facebook and does not impact the privacy of personal messages of the

WhatsApp users; it provides more specifics on how WhatsApp works with businesses that use Facebook or third-parties to manage their communications with users on WhatsApp.

8. It is further asserted by WhatsApp that its 2021 Update has been challenged in several judicial fora, including before this Court and the Supreme Court. It makes specific reference to the two petitions pending before this Court that is, W.P.(C) No.677/2021 titled ***Chaitanya Rohilla vs. Union of India & Ors.,*** and W.P.(C) No.1355/2021 titled ***Dr.Seema Singh & Anr. vs. Union of India & Anr.*** It is further contended that the petitioner, in the above-referred Special Leave Petition and the intervener therein (Internet Freedom Foundation), have filed applications seeking to restrain WhatsApp from implementing the 2021 Update. The said applications are pending before the Supreme Court.

9. The petitioner(s) (WhatsApp and Facebook) challenge the Impugned Order passed by the respondent no.1 on the ground that despite the judicial challenge to the 2021 Update pending before the Supreme Court and before this Court, the respondent no. 1 has wrongly taken *suo moto* action and passed the Impugned Order.

10. Mr.Salve, the learned senior counsel for WhatsApp LLC., and Mr. Rohatgi, learned senior counsel appearing for Facebook Inc., submit that the issue as to whether the sharing of the information available with WhatsApp with Facebook violates the right of privacy of the users protected under Article 21 of the Constitution of India, and as to whether the petitioner(s) are under any legal obligation to provide an 'opt-out' facility to the users of WhatApp, are issues that are pending adjudication

before the Constitutional Court, and especially the Constitutional Bench of the Supreme Court, and therefore, it is not open for the respondent no.1 to consider the same issues in exercise of its *suo moto* powers under the Act. They submit that judicial discipline would demand that the respondent no.1 refrains from adjudicating on the said issues till the same are pronounced upon by the Supreme Court and this Court in the above-referred proceedings. They place reliance on the judgment of the Supreme Court in ***Competition Commission of India vs. Bharti Airtel Limited & Ors.,*** (2019) 2 SCC 521 in support of their submission that the respondent no. 1 should be restrained from proceeding with the investigation until the issues pending adjudication before the Supreme Court and this Court are first decided by the said Courts.

11. Mr.Salve submits that even otherwise, the challenge to the 2016 Update was rejected by the respondent no.1 by its order dated 01.06.2017 passed in Case No. 99/2016, ***Shri Vinod Kumar Gupta v WhatsApp Inc.*** The same is pending adjudication in an appeal before the learned National Company Law Appellate Tribunal (NCLAT), being Compt. Appeal (AT) No.13/2017 titled ***Vinod Kumar Gupta vs. Competition Commission of India & Anr.*** He submits that, therefore, the respondent no. 1 cannot re-open the issues already decided and should have awaited the outcome of the appeal.

12. Mr.Sibal, the learned senior counsel appearing for WhatApp, adds that the investigation could not have been ordered by the respondent no. 1 without first coming to a *prima facie* finding on the claim of WhatsApp that the 2021 Update does not expand WhatsApp's ability to share data

with Facebook and that the said update intends to provide users with further transparency about how WhatsApp collects, uses and shares data.

13. Mr.Rohatgi, the learned senior counsel appearing for Facebook, while reiterating the submissions of Mr.Salve, has further submitted that in any case, Facebook could not have been involved in the investigation directed by the Impugned Order. He submits that Facebook Inc. is merely the parent company of WhatsApp LLC, however, the 2021 Update is in relation to the Terms of Service and Privacy Policy offered by WhatsApp alone. He submits that the said update is not applicable for the Facebook users and therefore, Facebook could not have been added as a party in such an investigation into WhatsApp's Terms and Conditions of Service to its users.

14. On the other hand, the learned Additional Solicitor General appearing for the respondent no.1, submits that apart from the issues which are pending before the Supreme Court in SLP(C) No.804/2017 or before this Court in the petitions mentioned hereinabove, the respondent no.1 is examining the 2021 Update in relation to any violation of the provisions of Section 4 of the Competition Act, 2002. He submits that the respondent no. 1 is examining as to whether the excessive data collection by WhatsApp and the use of the same has any anti-competitive implications. He submits that the concentration of data in the hands of WhatsApp may itself raise competition concerns, thereby resulting in violation of the provisions of Section 4 of the Act.

15. Placing reliance on the judgment of the Supreme Court in ***Competition Commission of India vs. Steel Authority of India Ltd. &***

Anr., (2010) 10 SCC 744, he submits that the Impugned Order has been passed under Section 26(1) of the Act and it does not determine any rights or obligations of the parties; it is only administrative in nature; and is not appealable. He submits that in fact, the petitioner(s) in the present petitions were not even entitled to a notice or hearing before passing of the order under Section 26(1) of the Act and therefore, cannot be heard in challenge to such an order.

16. I have considered the submissions made by the learned senior counsels for the parties.

17. The scope and ambit of an order passed under Section 26(1) of the Act, has been authoritatively explained by the Supreme Court in ***Steel Authority of India Ltd.*** (supra), holding as under:-

> *"**38**. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.*
>
> ***39.** Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim*

order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable.

