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

Date of decision: 25th AUGUST, 2022

IN THE MATTER OF:

\+ **LPA 163/2021 & CM APPLs. 15908/2021, 16893/2021, 18800/2021, 18910/2021, 46058/2021, 46059/2021, 46655/2021**

WHATSAPP LLC ..... Appellant

Through: Mr. Harish Salve, Sr. Advocate with Mr. Tejas Karia, Mr. Shashank Mishra, Ms Supritha Prodaturi and Mr. Shashank Mishra, Advocates.

versus

COMPETITION COMMISSION OF INDIA & ANR .... Respondents

Through: Mr. N. Venkataraman, ASG with Mr.V. Chandrashekara Bharathi, Ms.Amritha Chandramouli, Mr. S. Ram Narayan, Mr. Samar Bansal, Mr.Madhav Gupta, Mr. Vedant Kapur, Advocates for R-1.
Ms Binsy Susan, Ms. Anjali Kumar, Mr. Shyamal Anand and Mr. Vishesh Sharma, Advocates for Meta Platforms Inc.
Mr. Parag Tripathi, Sr. Advocate with Mr. Ajit Warrier, Mr. Yaman Verma, Mr. Swati Aggarwal and Ms. Mishika Bajpai, Advocates for Facebook India in CM APPL. 40334/2021.

\+ **LPA 164/2021 & CM APPLs. 15931/2021, 18798/2021, 18912/2021, 40334/2021, 40335/2021, 46656/2021**

FACEBOOK INC ..... Appellant

Through: Mr. Mukul Rohatgi, Sr. Advocate

with Ms. Sweta Shroff Chopra, Mr.Gauhar Mirza and Ms. Nitika Dwivedi, Advocates.

versus

COMPETITION COMMISSION OF INDIA & ANR .... Respondents

Through: Mr. Balbir Singh, ASG with Ms.Monica Benjamin, Ms. Anu Sura, Mr. Samar Bansal, Mr. Madhav Gupta, Mr. Vedant Kapur, Advocates for R-1

Mr. Varun Pathak, Mr. Mitali Daryani, Mr. Yash Karunakaran and Ms. Vani Kaushik, Advocates for R-2

Mr. Parag Tripathi, Sr. Advocate with Mr. Ajit Warrier, Mr. Yaman Verma and Ms. Mishika Bajpai, Advocates for Facebook India in CM APPL. 40334/2021.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The Appellant seeks to challenge the Judgement dated 22.04.2021, passed by the learned Single Judge in W.P.(C) 4378/2021 & W.P.(C) 4407/2021 by which the learned Single Judge rejected the Writ Petition filed by the Appellants. The Appellants herein, by way of the abovementioned Writ Petition, had sought to challenge the Order dated 24.03.2021 passed by the Respondent No.1 herein directing the Director-General, CCI, to initiate

investigation into the 2021 Terms of Service and Privacy Policy of the Appellant in LPA No.163/2021 on the ground that it violates the provisions of the Competition Act, 2002 (*hereinafter referred to as 'the Act'*).

2. The facts, in brief, leading to the instant Appeals are as under:-

i. Prior to 25.08.2016, WhatsApp (the Appellant in LPA 163/2021), a messaging platform, was governed by its Terms of Service and Privacy Policy of July 2012. In the year 2014, WhatsApp was acquired by Facebook (the Appellant in LPA 164/2021). Facebook Inc. is now known as "Meta Platforms", however, for ease of comprehension, this Court shall refer to the Appellant in LPA 164/2021 by its former nomenclature.

ii. On 25.08.2016, the Terms and Services and the Privacy Policy of WhatsApp (*hereinafter referred to as "2016 Policy"*) was updated, and WhatsApp users were informed of Facebook's acquisition of WhatsApp and how Facebook would use WhatsApp's information for its advertisement and products. A one-time opportunity was given to WhatsApp users to opt out of Facebook using their information that was shared over WhatsApp. However, users who joined WhatsApp after the 2016 Policy, were not offered this option.

iii. The 2016 Policy, was challenged by way of a writ petition in Karmanya Singh Sareen & Anr. v. Union of India &Ors., **W.P.(C) 7663/2016**, and the policy was upheld *vide* Judgement dated 23.09.2016. This Judgment has been challenged before the Hon'ble Supreme Court and adjudication on the same is pending.

iv. On 04.01.2021, WhatsApp announced an update to its Terms of Service and Privacy Policy (*hereinafter referred to as "2021 Policy"*). The 2021 Policy was also challenged before this Court as well as the Hon'ble Supreme Court, and the said matters are still pending.

v. It is stated that cognizance was taken by the Respondent No.1, Competition Commission of India *(hereinafter referred to as the "CCI")*, of the 2021 Policy, and accordingly *vide* Order dated 24.03.2021, the CCI initiated a *suo motu* case under Section 26(1) of the Act by directing the Director-General, CCI (DG) to conduct an investigation in order to examine the potential abuse of dominance exercised by both the Appellants under Section 4 of the Act.

vi. This Order dated 24.03.2021 under Section 26(1) of the Act was challenged before this Court in W.P.(C) 4378/2021 and W.P.(C) 4407/2021 by the Appellants herein. *Vide* Judgment dated 22.04.2021, the learned Single Judge held that the CCI-Respondent No.1 in both the Appeals would not be divested of its jurisdiction that it possesses under the Act merely because an issue may be pending before the Supreme Court or the High Court. Furthermore, it was observed that 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 Appellants herein. Accordingly, the learned Single Judge dismissed the petitions filed by the Appellants herein.

vii. Aggrieved by the Judgment dated 22.04.2021, passed by the learned Single Judge in W.P.(C) 4378/2021 and W.P.(C)

4407/2021, the Appellants have approached this Court by filing the instant Appeals.

