* **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

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":*
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> > *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.*
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> ***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

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."

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.