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***91**. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (the Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice or hearing is not contemplated under the provisions of Section 26(1) of the Act.*

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***93**. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision-making process. That is the precise reason that the legislature has used the word "direction" to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission.*

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97*. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned."*

18. A reading of the above clearly shows that at this stage, the respondent no.1 was merely to form a *prima facie* opinion for directing an investigation to be carried out by the Director General. It has not to give any final conclusions on the merit of the violation alleged or on the

defence of the petitioner(s) herein. The order passed under Section 26(1) of the Act is purely administrative in nature and does not entail any consequence on the civil rights of the petitioner(s). In fact, the Impugned Order could have been passed without notice or granting an opportunity of hearing to the petitioner(s). Though the respondent no. 1 is to give reasons in the Impugned Order, in my opinion, as it is not to give any conclusive findings but is to form only a *prima facie* opinion to order an investigation, it need not deal with all the submissions of the petitioner(s) in detail.

19. In the present set of petitions, the respondent no.1 has, *inter alia*, given the following reasons for directing an investigation to be carried out by its Director General into the 2021 Update of WhatsApp:-

> *"20. Based on the above, the Commission concluded that WhatsApp is dominant in the relevant market for OTT messaging apps through smartphones in India. As such, in light of the said holding of the Commission in Harshita Chawla case, there is no occasion to separately and independently examine the issue of relevant market and dominance of WhatsApp therein, when there is no change in the market construct or structure since the passing of the said order in August, 2020 and announcing of the new policy by WhatsApp on January 04, 2021 – which itself seems to emanate out of the entrenched dominant position of WhatsApp in the said relevant market, as detailed in this order. The Commission has also taken note of the recent developments wherein the competing apps, i.e. Signal and Telecom witnessed a surge in downloads after the policy announcement by WhatsApp. However, apparently this has not resulted in any significant loss of users for WhatsApp. Further, as elaborated in detail in succeeding paras, the network effects working in favour of WhatsApp reinforces its position of strength and limit its substitutability with other functionally similar apps/platforms.*

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25. Having considered the overarching terms and conditions of the new policy, the Commission is of prima facie opinion that the 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein, merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp. The Commission has also taken note of the submission of WhatsApp that 2021 Update does not expand WhatsApp's ability to share data with Facebook and the said update intends to provide users with further transparency about how WhatsApp collects, uses and shares data. The veracity of such claims would also be examined during the investigation by the DG.

26. WhatsApp is the most widely used app for instant messaging in India. A communication network/platform gets more valuable as more users join it, thereby benefiting from network effects. The OTT messaging platforms not being interoperable, communication between two users is enabled only when both are registered on the same network. Thus, the value of a messaging app/platform increases for users with an increasing number of their friends and acquaintances joining the network. In India, the network effects have indubitably set in for WhatsApp, which undergird its position of strength and limit its substitutability with other functionally similar apps/platforms. This, in turn, causes a strong lock-in effect for users, switching to another platform for whom gets difficult and meaningless until all or most of their social contacts also switch to the same other platform. Users wishing to switch would have to convince their contacts to switch and these contacts would have to persuade their other contacts to switch. Thus, while it may be technically feasible to switch, the pronounced network effects of WhatsApp significantly circumscribe the usefulness of the same. The network effects have been reflected when despite increase in downloads of the competing apps like Signal and Telegram, user base of WhatsApp apparently did not suffer any significant loss. As pointed out in Harshita Chawla case (supra), the second largest player in terms of market share in the relevant market of instant messaging and thus the next sizeable alternative available to users

is Facebook Messenger, which too is a Facebook Group company. Thus, the conduct of WhatsApp/ Facebook under consideration merits detailed scrutiny.

27. The Commission is of further opinion that users, as owners of their personalised data, are entitled to be informed about the extent, scope and precise purpose of sharing of such data by WhatsApp with other Facebook Companies. However, it appears from the Privacy Policy as well as Terms of Service (including the FAQs published by WhatsApp), that many of the information categories described therein are too broad, vague and unintelligible. For instance, information on how users "interact with others (including businesses)" is not clearly defined, what would constitute "service-related information", "mobile device information", "payments or business features", etc. are also undefined. It is also pertinent to note that at numerous places in the policy while illustrating the data to be collected, the list is indicative and not exhaustive due to usage of words like 'includes', 'such as', 'For example', etc., which suggests that the scope of sharing may extend beyond the information categories that have been expressly mentioned in the policy. Such opacity, vagueness, open-endedness and incomplete disclosures hide the actual data cost that a user incurs for availing WhatsApp services. It is also not clear from the policy whether the historical data of users would also be shared with Facebook Companies and whether data would be shared in respect of those WhatsApp users also who are not present on other apps of Facebook i.e., Facebook, Instagram, etc.

28. Further, users are not likely to expect their personal data to be shared with third parties ordinarily except for the limited purpose of providing or improving WhatsApp's service. However, it appears from the wordings of the policy that the data sharing scheme is also intended to, inter alia, 'customise', 'personalise' and 'market' the offerings of other Facebook Companies. Under competitive market condition, users would have sovereign rights and control over decisions related to sharing of their personalised data. However, this is not the case with WhatsApp users and moreover, there appears to be no justifiable reason as to why users

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should not have any control or say over such cross-product processing of their data by way of voluntary consent, and not as a precondition for availing WhatsApp's services.