3. Mr. Harish Salve, learned Senior Counsel appearing for Appellant in LPA 163/2021, submits that WhatsApp provides an end-to-end encryption service for sending and receiving of messages to safeguard the privacy of its users. He submits that this very issue has been considered by this Court in Karmanya Singh Sareen & Anr. v. Union of India & Ors., **W.P.(C) 7663/2016,** and this Court *vide* Judgment dated 23.09.2016 had upheld the 2016 Policy by holding that the users of WhatsApp, having voluntarily opted to avail services of the said application, were bound by the terms of service offered by WhatsApp, and it is always open to users of WhatsApp who do not want their information to be shared with Facebook to opt for deletion of their accounts. Mr. Salve further relies upon Vinod Kumar Gupta v. Whatsapp Inc., **(Case No. 99/2016)**, wherein the CCI, i.e. Respondent No.1 upheld the 2016 Policy with the finding that there had been no abuse of dominance by the Appellant. He also states that the Ministry of Electronics and Information Technology (MeiTY) is in the process of promulgating a Personal Data Protection Bill and the policies of the Appellant would be answerable to the provisions stipulated in the same, and therefore, the CCI should refrain from adjudicating on this issue before the Bill is promulgated.

4. The learned Senior Counsel further submits that the preliminary order makes it clear that the issues before the Supreme Court and the issues before Respondent No.1 are identical and overlapping. He states that as per the principle of judicial discipline, Respondent No.1 must exercise restraint and refrain from issuing the CCI order on the ground that the Supreme Court in Karmanya Singh Sareen v. Union of India and Ors., **[SLP (Civil) No. 804 of**

2017] and this Court in Chaitanya Rohilla v. Union of India &Ors., **[W.P.(C) No. 677 of 2021]** and Dr. Seema Singh v. Union of India &Ors., **[W.P.(C) No. 1355 of 2021]** are already seized of the issues pertaining to the same subject matter. In this regard, he also brings to notice of this Court paragraph 33 of the impugned Judgement wherein the learned Single Judge has observed that *"maybe, it would have been prudent for the respondent no.1 to have awaited the outcome of the above-referred petitions"*. He submits that the order of CCI is not merely administrative, as has been held by the learned Single Judge, as the powers of the DG are quite drastic. He relies upon the Order dated 24.03.2021 to state that Respondent No.1 itself in Paragraph 4 of the said Order has referred to a previous case on the same issue, i.e. Vinod Kumar Gupta v. Whatsapp Inc., **(Case No. 99/2016)** wherein the CCI has held that 2016 Policy does not institute anti-competition practices. He further submits that the 2021 Policy also falls within the purview of the information technology law framework and that a reading of the letter dated 18.05.2021 issued by the MeiTY also demonstrates that the issues are overlapping.

5. Mr. Harish Salve, learned Senior Counsel, relies on the judgment of the Supreme Court in Competition Commission of India v. Bharti Airtel, **(2019) 2 SCC 521,** to submit that in the said case, the Supreme Court had rejected the Respondent No.1's attempt to exercise jurisdiction over matters that were being considered by the sectoral regulator, i.e. TRAI, despite the matter involving competition related issues. He submits that the learned Single Judge has come to the conclusion that there is an overlap of jurisdiction in paragraph 33 of the impugned Judgment and, after arriving at the said conclusion, the learned Single Judge has observed that it would be prudent for the Commission to keep its hands off till the issues pending

before the Supreme Court are decided. He states that a perusal of the additional affidavit demonstrates that the questions that have been posed by MeiTY in its letter dated 18.05.2021 with regard to the 2021 Policy to the Appellant are the same as the questions that have been referred by Respondent No.1 to the Appellant. Therefore, the learned Senior Counsel argues that if the same issue is decided by different authorities, then it might lead to conflicting opinions being rendered.

6. Mr. Salve contends that the challenge is not to any inquiry under Section 26 of the Act, but the challenge is jurisdictional in nature. He states that currently the challenge to the policy itself is pending, and if the Appellant's right to continue a particular action is in itself in question, then the question of CCI inquiry does not arise. He further brings to the notice of this Court Section 57 of the Act and Regulation 35 of the Competition Commission of India (General) Regulations, 2009, and states that these provisions do not ensure that the confidentiality of the matter is maintained as the same is only dependent on the discretion of the CCI at the end of the day. Further, there is no guarantee regarding the maintenance of confidentiality as is evident by the fact that other entities such as the Internet Freedom Foundation (IFF) and one Prachi Kohli have filed intervention applications on being made aware of the issue. He states that, therefore, an intrusive and unnecessary investigation by the DG would have the potential of revealing the internal workings of the Appellant to the public, thereby hampering its business.

7. Mr. Mukul Rohatgi, learned Senior Counsel appearing for Appellant in LPA 164/2021, at the outset, states that he is adopting the arguments of Mr. Harish Salve, learned Senior Counsel appearing for the Appellant in LPA 163/2021, and submits that the Appellant in LPA 164/2021 has been

roped in the instant matter by virtue of a few references made in the CCI's Order dated 24.03.2021. He submits that there is no material that would lead to a *prima facie* opinion being formed that there exists abuse of dominance as per Section 4 of the Act by the Appellant, and that, therefore, it does not satisfy the requirements of the Act to establish a *prima facie* case of abuse of dominance.

