



**COMPETITION COMMISSION OF INDIA**

**Case No. 99 of 2016**

**In re:**

**Shri Vinod Kumar Gupta, Chartered Accountant  
Fight for Transparency Society,  
291, Rajeev Gandhi Nagar,  
Kota – 324005, Rajasthan**

**Informant**

**And**

**WhatsApp Inc.  
650 Castro Street Suite 120-219,  
Mountain View, California, 94041, U .S. A**

**Opposite Party**

**CORAM**

**Mr. Devender Kumar Sikri  
Chairperson**

**Mr. S. L. Bunker  
Member**

**Mr. Sudhir Mital  
Member**

**Mr. Augustine Peter  
Member**

**Mr. U. C. Nahta  
Member**

**Mr. Justice G. P. Mittal  
Member**



### **Appearances:**

*For Informant: Shri Vinod Kumar Gupta, Informant in-person*

*For Opposite Party: Shri Amit Sibal, Sr. Advocate  
Shri P. Ram Kumar, Advocate  
Shri Avinash Amarnath, Advocate  
Shri Naval Satarawala Chopra, Advocate  
Shri Yaman Verma, Advocate  
Shri Tejas Karia, Advocate  
Ms. Deepali, Associate General Counsel*

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

1. The present information has been filed by Shri Vinod Kumar Gupta ('**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (the '**Act**') against WhatsApp Inc. ('**OP**'/ '**WhatsApp**') alleging contravention of the provisions of Section 4 of the Act.
2. The Informant is stated to be a Chartered Accountant and has filed the present information on behalf of Fight for Transparency Society. As per the information, OP is a provider of consumer communication services *via* a mobile app called 'WhatsApp' which is a proprietary, cross-platform, encrypted instant messaging services for smartphones. It uses internet as a medium to send text messages, documents, images, videos, user location and audio messages to other users of 'WhatsApp' using standard cellular mobile numbers.
3. It is stated that the OP was acquired by Facebook Inc. ('**Facebook**'), the largest social networking site, on 19<sup>th</sup> February, 2014 for approximately US\$19.3 billion. As per the Informant, the OP had introduced many changes to its



privacy policy on 25<sup>th</sup> August, 2016 whereby the users of 'WhatsApp' have been forced to share their account details and other information with 'Facebook' in order to continue availing the services of 'WhatsApp'.

4. The Informant has submitted that the relevant product market in the instant matter would be 'free messaging app available for various smartphones' and the relevant geographical market would be 'Global'. It is stated that the OP is the most popular messaging app in the world with clear market domination in 109 countries and it is having a market share of 55.6% in the world. It is also stated that in 95% of android smartphone devices in India, 'WhatsApp' has been installed, and with more than 70 million users, the OP holds a substantial market share in India.
5. It is stated that after one year of free trial, the OP started charging US\$0.99 per annum from its users as subscription fee. However, it is averred that since January, 2016, it has stopped charging any fee, which was its only source of revenue, from its users and is providing free services. As per the Informant, by removing subscription fees, the OP has enlarged its consumer base substantially from 450 million to over 1 billion and it is providing the services by sourcing funds from its parent company *i.e.* 'Facebook'. Thus, the Informant has alleged that by indulging in the practice of predatory pricing, the OP is abusing its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act.
6. Further, it is alleged that by mandating the users to agree with its terms of service and privacy policy as updated in August, 2016, the OP has been sharing the information/ data of its users with 'Facebook' which in turn is being used by 'Facebook' for targeted advertisements. It is alleged that the manner in which the so-called consent is taken by the OP from its users is highly deceptive. It is stated that almost the entire community of users of 'WhatsApp' in India are not equipped to even read, much less comprehend, the consequences of the terms and conditions on the basis of which 'WhatsApp' is



pretending to obtain the consent of the users. The Informant has alleged that the new privacy policy of the OP is in contravention of the provisions of Section 4 of the Act. It is also alleged that the new privacy policy of the OP enables it to copy/ extract/ download the mobile's database and information including vital information of the users such as contacts, *etc.* which is then used for commercial benefits of the OP in violation of the provisions of Information Technology Act, 2000 (IT Act, 2000).