29. As pointed out previously, users earlier had such control over sharing of their personal data with Facebook, in terms of an 'opt-out' provision available for 30 days in the previous policy updates. However, the same has not been made available to users this time. Thus, users are required to accept the unilaterally dictated 'take-it-or-leave-it' terms by a dominant messaging platform in their entirety, including the data sharing provisions therein, if they wish to avail their service. Such "consent" cannot signify voluntary agreement to all the specific processing or use of personalised data, as provided in the present policy. Users have not been provided with appropriate granular choice, neither upfront nor in the fine prints, to object to or opt-out of specific data sharing terms, which prima facie appear to be unfair and unreasonable for the WhatsApp users.

30. On a careful and thoughtful consideration of the matter, the conduct of WhatsApp in sharing of users' personalised data with other Facebook Companies, in a manner that is neither fully transparent nor based on voluntary and specific user consent, appears prima facie unfair to users. The purpose of such sharing appears to be beyond users' reasonable and legitimate expectations regarding quality, security and other relevant aspects of the service for which they register on WhatsApp. One of the stated purposes of data sharing viz. targeted ad offerings on other Facebook products rather indicates the intended use being that of building user profiles through cross-linking of data collected across services. Such data concentration may itself raise competition concerns where it is perceived as a competitive advantage. The impugned conduct of data-sharing by WhatsApp with Facebook apparently amounts to degradation of non-price parameters of competition viz. quality which result in objective detriment to consumers, without any acceptable justification. Such conduct prima facie amounts to imposition of unfair terms and conditions upon the users of WhatsApp messaging app, in violation of the provisions of Section 4(2)(a)(i) of the Act.

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31. Given the pronounced network effects it enjoys, and the absence of any credible competitor in the instant messaging market in India, WhatsApp appears to be in a position to compromise quality in terms of protection of individualised data and can deem it unnecessary to even retain the user-friendly alternatives such as 'opt-out' choices, without the fear of erosion of its user base. Moreover, the users who do not wish to continue with WhatsApp may have to lose their historical data as porting such data from WhatsApp to other competing apps is not only a cumbersome and time consuming process but, as already explained, network effects make it difficult for the users to switch apps. This would enhance and accentuate switching costs for the users who may want to shift to alternatives due to the policy changes.

32. Today's consumers value non-price parameters of services viz. quality, customer service, innovation, etc. as equally if not more important as price. The competitors in the market also compete on the basis of such non-price parameters. Reduction in consumer data protection and loss of control over their personalised data by the users can be taken as reduction in quality under the antitrust law. Lower data protection by a dominant firm can lead to not only exploitation of consumers but can also have exclusionary effects as WhatsApp/Facebook would be able to further entrench/reinforce their position and leverage themselves in neighbouring or even in unrelated markets such as display advertising market, resulting in insurmountable entry barriers for new entrants.

33. Data and data analytics have immense relevance for competitive performance of digital enterprises. Cross-linking and integration of user data can further strengthen data advantage besides safeguarding and reinforcing market power of dominant firms. For Facebook, the processing of data collected from WhatsApp can be a means to supplement the consumer profiling that it does through direct data collection on its platform, by allowing it to track users and their communication behaviour across a vast number of locations and devices outside Facebook platform. Therefore, the impugned data sharing provision may

have exclusionary effects also in the display advertising market which has the potential to undermine the competitive process and creates further barriers to market entry besides leveraging, in violation of the provisions of Section 4(2)(c) and (e) of the Act. As per the 2021 update to the privacy policy, a business may give third-party service provider such as Facebook access to its communications to send, store, read, manage, or otherwise process them for the business. It may be possible that Facebook will condition provision of such services to businesses with a requirement for using the data collected by them. The DG may also investigate these aspects during its investigation."

20. A reading of the above would show that the respondent no. 1 has *prima facie* concluded that WhatsApp is dominant in the relevant market for Over-the-Top (OTT) messaging apps through smartphones in India; due to lack of/restricted interoperability between platforms, the users may find it difficult to switchover to other applications except at a significant loss; there is opacity, vagueness, open-endedness and incomplete disclosures in the 2021 Update on vital information categories; concentration of data in WhatsApp and Facebook itself may raise competition concerns; data-sharing amounts to degradation of non-price parameters of competition.

21. It cannot, therefore, be said that the issues raised by the respondent no. 1 are beyond its jurisdiction under the Act or that there is a total lack of jurisdiction in the respondent no.1. In fact, this has not even been pleaded by the petitioner(s) before this Court.

22. The question, therefore, would be as to whether the respondent no.1 should, in deference to the petitions pending before the Supreme

Court and before this Court, not have taken *suo moto* cognizance and directed an investigation to be made by the Director General.

23. Though some of the issues may substantively be in issue before the Supreme Court and this Court in the above-referred petitions, in my opinion, there cannot be an inviolable rule, nor is one pleaded by the petitioner(s), that merely because an issue may be pending before the Supreme Court or before the High Court, the Commission would get divested of the jurisdiction that it otherwise possesses under the Act.