8. Mr. Rohatgi submits that Section 26(1) of the Act prohibits Respondent No.1 from exercising jurisdiction over and initiating an investigation into the Appellant, unless it first establishes a *prima facie* case of abuse of dominance. He states that Respondent No.1 has failed to satisfy any of the requirements stipulated under Section 4 of the Act that could establish abuse of dominance. He states that the Appellant has a right to carry on his business in accordance with law and relies upon Barium Chemicals v. Company Law Board & Ors., **1966 Supp. SCR 311**. He states that the subject of investigation is WhatsApp, i.e. Appellant in LPA 163/2021, and that just because the Appellant in LPA 164/2021 is a common owner, it would not mean that they are required to share the burden. He further states that it is the 2016 Policy and the 2021 Policy which are under challenge, and that these updates are not the policies of the Appellant in LPA 164/2021. He, therefore, states that just because information can be shared by virtue of those policies, it is not a ground to investigate into the affairs of Facebook.

9. Mr. Rohatgi also relies upon Vinod Kumar Gupta v. Whatsapp Inc., **(Case No. 99/2016)**, wherein the CCI had found that no *prima facie* case of contravention of the provisions of Section 4 of the Act had been made out with regard to the 2016 Policy, and CCI did not have jurisdiction over violations arising out of the Information Technology Act, 2000, to submit

that the CCI is bound by its own order and that judicial discipline requires the CCI not to intrude into this arena when the highest authority of the land is seized of the matter. He also places on record a judgement of NCLAT dated 02.08.2022 wherein the NCLAT upheld the Order of the CCI in Vinod Kumar Gupta (supra), thereby cementing the findings of the CCI. The learned Senior Counsel submits that Section 26 of the Act stipulates the procedure of inquiry into complaints under Section 19 of the Act, which in turn is regarding inquiry into certain agreements and dominant position of enterprise. He further states that Section 4 of the Act stipulates what constitutes dominant position and there is nothing in the Order to indicate that the Appellant is abusing its dominant position.

10. The learned Senior Counsel submits that the interpretation of the learned Single Judge of Competition Commission of India v. Bharti Airtel (supra) is misplaced as in the said matter, the issue was between two regulators. In the instant case, it is the Constitution Bench of the Supreme Court which is seized of the matter pertaining to the 2021 Policy, and therefore, judicial propriety would dictate that CCI should stay its hands before initiating any investigation whatsoever before the Supreme Court has rendered its decision.

11. Mr. Parag Tripathi, learned Senior Counsel appearing for Facebook India Online Services Pvt. Ltd. *(hereinafter referred to as the "Applicant")* by way of an Impleadment Application, submits that there is no material which clubs the Applicant with the Appellants herein and that the Applicant has nothing to do with the activities of Facebook Inc. itself. He contends that the entity has been incorporated to carry out business in India and abroad, *inter alia*, online support services, software development, providing

technical support, and services, and that it is not operating the social media website, and thus, it has nothing to do with the instant matter.

12. The learned Senior Counsel relies on the Judgement of the Supreme Court in Competition Commission of India v. Steel Authority of India Limited, (**2010) 10 SCC 744**, to submit that there has to be an element of reasoning at the stage of forming a *prima facie* view by the CCI. He states that CCI does not need detailed reasoning, but must express in no uncertain terms that it is of the view that there exists a *prima facie* case, requiring issuance of a direction for investigation to the Director General. As per Mr. Tripathi, CCI's Order lacks the reasoning required to embark upon the journey of investigating into the anti-competitive concerns that have been raised.

13. Mr. Tripathi contends that unless there is some kind of finding that the Applicant has violated any of the conditions under Section 4 of the Act, he cannot be subjected to any scrutiny under the Act. He states that without there being a modicum of allegation under Section 4 of the Act, there is no jurisdiction of the CCI to conduct a roving inquiry. He further states that since the learned Single Judge had already upheld the Order passed by the CCI, no useful purpose would have been served by approaching the Single Judge. He, therefore, submits that the Applicant has moved the present application for impleadment in the instant LPAs.

14. Mr. Tripathi further places reliance on Union of India v. Special Tehsildar (ZA) &Ors., **(1996) 2 SCC 332,** Jatan Kumar Golcha v. Golcha Properties Pvt. Ltd., **(1970) 3 SCC 573,** Harvinder Singh v. Paramjit Singh, **(2013) 9 SCC 261,** and V.N. Krishna Murthy v. Ravikumar, **(2020) 9 SCC 501,** to argue that the impleadment application of the Facebook India Online Services Pvt. Ltd. should be allowed as the rights of the party are being

directly affected by the actions of the CCI and, thus, the Applicant falls within the four corners of the category of an "aggrieved person" whose standing shall be in jeopardy if the investigation is allowed to be continued and if a right of hearing is not provided. Relying on the aforesaid judgements, he states that it is always open to a person who is aggrieved by an Order to approach in appeal which arises out of those proceedings.

15. *Per contra*, Mr. N. Venkataraman, learned ASG appearing for Respondent No.1/CCI, submits that there is no overlap factually with any pending proceedings across other Courts. He states that the Order of the CCI indicates that a careful and thoughtful consideration of the matter was done before arriving at the conclusion that there were concerns regarding violation of the provisions of the Act. He states that the CCI is examining the 2021 Policy through the prism of the Competition Act, 2002, in a bid to discharge its statutory functions as a competition law regulator and is, therefore, not concerned with the possible violation of fundamental rights that is being delved into by the Supreme Court. Mr. Venkataraman, therefore, argues that the scope of jurisdiction of the CCI lies on a different plane than that of a Constitutional Court, and the fact that the latter is seized of the matter has no bearing on the investigation that is being conducted by the DG, CCI. Furthermore, attention has been drawn to Sections 60 and 62 of the Act to state that the Act shall have an overriding effect, and that the application of other laws would not be barred.