7. Based on the above submissions, the Informant has *inter alia* prayed the Commission to enquire into the above said abusive conduct of the OP and pass order(s) accordingly, prohibit the OP from sharing users' data with 'Facebook' and direct the OP not to discontinue its services to those users who have not agreed to 'opt in' the change in its privacy policy.
8. Besides hearing the learned counsel appearing on behalf of the Informant and the OP on 14.03.2017, the Commission has perused the information and supplementary information filed by the Informant, submissions of the OP and other materials available on record.
9. It is observed that the Informant is primarily aggrieved by the alleged abusive conduct of the OP in compelling the users, through change in its terms of service and privacy policy, to share their account details and other information with 'Facebook' and indulging in the practice of predatory pricing by not charging any subscription fee from its users in violation of the provisions of Section 4 of the Act. As per the Informant, through the aforesaid conduct, 'WhatsApp' and 'Facebook' have been able to enlarge their user base and recouping profits by using the data base of the users for the purpose of targeted advertisements.
10. In order to arrive at a decision in this matter, it is to be determined is whether the OP has infringed the provisions of Section 4 of the Act. However, determination of the said issue requires delineation of relevant market,



assessment of the position of dominance of the OP in the relevant market and examination of the alleged abusive conduct of the OP in terms of Section 4 of the Act in case it is found to be in a dominant position in the relevant market.

11. The Commission notes that as per Section 2(r) of the Act, ‘relevant market’ means the market which may be determined by the Commission with reference to the ‘relevant product market’ or the ‘relevant geographic market’ or with reference to both the markets. In regard to the relevant product market, the Commission notes that ‘WhatsApp’, an instant communication app for smartphones using standard cellular mobile numbers, is a platform for communication through texting, group chats and voice and video calls. It is noted that instant communication apps cannot be compared with the traditional electronic communication services such as text messaging, voice calls *etc.* as provided by various telecommunication operators. It is so because unlike traditional modes of communication, instant messaging using communication apps are internet based and provide additional functionalities to the users. For example, users of communication apps can see when their contacts are online, when they are typing or when they last accessed the application. Further, instant communication apps can be used through smartphones only whereas traditional electronic communication services can be used through any mobile phone. There are also differences in the pricing conditions in both the abovesaid modes of communication. ‘WhatsApp’ is a free to download communication application which does not charge any fee from its users for providing the services and just uses internet connection on the device to send instant messages, connect voice calls *etc.* Further, text messaging through traditional modes can be done between people who do not use the mobile service of the same service provider, whereas instant messaging services typically require you and your contacts to be on the same communication application platform. Thus, the Commission is of the view that the relevant product market in this case may be considered as *‘the market for instant messaging services using consumer communication apps through smartphones’*.



12. With regard to the relevant geographic market, the Commission observes that the functionality provided by consumer communication apps through smartphones is inherently cross-border. As consumers are free to install any app they want, the geographic scope for either demand or supply of consumer communication apps is not limited to any particular area where the consumers acquires connectivity to his/ her device. Moreover, the developers distribute similar products to all of their customers regardless of their geographic location. Further, functionality of consumer communication apps through smartphones does not differ depending on the region or country concerned, either in terms of price, functionalities, platforms or operating system. This is consistent with the fact that all consumers with access to internet are in principle free to download and install any app they want, irrespective of their geographic location anywhere in the world. However, competitive conditions, regulatory architecture and players may vary in different countries/ regions. Since in the present matter, the allegations of the Informant pertain to the alleged anti-competitive conduct of 'Whatsapp' within the geographic boundary of India and the conditions of competition in the market for instant messaging services using consumer communication apps through smartphones is homogeneous throughout India, the Commission is of the view that the geographic area of 'India' may be considered as the relevant geographic market in the instant case.

13. Considering the relevant product market and the relevant geographic market delineated above, the Commission is of the view that relevant market in this case may be considered as '*the market for instant messaging services using consumer communication apps through smartphones in India*'.