24. The reliance of the petitioner on the judgment of ***Bharti Airtel Ltd.*** (supra) in this regard is ill-founded. In the said case, the Supreme Court was considering the scope and ambit of two specialized regulators, that is the respondent no.1 herein and the Telecom Regulatory Authority of India (TRAI), to deal with a complaint regarding denial of Points of Interconnection to one of the telecom operators. The Supreme Court explained the jurisdiction to the two Regulators as under:-

> ***"85***. *It is for the aforesaid reason that CCI is entrusted with duties, powers and functions to deal with three kinds of anti-competitive practices mentioned above. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by the other participants, in India. For the purpose of conducting such an inquiry, CCI is empowered to call any person for rendering assistance and/or produce the records/material for arriving at even the prima facie opinion. The regulations also empower CCI to hold conferences with the persons/parties concerned, including their advocates/authorised persons.*
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99. *TRAI is, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It is assigned the duty to achieve the universal service which should be of world standard quality on the one hand and also to ensure that it is provided to the customers at a reasonable price, on the other hand. In the process, purpose is to make arrangements for protection and promotion of consumer interest and ensure fair competition. It is because of this reason that the powers and functions which are assigned to TRAI are highlighted in the Statement of Objects and Reasons. Specific functions which are assigned to TRAI, amongst other, including ensuring technical compatibility and effective inter-relationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers."*

25. The Supreme Court further held as under:-

*"**103**. We are of the opinion that as TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by TRAI in the first instance. These are jurisdictional aspects. Unless TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated 6-9-2016 that the matter related to interconnectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show cause notice dated 27-9-2016; and post issuance of show cause notice and directions, TRAI issued recommendations dated 21-10-2016 on the issue of interconnection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive*

market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licences granted to them. The TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIs. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned.

***104**. We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by TRAI which would bring on record findings on the aforesaid aspects, CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of the TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 72 and 102 above are determined by TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage CCI can go into the question as to whether violation of the provisions of the TRAI Act amounts to "abuse of dominance" or "anti-competitive agreements". That also follows from the reading of Sections 21 and 21-A of the Competition Act, as argued by the respondents.*

***105**. The issue can be examined from another angle as well. If CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in para 102 above.*

Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and CCI on the other, arrive at conflicting views. Such a situation needs to be avoided. This analysis also leads to the same conclusion, namely, in the first instance it is TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out of the telecom licences granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various regulations and directions issued by TRAI itself."

26. The Supreme Court, however, rejected the argument that TRAI would have exclusive jurisdiction to deal with the matters involving anti-competitive practices to the exclusion of the respondent no.1, observing as under:-

*"**108**. Such a submission, on a cursory glance, may appear to be attractive. However, the matter cannot be examined by looking into the provisions of the TRAI Act alone. Comparison of the regimes and purpose behind the two Acts becomes essential to find an answer to this issue. We have discussed the scope and ambit of the TRAI Act in the given context as well as the functions of TRAI. No doubt, we have accepted that insofar as the telecom sector is concerned, the issues which arise and are to be examined in the context of the TRAI Act and related regime need to be examined by TRAI. At the same time, it is also imperative that specific purpose behind the Competition Act is kept in mind. This has been taken note of and discussed in the earlier part of the judgment. As pointed out above, the Competition Act frowns at the anti-competitive agreements. It deals with three kinds of practices which are treated as anti-competitive and are prohibited. To recapitulate, these are:*

(a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

(b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

(c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

***109**. CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to CCI is distinct from the function of TRAI under the TRAI Act. The learned counsel for the appellants are right in their submission that CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by CCI. In Haridas Exports, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act.*

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112. *Obviously, all the aforesaid functions not only come within the domain of CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. lf such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the standpoint of the Competition Act is concerned, CCI is the experienced body in conducting competition analysis. Further, CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to CCI cannot be completely wished away and the "comity" between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. CCI) is to be maintained.*

113. *The conclusion of the aforesaid discussion is to give primacy to the respective objections (sic objectives) of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.*

114. *We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that*

insofar as the telecom sector is concerned, jurisdiction of CCI under the Competition Act is totally ousted. In a nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to "regulatory capture" and, therefore, CCI is competent to exercise its jurisdiction from the standpoint of the Competition Act. However, having taken note of the skilful exercise which TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out."

27. A reading of the above judgment would clearly show that, in spite of having come to the conclusion that TRAI is the expert regulator constituted for the purposes of ensuring an orderly and healthy growth of telecommunication infrastructure services, the Supreme Court held that TRAI would not be the sole repository of the jurisdiction to deal even with the Competition Act and violations thereunder. However, the Supreme Court found that the jurisdictional facts and obligations under the TRAI Act, 1997 and the Regulations framed thereunder were first to be determined by the TRAI and therefore, held that the respondent no. 1 had to await the outcome of the proceedings before TRAI before

proceeding with the investigation ordered by it under Section 26(1) of the Act.

28. In the present case, the issue as to whether the 2016 Update/2021 Update announced by WhatsApp in any manner infringes upon the Right of Privacy of the users guaranteed under Article 21 of the Constitution of India is pending adjudication before the Supreme Court and this Court. The question regarding the 2016 Update/2021 Update not giving an option to opt-out is also an issue before the Supreme Court and this Court. However, the same cannot necessarily mean that during the pendency of those petitions, the respondent no.1 is completely denuded of the jurisdiction vested in it under the Competition Act, 2002 or that it must necessarily await the outcome of such proceedings. Therefore, it is not a question of lack of jurisdiction of the respondent no. 1, but rather one of prudence and discretion.