16. The learned ASG submits that the reliance of the Appellants on Paragraph 23 of the impugned Judgement is misplaced on the ground that the learned Single Judge had merely implied that though the underlying transactions were the same, however, plural examination was required. He states that the learned Single Judge has aptly noted that the reliance of the

Appellants on Competition Commission of India v. Bharti Airtel (supra) is erroneous to the extent that the said Judgement deals with a conflict between the scope of jurisdiction of a sectoral regulator, which is the TRAI, and a market regulator which is the CCI, and that the market regulator's jurisdiction is not ousted solely for the reason that the sectoral regulator is seized of the matter; it only entails for the sectoral regulator to conduct its investigation prior to the market regulator. The learned ASG further submits that the case needs to be read factually as the Supreme Court had therein found that it was primarily a telecom issue, not a competition issue.

17. Mr. Venkataraman relies upon S. Sukumar v. Secretary, Institute of Chartered Accountants of India and Ors., **(2018) 14 SCC 360**, to state that in the said matter, the Supreme Court had held that a case had been made out for examination not only by the Enforcement Directorate as well as the Institute of Chartered Accountants of India (ICAI), but also by the Central Government with regard to issues of violation of RBI/FDI policies and The Chartered Accountants Act, 1949. He states that, similarly, in the instant case, as different aspects of the 2021 Policy were to be considered and the CCI would not be denuded of its power to conduct the investigation solely on the basis that the Supreme Court was also looking into the aspect of violations of right to privacy.

18. Further reliance has been placed on Panther Fincap and Management Services Ltd. v Union of India, **(2005 SCC OnLine Bom 386),** and the following paragraph of the Bombay High Court judgement has been cited:

> *"**33**. I have considered these rival submissions of the parties and I am of the opinion that the jurisdiction and the power of the various investigating authorities derived from the jurisdiction vested in them by the*

various legislations or statutes, the authority which is doing the inquiry and or conducting the investigation is required to carry out investigation keeping in mind the legal provisions and legal limitations which are stipulated under the respective statute. Undoubtedly it can be that there may be an overlapping investigation but in my opinion such an eventuality cannot prevent any investigating authority from carrying out investigation in respect of their jurisdiction conferred on them under the statute. I am also of the further opinion that the investigation in respect of the corporate fraud can be initiated and considered by the central government under section 237(b)(i) of the companies Act. I have not been able to come across any provisions under the SEBI act in which any corporate fraud can be investigated by the SEBI. Undoubtedly it can be investigated under normal criminal law by the CBI. I am further of the opinion that merely because the material on the basis of which investigation is being undertaken is identical to the material which is subject matter of investigation by the other authority it can not be stated that both the authorities can not simultaneously investigate pursuant to power conferred on them under their respective statutes. I am of the opinion that every authority is entitled to investigate even may be in respect of the same material as well as from the angle and facet in which they have been asked to carry out investigation. It is possible that the SEBI may be investigating the same material on the ground of breach of the various provisions of the SEBI act and other security related legislations whereas the central government, department of company affairs can consider and/or investigate the fraud and/or breach of various provisions of law in the light and context of the provisions of the companies act may be in respect of the same material. However, I am of the opinion that the contentions advanced by the learned counsel for the appellant cannot be accepted particularly in view of the fact that every authority has been conferred various powers in their respective legislation. A similar issue

> *aroused before the English Court under the identical provisions of investigation under the Companies Law and the Court of Appeal in the case of Re London United Investments plc reported in 1992 BCLC 285 equivalent to 1971 All England Law Reports page 849 it is held as under:*
>
> > *"The power of the secretary of state to appoint inspectors to investigate the affaris of a company and to report is an important regulatory mechanism for ensuring probity in the management of companies' affairs. That of course is in the public interest. Since the Secretary of State's powers under s 432(2) are exercisable where there are circumstances suggesting fraud, it is likely that in many cases where inspectors are appointed an investigation by the police or the Serious Fraud Office could also be appropriate. But the code under the 1985 Act is a separate code even though it may overlap the field of criminal investigation.""*

19. The learned ASG relies upon Section 4(2) of the Act to submit that the focus of a competition law-based investigation is apparent from a reading of the said provision. It has further been submitted that the learned Single Judge has rightly observed that the CCI Order records that WhatsApp is a dominant entity in the relevant market for OTT messaging apps through smartphones in India [as has been held by CCI in Harshita Chawla v. WhatsApp Inc and Anr., **(Case No. 15 of 2020)]**, and that the 2021 Policy is a product that emanates out of the entrenched dominant position of WhatsApp in the said market. Furthermore, Paragraph 25 of the CCI Order has been referred to in order to argue that the CCI, after duly analysing how the "take it or leave it" nature of the 2021 Policy and Terms of Service of WhatsApp, and the information sharing stipulations therein, has held that the

same merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp. He further states that the existence of Regulation 35 of the Competition Commission of India (General) Regulations, 2009, ensures that whatever happens during the course of investigation is kept confidential.

20. Mr. Venkataraman refers to the letter dated 18.05.2021 issued by MeiTY to state that the Ministry had warned WhatsApp as to how the 2021 Policy was violative of not only the right to privacy enshrined in our Constitution of India, 1950, but further violated the legal framework under the Information Technology Act, 2000, the Competition Act, 2002, and other statutory provisions. He states that WhatsApp's response dated 22.05.2021 to the said letter reveals that the entity has not stopped the exercise of its policy. He further submits that Rule 5(7) of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 *(hereinafter referred to as the "SPDI Rules")* can at the most be said to overlap with Article 21, but cannot be said to impinge upon provisions related to anti-competitive practices, and that an investigation under Section 4(2) of the Act cannot be stopped merely because there is an overlap. Furthermore, by no stretch of imagination can it be said that by way of the said letter, the Ministry seeks to investigate into the 2021 Policy.