14. On the issue of dominance of the OP in the relevant market as defined *supra*, the Commission notes that in India a number of other players such as Apple with *iMessage*, BlackBerry with *BBM*, Samsung with *ChatON*, Google with *Google Hangouts* and Microsoft with *Skype* are providing consumer



communication apps and are also active in the provisions of smartphone hardware and operating systems. Besides, many other consumer communication apps providers such as *Hike*, *Viber*, *WeChat* and *Snapchat* are also active in market. As per the information available in the public domain, globally 'WhatsApp' is having a billion monthly active users and within India, it is having 160 million monthly active users. According to a study of '*Jana and mCent*', 97% of the smartphone users in India use a communication app daily and the most popular is 'WhatsApp', which is installed on 96% of devices and has more daily active users than any other communication app in India. As per the said report, 'WhatsApp' is installed in 2.3 times more devices than home-grown messaging app *Hike*. According to a study conducted by '*TNS/TNC Connected Life Study 2015*', 56% of the internet users in India use 'WhatsApp' and 51% use 'Facebook' every day. Further, amongst India's internet users, 'WhatsApp' tops the list of instant messaging apps. Further, citing a study conducted by Global Web Index, the Informant has submitted that 64% of mobile users in India use 'WhatsApp' which is the largest as compared to any other mobile messaging app usage. Based on the the above, the Commission is of the opinion that the OP is in a dominant position in the relevant market as defined under para 13 above.

15. With regard to the abusive conduct of the OP in the relevant market, it is noted that the Informant has alleged that the OP is abusing its dominant position in the relevant market by introducing privacy policy which compels its users to share their account details and other information with 'Facebook'. In this regard, the Commission observes that the data sharing terms of the privacy policy of the OP as updated on 25<sup>th</sup> August, 2016 relate to sharing of users' 'WhatsApp' account information with 'Facebook' to improve the online advertisement and products experiences available on user's 'Facebook' page. It is noted that the OP provides the option to its users to 'opt out' of sharing user account information with 'Facebook' within 30 days of agreeing to the updated terms of service and privacy policy. Moreover, the OP has submitted that 'Facebook family of companies' will use such information for the purpose



of improving infrastructure and delivery systems, understanding how their services are used, securing systems, and fighting spam, abuse or infringement activities. The Commission also finds force in the submission of the OP regarding its users safeguards that all types of ‘WhatsApp’ messages (including chats, group chats, images, videos, voice messages and files) and ‘WhatsApp’ calls are protected by end-to-end encryption so that third parties and ‘WhatsApp’ cannot read them and also the message can only be decrypted by the recipient. Further, as stated in the key updates summary of the OP, nothing a user shares on ‘WhatsApp’, including his/ her messages, photos, and account information, will be shared onto ‘Facebook’ or any other apps of ‘Facebook family of companies’ for any third party to see, and nothing a user posts on those apps will be shared by ‘WhatsApp’ for any third party to see.

16. The Informant has also alleged that the conduct of the OP is in breach of the IT Act, 2000 and the right to privacy. In this regard, the Hon’ble High Court of Delhi in W.P. (C) 7663/2016 in the matter of *Karmanya Singh Sareen and Others Vs. Union of India and Others*; wherein the Petitioners, who were the users of WhatsApp, had made the prayer that sharing user data of subscribers of ‘WhatsApp’ with any entity including ‘Facebook’ should be prohibited and protection and safety of privacy of details/ data of every kind of user of ‘WhatsApp’ should be ensured; *vide* its order dated 23<sup>rd</sup> September, 2016 has observed that:

*“However, the contention of the petitioners is that the proposed change in the privacy policy of WhatsApp amounts to infringement of the Right to Privacy guaranteed under Article 21 of the Constitution of India. Even this cannot be a valid ground to grant the reliefs as prayed for since the legal position regarding the existence of the fundamental right to privacy is yet to be authoritatively decided [Vide: K. S. Puttaswamy (Retired) and Anr. v. Union of India & Ors., (2015) 8 SCC 735]. Having taken note of the inconsistency in the decisions on the issue as to whether there is any “right to privacy”*