29. It must be remembered that any finding by the respondent no. 1 on any of the issues would always be subject to the findings of the Supreme Court or of this Court in the above-mentioned petitions and would be binding on the respondent no. 1. Such is the case in every proceeding before the respondent no. 1. Nevertheless, while such issues are being determined by the Supreme Court or by the High Court, it cannot be stated that the respondent no.1 has to necessarily await the outcome of such proceedings before acting further under its own jurisdiction. The respondent no.1 has to proceed within its own jurisdiction, applying the law as it stands presently. In this regard, I may only note the submission of the learned ASG appearing for the respondent no. 1 that the scope of

inquiry before the respondent no. 1 is not confined only to the issues raised before the Supreme Court or before this Court, but is much vaster in nature.

30. In ***State of Maharashtra and Anr. vs. Sarva Shramik Sangh, Sangli and Ors.;*** (2013) 16 SCC 16, the Supreme Court in relation to the Industrial Disputes Act, 1947, has observed as under:-

> *"27. It is, however, contended on behalf of the appellant that the said undertaking was being run by the Irrigation Department of the first appellant, and the activities of the Irrigation Department could not be considered to be an "industry" within the definition of the concept under Section 2(j) of the ID Act. As noted earlier, the reconsideration of the wide interpretation of the concept of "industry" in Bangalore Water Supply and Sewerage Board (supra) is pending before a larger Bench of this Court. However, as of now we will have to follow the interpretation of law presently holding the field as per the approach taken by this Court in State of Orissa v. Dandasi Sahu (supra), referred to above. The determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger Bench is received."*
>
> *(Emphasis supplied)*

31. Similarly, in ***P. Sudhakar Rao & Ors. vs. U. Govinda Rao & Ors.,*** (2013) 8 SCC 693, the Supreme Court observed that the pendency of a similar matter before a larger Bench did not prevent the Supreme Court from dealing with the issue on merit.

32. The Division Bench of this Court in ***Union of India & Anr. vs. V.K. Vashisht;*** (judgment dated 19.12.2012 in WP (C) No. 5036/2012)

has also observed on the question of effect of a reference to the larger Bench as under:-

> *"14. With regard to the contention that a similar matter is pending before a Larger Bench of the Supreme Court, it would be suffice to state that reference to Larger Bench does not lead to an inescapable conclusion that such matters be kept in abeyance. In a recent case reported as* ***Ashok Sadarangani and Anr. vs. Union of India and Ors.****, AIR 2012 SC 1563, the Supreme Court has observed:*
>
> > *"19. As was indicated in Harbhajan Singh's case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field."*

33. Though the above-mentioned judgments are in relation to issues pending before the larger bench of the Supreme Court, in my opinion, they show that even during such pendency, the other courts may and should continue to decide the cases and applying the law as it then prevails. This is so, as mere pendency of a reference before the larger bench does not denude the other courts of their jurisdiction to decide on the *lis* before them. Similarly, merely because of the pendency of the above proceedings before the Supreme Court and before this Court, the respondent no. 1 cannot be said to be bound to necessarily hold its hands and not exercise the jurisdiction otherwise vested in it under the statute.

Maybe, it would have been prudent for the respondent no.1 to have awaited the outcome of the above-referred petitions before the Supreme Court and before this Court, however, merely for its decision not to wait, the Impugned Order cannot be said to be without jurisdiction or so perverse so as to warrant to be quashed by this Court in exercise of its extra-ordinary jurisdiction.

34. I may also note that the challenge to the WhatsApp 2021 Update has been raised before the Supreme Court only in form of applications being filed by the petitioner and intervener therein. It is not stated by the petitioner(s) herein if the Supreme Court has taken cognizance of these applications or passed any order thereon. As far as the petitions before this Court are concerned, the same are also at a preliminary stage. The petitioner(s) instead of filing any application in these petitions (before the Supreme Court or before this Court) seeking appropriate clarification/relief, have filed an independent challenge to the Impugned Order. The same, in my opinion, is not sustainable.

35. As far as the 2016 Update having been upheld by respondent no. 1 in ***Vinod Kumar Gupta*** (supra) or by this Court in ***Karmanya Singh Sareen*** (supra), it need only be noted that presently there is nothing on record to presume that the respondent no. 1 shall act contrary to the same. In any case, these orders are also pending challenge before the learned NCLAT and before the Supreme Court respectively.

36. As far as the submission of Facebook on its impleadment in the investigation is concerned, the same is only stated to be rejected. A reading of the Impugned Order passed by the respondent no.1 itself

shows that Facebook shall be an integral part of such investigation and the allegations in relation to sharing of data by Whatsapp with Facebook would necessarily require the presence of Facebook in such an investigation.

37. In view of the above, I find no merit in these present petitions. The same are dismissed. The parties shall bear their own costs.

NAVIN CHAWLA, J

APRIL 22, 2021
RN/A.

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Government of India
Ministry of Electronics and Information Technology (MeitY)
Electronics Niketan, 6, CGO Complex,
New Delhi – 110003
Website: www.meity.gov.in

No. 2(9)2018-CLeS 18th May,2021

To,

Chief Executive Officer
WhatsApp Inc.