21. The learned ASG relies upon Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors., **2020 SCC OnLine Del 598,** to argue that the legislative intent of the Competition Act was to ensure that its provisions were implemented in addition to provisions of other statutes. Mr. Venkataraman concludes his submissions by relying upon Flipkart Internet Pvt. Ltd. v Competition Commission of India and Ors.,

MANU/KA/3124/2021, State of West Bengal and Ors. v. Swapan Kumar Guha and Ors., **(1982) 1 SCC 561,** Skoda Auto Volkswagen (India) Pvt. Ltd. v. State of Uttar Pradesh, **(2021) 5 SCC 795,** and Eastern Spinning Mills and Virendra Kumar Sharda and Anr. v. Rajiv Poddar and Ors., **1989 Supp (2) SCC 385,** to largely submit that once an offence is disclosed an investigation into the offence must necessarily follow in the interests of justice, and that Courts and other judicial processes should not interfere in the course of investigation which must proceed unhampered by Court orders.

22. Mr. Balbir Singh, learned ASG, supplements the submissions of Mr. N. Venkataraman, and argues that the long-term objective of such technology and devices is to consume every inch of human time, and to capitalise on it. He states that in pursuance of this, exclusionary tactics are adopted by such entities which are backed by the dominant position that these entities occupy. He submits that there is a design and object behind these tech companies, and that the Competition Act, 2002, was brought in to ensure that these companies did not use their position to institute anti-competitive practices to the detriment of their users. He further submits that the principle of *res judicata* would not apply in the case of Vinod Kumar Gupta (supra) for the reason that it was the 2016 Policy which was under assessment therein and that there had been a varied change in circumstances since the said Policy.

23. Mr. Singh contends that competition is not a conduct; it is a behaviour, and that Section 4 of the Act categorically uses the term "enterprise" to denote the concept of a group. He states that it would not be in the realm of law to investigate only WhatsApp and not Facebook, and that the language of Section 26 itself indicates that the issue is not about a party, but about the matter. He further states that by virtue of being a group

company as well as the holding company of WhatsApp, Facebook inhabits a position whereby they can virtually use the information being shared by WhatsApp and potentially misuse the same.

24. The learned ASG concludes his submissions by reiterating that the Competition Commission of India v. Bharti Airtel (supra) is not applicable in the instant case as the issue in that case was a Point of Interconnect which was in realm of the telecom sector, and that it had never been said that CCI had no jurisdiction at all. Furthermore, Mr. Singh submits that there is enough material to showcase that the entire group, including Facebook India Online Services Pvt. Ltd. which is seeking impleadment in the instant matter, belongs to the Facebook company. The learned ASG, in this regard, relies upon Cadila Healthcare Limited v. Competition Commission of India, **2018 SCC OnLine Del 11229,** and Competition Commission of India v. Grasim Industries Ltd., **2019 SCC OnLine Del 10017,** to submit that when Section 26(1) of the Act is in operation, at this stage, the investigation is quasi-inquisitorial, to the extent that the report given is inconclusive of the rights of the parties. However, he states that, stemming from Excel Crop Care Ltd. v. Competition Commission of India, **(2017) 8 SCC 47**, the DG has the right to investigate the subject matter, along with other allied and unenumerated issues, involving others (i.e. third parties). He additionally states that once you are a part of the Facebook company, you mechanically fall under the purview of Section 4 of the Act. Furthermore, it is judicially prudent for the Applicant to implead itself in appeal when the principle Order has not been challenged.

25. Heard Mr. Harish Salve, learned Senior Counsel appearing for Appellant in LPA 163/2021, Mr. Mukul Rohatgi, learned Senior Counsel appearing for Appellant in LPA 164/2021, Mr. N. Venkataraman and Mr.

Balbir Singh, learned ASGs for CCI-Respondent No.1 in both the appeals, and Mr.Parag Tripathi, learned Senior Advocate for the Applicant in CM APPL. 40334/2021, and perused the material on record.

26. At the outset, it becomes pertinent to delineate the objective of the Competition Act, 2002, and the role of the CCI. The objective of the Act is set out in the Preamble itself, i.e. to establish a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure the freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. Chapter II of the Competition Act prohibits certain agreements, abuse of dominant position, and regulation of combinations, with Section 4 specifically prohibiting the abuse of dominant position. Chapter IV of the Act deals with provisions which set out the duties, powers and functions of the CCI, with Section 18 stating that it shall be the duty of the Commission to eliminate practices relating to the principles set down in the Preamble itself [Refer to Competition Commission of India v. State of Mizoram and Ors., **2022 SCC OnLine SC 63**].

27. Therefore, as has been succinctly enumerated by the Supreme Court in Competition Commission of India v. Steel Authority of India (supra), the main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of a market responsive to consumer preferences. Satisfactory implementation of competition law would lead to a threefold advantageous system wherein there would be allocative efficiency, which ensures effective allocation of resources; productive efficiency, which ensures that costs of production are kept at a minimum; and dynamic efficiency, which promotes innovative

practices. One can only proceed ahead with a matter entailing an attack to the jurisdiction of the CCI by keeping these objectives of the Competition Act in mind.

28. The primary issue that has been submitted before this Court is with regard to the overlapping jurisdiction of the CCI and the Constitutional Courts, and whether CCI should abstain from exercising its jurisdiction to maintain comity between decisions of different authorities on the same issues. In this context, the Appellants have placed heavy reliance on Competition Commission of India v. Bharti Airtel (supra) to submit that therein the sectoral regulator, i.e. TRAI, had been given leeway by the Supreme Court to conduct its inquiry, over CCI.