*guaranteed under our Constitution, a three Judge Bench in K.S. Puttaswamy (supra) referred the matter to a larger Bench and the same is still pending.*

*18. Be that as it may, since the terms of service of “WhatsApp” are not traceable to any statute or statutory provisions, it appears to us that the issue sought to be espoused in the present petition is not amenable to the writ jurisdiction under Article 226 of the Constitution of India.*

*19. However, we have taken note of the fact that under the Privacy Policy of “WhatsApp”, the users are given an option to delete their “WhatsApp” account at any time, in which event, the information of the users would be deleted from the servers of “WhatsApp”. We are therefore, of the view that it is always open to the existing users of “WhatsApp” who do not want their information to be shared with “Facebook” to opt for deletion of their account.....”*

17. In the said order the Hon’ble High Court of Delhi had also ruled that if the users opt for completely deleting ‘WhatsApp’ account before September 25, 2016, the information/ data/ details of such users should be deleted completely from ‘WhatsApp’ servers and the same shall not be shared with ‘Facebook’ or any one of its group companies. However, against the aforesaid order of the Hon’ble High Court of Delhi, an appeal was preferred before the Hon’ble Supreme Court and the matter is still pending before the Hon’ble Supreme Court. In the above backdrop, the Commission is of the view that the allegations of breach of the IT Act, 2000 do not fall within the purview of examination under the provisions of the Act.

18. Further, the Informant has alleged that by not charging any subscription fee since January, 2016 from its users, the OP is indulging in predatory pricing. In this regard, the Commission observes that there are several other applications available in the relevant market which do not charge any fee from the users for



availing their services for instance, *Hike*, *Messenger* and *Viber* are also available for free. It appears to be the standard practice in the industry/ business that all consumer communication apps are not charging any fee from the users. The Commission observes that 'WhatsApp' was previously charging subscription fee from its users which was subsequently scrapped. This may be due to the presence of many other service providers who are offering the services for free of cost. Furthermore, from the submissions of the OP, the Commission notes that the revenue model of the OP is like other players in the industry/ business and it is still evaluating the various modes that can be used to earn revenues from its services by providing value to its customers.

19. The Commission also observes that there are no significant costs preventing the users to switch from one consumer communication apps to another. It may be due to the following reasons: (i) all consumer communication apps are offered for free of cost or at a very low price (mostly free), (ii) all consumer communication apps are easily downloadable on smartphones and can co-exist on the same handset (also called '*multi homing*') without taking much capacity along with other apps, (iii) once consumer communication apps are installed on a device, users can pass on from one app to its competitor apps in no-time, (iv) consumer communication apps are normally characterised by simple user interfaces so that costs of switching to a new app are minimal for consumers, and (v) information about new apps is easily accessible given the ever increasing number of reviews of consumer communication apps on apps store like google play store *etc.* Furthermore, the expansion of *Hike Messenger* to nearly 100 million user base within three years of launching their services into the aforesaid market reflects that in this market, there are no significant barriers to entry and consumers appear to be price sensitive. Based on the above, the Commission is of the view that even though 'WhatsApp' appears to be dominant in the relevant market, the allegations of predatory pricing have no substance and the OP has not contravened any of the provisions of Section 4 of the Act.



20. In the light of the above analysis, the Commission finds that no *prima facie* case of contravention of the provisions of Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.

21. The Secretary is directed to inform all concerned accordingly.

Sd/-

**(Devender Kumar Sikri)**  
**Chairperson**

Sd/-

**(S. L. Bunker)**  
**Member**

Sd/-

**(Sudhir Mital)**  
**Member**

Sd/-

**(Augustine Peter)**  
**Member**

Sd/-

**(U. C. Nahta)**  
**Member**

Sd/-

**(Justice G. P. Mittal)**  
**Member**

**New Delhi**

**Dated: 01.06.2017**