(through email)

Subject: **Recent changes to the WhatsApp Privacy Policy (2021)**

Dear Sir

1. This is with reference to the proposed amendment in the WhatsApp Privacy Policy (2021) and recent FAQ by WhatsApp conveying deferral of the WhatsApp new privacy policy beyond 15th May, 2021. MeitY has been keeping a close watch based on the responses provided by you vide your communication dated January 25, 2021, subsequent developments in the courts including at High Court of Delhi and Supreme Court of India where this policy (and the earlier policy of 2016) have been challenged, the counter affidavit submitted by WhatsApp and the recent FAQ published by WhatsApp, and also the international developments. MeitY has filed affidavit in the Delhi High Court, seeking withdrawal of the policy in view of its non-compliance with provisions under the IT Act and the Rules framed thereunder and the privacy judgement by the Hon'ble Supreme Court, wherein Privacy has been declared as a fundamental right in India.

2. The deferral of the privacy policy beyond 15th May 2021 does not absolve WhatsApp from respecting the values of informational privacy, data security and user choice for Indian users. The changes to the Privacy Policy and the manner of introducing these changes including in FAQ undermines these sacrosanct values and harms the rights and interests of Indian citizens. As you are doubtlessly aware, many Indian citizens depend on WhatsApp to communicate in everyday life. It is not just problematic, but also irresponsible, for WhatsApp to leverage this position to impose unfair terms and conditions on Indian users,

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particularly those that discriminate against Indian users vis-à-vis users in Europe.

3. It is unclear what the legal implications of the decision to defer the changes in your privacy policy mean for your users in India, the terms on which their data will be processed by you while the deferral is in effect, and whether they would be required to provide consent for the Privacy Policy again, if you were to reintroduce these changes. We reiterate that you were called upon to reconsider your approach and withdraw the proposed changes in your privacy policy in their entirety.

4. In your letter dated January 25 2021, you stated that the recent update does not expand WhatsApp's ability to share data with Facebook companies. According to you, the changes made to your privacy policy in 2016 already provided for, and enabled, this type of data sharing. However, users of WhatsApp were provided with an opt-out of sharing data with Facebook in 2016. The letter further states that the changes relate primarily to business messaging which is an optional feature. However, users are not given the ability to refuse consent specifically for the changes relating to business messaging. Effectively, refusing to consent to the terms for business messaging would cause a loss of access to WhatsApp for personal messaging.

5. As per Rule 5(7) of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rule*s, 2011 (SPDI Rules), a "Body corporate or any person on its behalf shall, prior to the collection of information including sensitive personal data or information, provide an option to the provider of the information to not to provide the data or information sought to be collected.The provider of information shall, at any time while availing the services or otherwise, also have an option to withdraw its consent given earlier to the body corporate. Such withdrawal of the consent shall be sent in writing to the body corporate. In the case of provider of information not providing or later on withdrawing his consent, the body corporate shall have the option not to provide goods or services for which the said information was sought.*"

6. It may be noted that the above referred SPDI Rules impose a host of obligations on a body corporate in relation to the security of the data collected by it in the course of its business. The impugned privacy policy violates the 2011 SPDI Rules as well **(Annexure)** which was submitted by MeitY in the High Court of Delhi in the case of W.P. (C) No. 1355/2021 - Dr. Seema Singh and 2 others Vs Union of India & Ors.

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7. In fulfilment of its sovereign responsibility to protect the rights and interests of Indian citizens, the Government of India will consider various options available to it under laws in India. In addition to provisions of the Information Technology Act, 2000 and the Rules made thereunder, WhatsApp is required to comply with the Competition Act, 2002 and other laws in force in India.

8. The Government of India reiterates that the unilateral changes to the WhatsApp Privacy Policy undermine the privacy, autonomy and freedom of choice of Indian citizens. Not only does Indian statutory law reflect this position currently, but upcoming laws like the Personal Data Protection Bill, currently pending in Parliament, reassert these fundamental building blocks of a free and fair digital India. In this context, the *"all-or-nothing" / limited functionality leading to complete withdrawal of service"* approach adopted by WhatsApp takes away meaningful choice from Indian users and undermines the spirit of the landmark judgment of the Supreme Court of India in *Puttaswamy*. It treats Indian citizens differently from their European counterparts.

9. It has also been noticed that regulatory authorities in countries such as Germany, Italy, Brazil and South Africa have raised their concerns towards the proposed WhatsApp's new privacy policy of 2021.

10. Accordingly, you are called upon to reconsider and withdraw the proposed changes in your privacy policy for India in its entirety. Please provide an explanation and your responses (with reference to the Annexure of this letter) within seven days of the issuance of this letter. If no satisfactory response is provided, all necessary steps in consonance with law will be taken.

Yours sincerely,

(Rakesh Maheshwari)
Group Co-ordinator, Cyber Law
e-mail: gccyberlaw@meity.gov.in
Ph: +91-11-24301468

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Annexure

Proposed WhatsApp policy (2021) that is in violation with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPDI Rules).*

Sl.No.	Provision in the IT Rules, 2011	Violation(s) in the impugned Privacy Policy
1.	Rule 4(1)(ii): "**4. *Body corporate to provide policy for privacy and disclosure of information.–*** (1) *The body corporate or any person who on behalf of body corporate collects, receives, possess, stores, deals or handle information of provider of information,* ***shall provide a privacy policy*** *for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are available for view by such providers of information who has provided such information under lawful contract.* ***Such policy*** *shall be published on website of body corporate or any person on its behalf and* ***shall provide for***— … (ii) ***type of personal or sensitive personal data or information collected under rule 3***;" (emphasis supplied)	**Fails to specify types of sensitive personal data being collected:** • The sub-rule requires the policy to specify the types of personal data or sensitive personal data that is being collected with reference to the types of data which have been categorised as 'sensitive personal data' under Rule 3. • In its Privacy Policy, WhatsApp has used extremely general terms to enlist the kinds of data collected. Crucially, there is no distinction between personal data or sensitive personal data which is being collected. • The impugned privacy policy thus fails to fulfil this obligation.
2.	Rule 5(3): ***"5. Collection of information.—*** *(3)While collecting information directly from the person concerned, the body corporate or*	**Fails to notify user details of collection of sensitive personal information:** • In this sub-rule "information" refers to sensitive personal information, as