29. The learned Single Judge has culled out the relevant portion of the said Judgement wherein the scope and ambit of the two specialised regulators have been considered to deal with a complaint regarding denial of Points of Interconnection to one of the telecom operators. This Court deems it fit to reproduce the relevant paragraphs of the said Judgement as follows:

> *"**100. In the instant case, dispute raised by RJIL specifically touches upon these aspects as the grievance raised is that the IDOs have not given POIs as per the licence conditions resulting into non-compliance and have failed to ensure inter se technical compatibility thereby. Not only RJIL has raised this dispute, it has even specifically approached TRAI for settlement of this dispute which has arisen between various service providers, namely, RJIL on the one hand and the IDOs on the other, wherein COAI is also roped in. TRAI is seized of this particular dispute**.*

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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.

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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 [Haridas Exports v. All India Float Glass Manufacturers' Assn., (2002) 6 SCC 600] , 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. If 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-à-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."* (emphasis supplied)

30. A reading of the aforesaid paragraphs of the Judgement indicates that the sole issue therein was a conflict between the jurisdiction of a sectoral regulator and the market regulator. The Supreme Court came to a finding that the matter pertained to the telecom sector, which was specifically regulated by the TRAI Act. However, it noted that the jurisdiction of TRAI would not oust that of CCI to deal with violations of Competition Act and violations thereunder. Moreover, Paragraph 100 of the Judgement states that

in the case therein, the dispute pertained to how Incumbent Dominant Operators (IDOs) had not given Points of Interconnect (POIs) as per the license conditions, and Reliance Jio Infocomm Ltd. (RJIL) had specifically approached TRAI for the settlement of this dispute. TRAI, being the authority that would mandate the adherence to licensing conditions, was, therefore, deemed fit to be seized of the matter before the charge of investigation could be given to the CCI.

31. It is the contention of the Appellants that since the underlying issues arising before the Apex Court and this Court, and the investigation that is sought to be conducted by the CCI are common, this can potentially lead to conflicting opinions. This contention of the Appellants is not acceptable. It is the case of the Appellants that while the Apex Court is looking into whether the 2021 Policy is violative of the right to privacy under Article 21 of the Constitution of India or not, the investigation by CCI is confined to whether the 2021 Policy is in furtherance of the dominant position occupied by WhatsApp and institutes anti-competitive practices. The sphere of operation of both are vastly different. Neither this Court nor the Supreme Court are analysing the 2021 Policy through the prism of competition law. The Order dated 24.03.2021 rendered by the CCI also notes the same:

> *"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."*

32. The observation of the learned Single Judge that certain issues that the CCI is seized of *"may substantially be in issue before the Supreme Court and this Court"* does not lead to a conclusion that the Supreme Court or this Court are adjudicating upon the same issue. Contrary to what has been submitted by the Appellants, this observation cannot be interpreted as a holding that the issues being considered by both the authorities are the same. Even if the issues are the same, the approach of the authorities is vastly dissimilar, and there exists no inviolable rule that the CCI would completely lack jurisdiction in the instant matter. Parallel inquiries by two different

authorities in their respective spheres of adjudication is not uncommon and a slight overlap between the inquiries does not mean that one must lead to the ouster of the other. Therefore, in the absence of any irreconcilable repugnancy between the jurisdiction of both the authorities, i.e. CCI and the Constitutional Courts, the CCI has the liberty to proceed ahead with its investigation under Section 26(1) of the Act.

33. The investigation conducted by the CCI will not be affected by the outcome of the proceedings pending before the Apex Court and this Court. In the event the Supreme Court upholds the 2021 Policy, then surely CCI can venture into the question as to whether the provisions of the Act have been violated or not. In the event that the 2021 Policy is set aside by the Supreme Court, the CCI will still possess the jurisdiction to investigate the violation of the Act, if any, during the pendency of the matter before the Supreme Court when the 2021 Policy was in operation. In either of the cases, it cannot be stated that the CCI does not have the authority look into this affair being the market regulator.

34. It further becomes necessary to examine the scope and ambit of Section 26(1) of the Act which has been done in Competition Commission of India v. Steel Authority of India (supra) and has been relied upon by the learned Single Judge. The relevant portion of the said Judgement is as follows:

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

35. A reading of the above Judgement indicates that the jurisdiction of the CCI under Section 26(1) does not contemplate an adjudicatory function, but is merely a function of an administrative nature. Accordingly, there is no right of notice or hearing contemplated under the provisions of Section 26(1) of the Act. It is in nature of preparatory measures in contrast to the decision-making process, and this nature is evident from the usage of the term "direction" that is issued to the Director General for investigation in that provision. In light of this, it becomes clear as day that the function that is performed by the CCI under Section 26(1) of the Act would not be affected by the adjudication by the Supreme Court or this Court while analysing the potential violation of fundamental rights instigated by the 2021 Policy.

36. Moreover, the contention of the Appellants that the CCI in Vinod Kumar Gupta (supra) has already assessed the 2016 Policy, and has come to