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	any person on its behalf snail take such steps as are, in the circumstances, reasonable to ensure that the person concerned is having the knowledge of — *(a) the fact that the information is being collected;* *(b) the purpose for which the information is being collected;* *(c) the intended recipients of the information; and* *(d) the name and address of —* *(i) the agency that is collecting he information; and* *(ii) the agency that will retain the information."* (emphasis supplied)	mentioned in sub-rules (1) & (2) of Rule 5. • This sub-rule requires the body corporate to provide users with the enlisted details in (a) to (d). In the present case, none of these details have been provided. For instance the policy mentions the involvement of third-party service providers who may have access to the data. However, the names of these service providers and other associated details have not been provided. No addresses have been provided either. • This is also the case for other Facebook companies, who are allowed to receive and share information about the user from and with WhatsApp (as per the privacy policy). • The impugned privacy policy thus fails to fulfil these obligations.
3.	Rule 5(6): "***5. Collection of information.—*** ... *(6) Body corporate or any person on its behalf permit the providers of information, as and when requested by them,* ***to review the information they had provided*** *and ensure that any personal information or sensitive personal data or information found to be inaccurate or deficient* ***shall be corrected or amended as feasible.****"*(emphasis supplied)	**<u>Fails to provide an option to review or amend information:</u>** • This sub-rule requires the body corporate to allow the user to review the information submitted by them, whenever the user so chooses. It also obligates the body corporate to correct any such information if it is found to be inaccurate. • The privacy policy is completely silent on correction/amendment of information. • The privacy policy appears to provide an option to "further manage, change, limit, or delete your information", but upon close perusal, it is apparent that this ability is limited to a user's profile name, picture, mobile number, and the "about" information. For the policy to be compliant with Rule 5(6), it must allow users to exercise this option for all kinds

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		of data collected by WhatsApp which are mentioned policy. • The impugned privacy policy thus fails to fulfil these obligations.
4.	Rule 5(7): "***5. Collection of information.—*** *(7) Body corporate or any person on its behalf shall, prior to the collection of information including sensitive personal data orinformation, provide an option to the provider of the information to not to provide the data or information sought to be collected.* ***The provider of information shall, at any time while availing the services or otherwise, also have an option to withdraw its consent given earlier to the body corporate.*** *Such withdrawal of the consent shall be sent in writing to the body corporate. In the case of provider of information not providing or later on withdrawing his consent, the body corporate shall have the option not to provide goods or services for which the said information was sought*." (emphasis supplied)	**<u>Fails to provide an option to withdraw consent retrospectively:</u>** • This sub-rule requires the body corporate to provide the user with two kinds of options: • First, an option to the user to not provide the data. • Second, an option to the user to withdraw consent given earlier for collection of data. • If these options are exercised, the body corporate has the discretion to not provide the user with its services. • WhatsApp has complied with the first requirement, as the user may choose not to share their data by refusing to accept the privacy policy. WhatsApp can then exercise its discretion to deny service to any users who do not wish to share data. • However, there is a clear failure to comply with the second requirement. If a user wishes to withdraw consent given in the past, the sub-rule effectively requires the body corporate to delete the data that they have already collected, as this data is now deemed to have been collected without the consent of the user. But WhatsApp has only provided the user with "Deleting Your WhatsApp Account" option on the privacy policy. If a user exercises this option, the policy clearly mentions that "*your undelivered messages are deleted from our servers* ***as well as any of your other information we no longer need*** *to operate and provide our Services*." (emphasis supplied)

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		• This means that a substantial corpus of data may be retained, even after the user has deleted their account. • Thus, the impugned privacy policy fails to fulfil this obligation.
5.	Rule 6(4) "***6. Disclosure of information.—*** *(4) The third party receiving the sensitive personal data or information from body corporate or any person on its behalf under sub-rule (1) shall not disclose it further*."	**<u>Fails to guarantee further non-disclosure by third parties:</u>** • This sub-rule prohibits a third party from further disclosing any information regarding the user that it has obtained from the body corporate. Any privacy policy that provides the scope for such further disclosure is to be seen as non-compliant. • In the impugned privacy policy, WhatsApp has mentioned that third party services will be given information about the user whenever a third party service is used through WhatsApp. Notably, this information is being shared to the third party service by WhatsApp, and not the users. This means that such services are 'third parties' within the meaning of Rule 6(4), and no further disclosure is permitted. However, the privacy policy abdicates this obligation by explicitly stating: "*If you interact with a third-party service or another Facebook Company Product linked through our Services…information about you, like your IP address and the fact that you are a WhatsApp user, may be provided to such third party…[and]…their own terms and privacy policies will govern your use of those services and products*." • Further, in the impugned policy, WhatsApp has stated that data and information will be freely shared with and received from other Facebook companies. Since the contract of the user is only with WhatsApp, all other Facebook companies

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		are 'third parties' within the meaning of Rule 6(4), and any inter-sharing of data obtained from WhatsApp by these companies will amount to a violation of the restriction on further disclosure. • The impugned privacy policy, thus fails to fulfil this obligation.