conclusion that the breach of the IT Act, 2000, does not fall within the purview of the CCI, is irrelevant on the ground that, as has been stated in the CCI Order as well, the CCI is only concerned with data accumulation that may result in exploitative and exclusionary competitive practices as well as the effect of data sharing on market capture and competitors' offerings. Furthermore, it is pertinent to note that the 2021 Policy is a substantially modified version of the 2016 Policy inasmuch as the 2016 Policy had an "opt-out" option, which is absent from the 2021 Policy that places its users in a "take-it-or-leave-it" situation. It is the "opt-out" option that primarily led to CCI rendering its conclusion that the 2016 Policy did not violate the Competition Act, 2002. However, in the face of changed circumstances, considering the dominant position occupied by WhatsApp, the investigation proposed to be conducted by CCI does not warrant interference, and *res judicata* would, thus, not be applicable in the instant case. In view of this, the fact that the Order of the CCI in Vinod Kumar Gupta (supra) has been upheld by the NCLAT *vide* Order dated 02.08.2022 is of no relevance and does not sway the opinion of this Court. Similarly, the emphasis placed by the Appellants on the letter dated 18.05.2021 is wholly irrelevant as the mere mentioning of the Competition Act does not denote that MeiTY is seized of the violations that may be incited by the 2021 Policy. The sphere of jurisdiction occupied by MeiTY is different from that of the CCI, and solely because the said letter alludes to possible violations of the Act does not oust the jurisdiction of the CCI. *Per contra,* the letter only strengthens the contention of Respondent No.1 that there does exist a *prima facie* violation of the provisions of Competition Act, 2002. It is further a matter of public knowledge that the Personal Data Protection Bill, as of date, has been withdrawn.

37. The second issue which has been agitated before this Court by both the Appellants is that the CCI has failed to discern a *prima facie* case that would entail a direction to the DG to investigate the alleged anti-competitive practices. Before delving into this, it would be prudent to reproduce relevant portions of Sections 4, 19 and 26 of the Act:

> *"4. [(1) No enterprise or group shall abuse its dominant position.]*
>
> *(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group].—-*
>
> *(a) directly or indirectly, imposes unfair or discriminatory—*
>
> *(i) condition in purchase or sale of goods or service; or*
>
> *(ii) price in purchase or sale (including predatory price) of goods or service.*
>
> *Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or*
>
> *(b) limits or restricts—*
>
> *(i) production of goods or provision of services or market therefor; or*
>
> *(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or*
>
> *(c) indulges in practice or practices resulting in denial of market access [in any manner]; or*

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors."

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19. (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) [receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority

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19. (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;
(I) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry

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26. (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to

> *cause an investigation to be made into the matter: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information."*

38. Whether or not the Appellants occupy a dominant position in the relevant geographical market and the relevant product market has been decided by the CCI in Harshita Chawla v. WhatsApp Inc and Anr. (supra). The relevant portion of the said Order which elaborates the finding that, given its popularity and wide usage, WhatsApp seems to be dominant, has been reproduced as under:

> *"84. Such data shows that WhatsApp messenger is the most widely used app for social messaging, followed by Facebook Messenger in the relevant market delineated by the Commission supra. Further, it is way ahead of other messaging apps like Snapchat, WeChat etc. showing its relative strength. Given that WhatsApp messenger and Facebook Messenger are owned by the same group, they do not seem to be constrained by each other, rather adding on to their combined strength as a group. Moreover, WhatsApp Messenger works on direct network effects where an increase in usage of a particular platform leads to a direct increase in the value for other users—and the value of a platform to a new user will depend on the number of existing users on that platform. Thus, given its popularity and wide usage, for one-to-one as well as group communications and its distinct and unique features, WhatsApp seems to be dominant.*
>
> *85. The Commission is cognizant that the data relied upon by the Informant cannot be said to be free from*

infirmities and is based on global usage or users. However, in the absence of concrete data/information available in the Indian context other than the subjective information on popularity of WhatsApp, the Commission is of the view that these trends and results can be used as a proxy. More so, these trends appear to be intuitively in sync with the information available in public domain, which though does not confirm market share/strength of WhatsApp in any quantitative terms, nevertheless point towards its dominance.

86. Further, with respect to the dependence of consumers on the enterprise and countervailing buyer power, WhatsApp undeniably has the advantage of reaping the benefits of network effect. Network effect in turn ensures that customers do not switch to other platforms easily unless there is a new competitor entering the market with an altogether disruptive technology. Moreover, lack of interoperability between platforms is another concern, as a result of which customers may be unwilling to incur switching costs, despite the same being primarily psychological.

87. As regards the barriers to entry, they may arise indirectly as a result of the networks effects enjoyed by the dominant player in the market, i.e. WhatsApp, in the present case. Since networks effects lead to increased switching costs, new players may be disincentivized from entering the market.

88. Thus, in view of the aforementioned factors, the Commission prima facie finds WhatsApp to be dominant in the first relevant market i.e. 'market for OTT messaging apps through smartphones in India'."

39. The dominance of the Appellant in LPA 163/2021 has also been deliberated upon by the Respondent No.1 and the following has been stated by the same in its Order dated 24.03.2021:

> *"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. FUliher, 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."*

40. The learned Single Judge, after a careful consideration of the CCI Order dated 24.03.2021, has also arrived at the same conclusion that WhatsApp assumes a dominant position in the relevant product market and the relevant geographical market, and has recorded its observations as under:

> *"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."*

Therefore, as can be discerned from the foregoing, WhatsApp occupies a dominant position in a market for OTT messaging apps through smartphones in India.

41. Having arrived at this conclusion, it becomes relevant for the CCI to have formed a *prima facie* case before issuing a direction to the Director General to cause an investigation to be made into the matter under Section 26(1). The term *"prima facie* case" has been discussed in various cases by the Supreme Court, such as Competition Commission of India v. Steel Authority of India (supra) wherein it was observed as under:

> *"37. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order*

has been specifically made appealable under Section 53-A of the Act.

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97.....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.

98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is

> *similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act."*

42. Therefore, while forming a *prima facie* case, the CCI, while not being required to record detailed reasons, must take into account all the material present, before expressing its mind, and this should be done without entering into any adjudicatory or determinative process. A *prima facie* case need not be a case proved to the hilt, but a case which can be said to be established if the evidence which is led in support of the same were to be believed [Refer to Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. B. Dasappa, **AIR 1960 SC 1352**].