*This table is the based on the affidavit filed on behalf of MeitY in Delhi High Court in **w.p.(c). No. 1355/2021 Dr. Seema Singh Vs. UoI where WhatsApp has been made respondent No. 2.**

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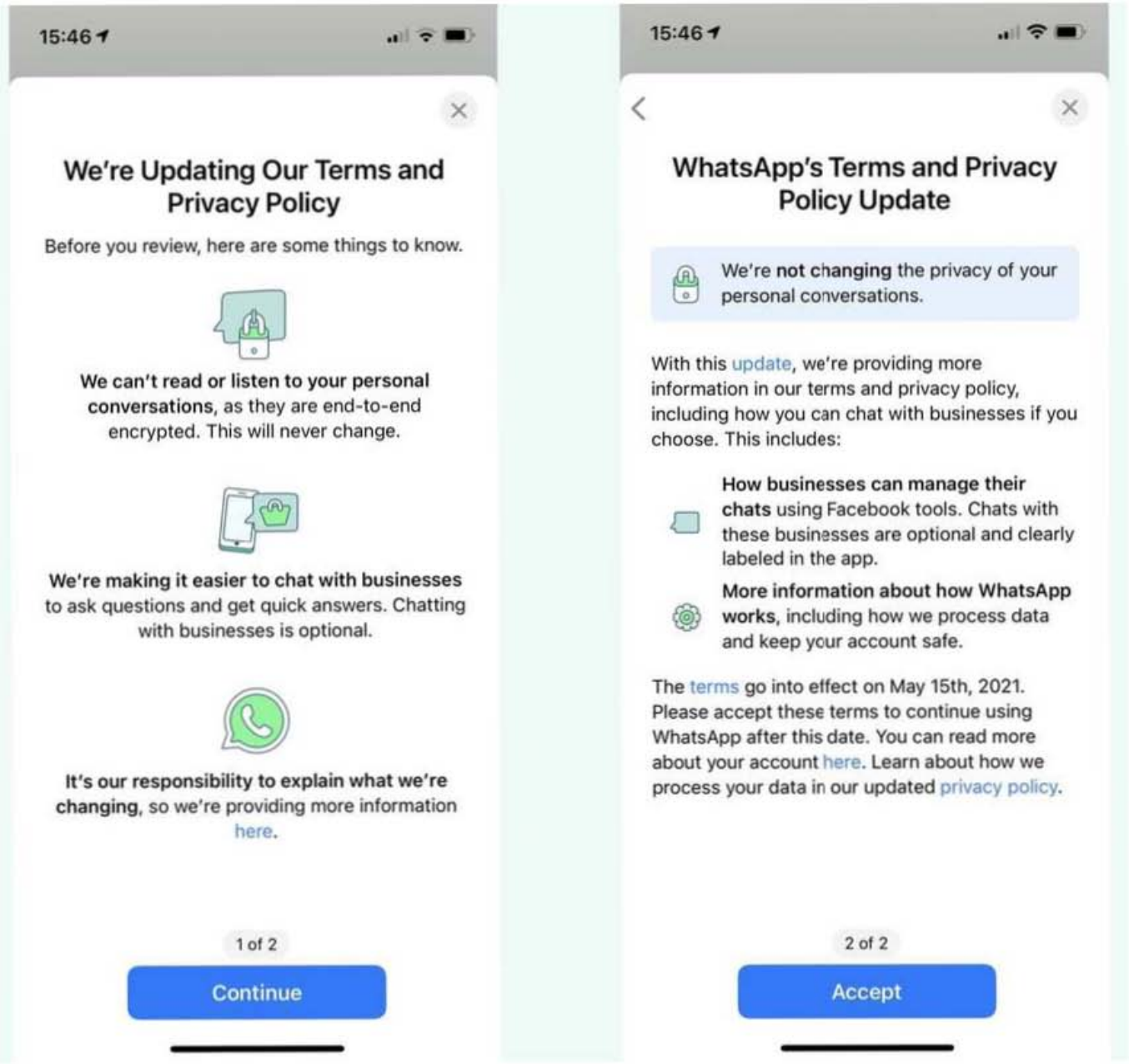
15:46
We're Updating Our Terms and Privacy Policy
Before you review, here are some things to know.
We can't read or listen to your personal conversations, as they are end-to-end encrypted. This will never change.
We're making it easier to chat with businesses to ask questions and get quick answers. Chatting with businesses is optional.
It's our responsibility to explain what we're changing, so we're providing more information here.
1 of 2
Continue
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WhatsApp's Terms and Privacy Policy Update
We're not changing the privacy of your personal conversations.
With this update, we're providing more information in our terms and privacy policy, including how you can chat with businesses if you choose. This includes:
How businesses can manage their chats using Facebook tools. Chats with these businesses are optional and clearly labeled in the app.
More information about how WhatsApp works, including how we process data and keep your account safe.
The terms go into effect on May 15th, 2021. Please accept these terms to continue using WhatsApp after this date. You can read more about your account here. Learn about how we process your data in our updated privacy policy.
2 of 2
Accept

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