43. The contention of the Appellants is that the CCI Order does not meet the jurisdictional threshold as no *prima facie* case has been established against the Appellants and the learned Single Judge has erred in upholding the Order dated 24.03.2021. However, a perusal of the CCI Order dated 24.03.2021 reveals that sufficient reasoning has been provided before the CCI arrived at the conclusion that a *prima facie* case of violation of Section 4 of the Act was made. The paragraphs of the said Order indicating the same are as under:

> *"25. Having considered the overarching terms and conditions of the new policy, the Commission is of prima facie opinion that the 'take-it-or-Ieave-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 ofWhatsApp 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 apps 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 informati0n 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 ofthose 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 oftheir

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. On of hte 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 ofWhatsApp 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 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 /clcie 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."

44. It is not in dispute that WhatsApp occupies a dominant position in the relevant product market and that there exists a strong lock-in effect which renders its users incapable of shifting to another platform despite dissatisfaction with the product – as is exemplified by how, despite an increase in the downloads of Telegram and Signal when the 2021 Policy was announced, the number of users of WhatsApp have remained unchanged. By and large, to ensure retention of its user base and to prevent any other disruptive technology from entering the market, data is utilised by tech companies to customise and personalise their own platforms so that its userbase remains hooked. When data concentration is seen through this prism, it does give meaning to the new adage that "data is the new oil", and, as noted in the CCI Order dated 24.03.2021, it raises competition concerns because it *prima facie* amounts to imposition of unfair terms and conditions upon its users, thereby violating Section 4(2)(a)(i) of the Act.

45. Furthermore, as Paragraph 33 of the CCI Order dated 24.03.2021 (which has been reproduced hereinabove) states, accumulation and processing of personal data from WhatsApp, in addition to its own direct data collection, can be done by Facebook for the purposes of consumer profiling that allows for targeted ads, *inter alia*, which in turn has the potential to undermine competitive processes and create further barriers to market entry in stark violation of Section 4(2)(c) and (e) of the Act. In view of these observations, it is evident that CCI has, after due consideration, arrived at its decision that a *prima facie* case of violation of provisions of the Competition Act, 2002, has been made out against the Appellants herein that would require an investigation to be initiated by the DG. The learned Single Judge has taken into consideration all these factors before observing that

concentration of data in the hands of WhatsApp may raise competition concerns, thereby resulting in the violation of Section 4 of the Act.

46. Additionally, the reliance of the Appellants on CCI's Order in Vinod Kumar Gupta (supra) is misplaced for the simple reason that 2016 Policy provided its users the 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. The 2021 Policy, however, places its users in a "take-it-or-leave-it" situation, virtually forcing its users into agreement by providing a mirage of choice, and then sharing their sensitive data with Facebook Companies envisaged in the policy. Therefore, it cannot be said that the CCI is bound by its own findings in Vinod Kumar Gupta (supra) when the issue at hand as well as the circumstances are different.

47. Apart from the aforesaid two issues, it is also the contention of the Appellant in LPA 164/2021 that it is a separate and distinct legal entity from WhatsApp, and therefore, it should not be subjected to an intensive and intrusive investigation by the DG in pursuance of the findings of the CCI under Section 26(1) of the Act. In this regard, the Court finds merit in the submission of the learned ASGs that one of the key issues with the 2021 Policy is its propensity to share the data of its users with Facebook Inc., the parent company of WhatsApp. Solely for the reason that the policies itself do not emanate out of Facebook Inc., the Appellant cannot hide behind the fact that it is the direct and immediate beneficiary of the data sharing mechanism envisaged by the policies. These circumstances necessitate the presence of the Appellant in LPA 164/2021 as a proper party in the investigation pertaining to the 2021 Policy and the alleged anti-competitive practices they trigger.

48. With regard to the submissions on behalf of Facebook India Online Services Pvt. Ltd., this Court does not find any merit on the aspect of impleading the said party on account of the fact that the decision of the DG to issue notice to the Applicant, designating it as an "Opposite Party", stems from the information it has secured from Internet Freedom Foundation in Case No. 30 of 2021 regarding its relevance in the investigation. The decision taken by the DG lies in the fact that a thorough investigation can only be conducted if the Applicant cooperates in the same.

49. Furthermore, it is not contemplated in law that a party should be impleaded at the stage of an appeal when it has not been a party to the matter at the stage when the decision from which the appeal arises has been given, and the remedy of the Applicant only lies by way of a writ against the Order by which it is aggrieved. The contention of Mr. Tripathi that the Applicant has chosen to implead itself in the appeal filed by Facebook cannot be accepted by this Court. The Applicant will have to first make out a *prima facie* case before the learned Single Judge that there is no allegation against it in the Order of the CCI. The case of the Applicant would involve independent application of mind by the learned Single Judge. The instant appeals are primarily on the issue as to whether the CCI ought to wait till final adjudication of the issues which are pending before the Apex Court. The Impleadment Application cannot be entertained in the instant appeals which have been filed by Facebook Inc. and WhatsApp. This Court, therefore, does not deem it fit to scuttle the investigation at a nascent stage and defers to the wisdom of the DG and the CCI, and rejects the Impleadment Application. However, the Applicant is granted the liberty to take all such steps as required by it, in accordance with law, to impugn the CCI Order.

50. In light of the aforesaid observations, this Court is of the opinion that the impugned Judgement dated 22.04.2021, passed by the learned Single Judge in W.P.(C) 4378/2021 & W.P.(C) 4407/2021, is well reasoned, and that the appeals filed by the Appellants are devoid of merit and substance that would warrant the interference of this Court.

51. Accordingly, the instant appeals are dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

AUGUST 25, 2022
hsk.