

WhatsApp's "Take It Or Leave It Policy": Sending the Wrong Signal?

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The Competition Commission of India has *suo moto* taken cognizance of the potential impact of the updated terms of service and privacy policy for WhatsApp users and passed an [order dated 24.03.2021](#) under Section 26(1) of the Competition Act, 2002.

The Commission sought response from both WhatsApp and Facebook. Facebook has submitted that while it is a parent company of WhatsApp, both are separate and distinct legal entities and Facebook stated that since WhatsApp is offering the service, Facebook need not be a party to the proceedings. The Commission rejected this request on the ground that Facebook is a direct and immediate beneficiary of the new updates and cannot feign ignorance.

The Commission also found that the response of the WhatsApp was not signed in accordance with the Regulation and rejected the contention that execution of the pleadings by the authorised counsel is not correct. However, the submissions made by WhatsApp was still taken on record in the interest of justice.

The Commission with reference to the preliminary objections has observed that:

- (i) In a data driven eco system, 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.
- (ii) 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.
- (iii) The contention that the 2021 update is under examination by Courts and hence cannot be examined by the Commission has been rejected by relying upon Section 62 of the Act which provides that the provisions of the Act are in addition to and not in derogation of the provisions of any other law. Further, it is not a case of parallel sectoral proceedings that are pending on the issue.
- (iv) The contention that the update has not yet implemented and stands postponed to 15.05.2021 was also rejected on the ground that the policy has already been announced; conduct has already taken place which can be examined under Section 4 and time has already started running for the users to comply therewith. Prompts have also been issued which are reflective of actionable conduct that has already taken place.

The Commission on merits has observed that:

- (i) WhatsApp being a dominant player in the relevant market for OTT messaging apps is a conclusion already arrived at in the **Harshita Chawla** [\[LSI-570-CCI-2020\(NDEL\)\]](#) case and there is no change in the market since the passing of the said order.
- (ii) It is evident from the latest policy statement published on WhatsApp website that the choice is no longer available as compared to the previous privacy policies. It appears that the consent to sharing an integration of user data with other Facebook companies for a range of purposes including marketing and advertising, has been made as a pre-condition for availing WhatsApp services.
- (iii) In the **Vinod Gupta** case, the Commission closed the matter after noting the fact that the users had an option to opt out of sharing user account information with Facebook within 30 days of agreeing to the updated terms of service and privacy policy.
- (iv) The opting out option was a critical consideration in deciding against the alleged contravention of WhatsApp. As against this, the new policy has removed the 'opt out' option given to users and users have to mandatorily agree to share their personalised data and further the policy envisages data collection which appears to be unduly expansive and disproportionate. The 2021 update has also not provided any carve out for users who opted out of not sharing information with Facebook during the 2016 update.
- (v) The Commission is of the prima facie opinion that the 'take it or leave it' nature of privacy policy and terms of service of WhatsApp merits a detailed investigation in view of the market position and market power enjoyed by WhatsApp.
- (vi) WhatsApp is the most widely used app and since OTT messaging platforms are not interoperable, communication between two users is enabled only when both are registered on the same network. On account of the strong lock in effect for users, switching to another platform gets difficult and meaningless unless all or most of their social contacts also switch to the same other platform. Thus, while it may be technically feasible to switch the pronounced network effects of WhatsApp significantly circumscribe the usefulness of the same.
- (vii) The information categories described in the privacy policy; terms of service including FAQs are too broad, vague and unintelligible. For example, what constitutes 'interact with others', 'service-related information', 'mobile device information', 'payment or business features', are all undefined.
- (viii) Users have not been provided with appropriate granular choice, neither upfront nor in the fine print to object to or opt out

of specific data sharing terms which prima facie appear to be unfair and unreasonable to them.

(ix) The impugned conduct of data sharing by WhatsApp and 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 unfair terms and conditions on users and is violative of Section 4(2)(a)(i) of the Act.

(x) The impugned data sharing provision may have exclusionary effects also in the display advertising market which has the potential to undermine competitive process and create further barriers to market entry besides leveraging in violation of Section 4(2)(c) and (e) of the Act.

(xi) WhatsApp has prima facie contravened Section 4 of the Act through its exploitative and exclusionary conduct in the garb of a policy update and a thorough and detailed investigation is required to ascertain the full extent, scope and impact of data sharing through involuntary consent of users.

The Competition Commission has directed the Director General to cause an investigation under Section 26 of the Act and has further directed the DG to complete the investigation and submit the report within a period of 60 days from the date of receipt of the order.

The observation by the Commission to the effect that it is not possible to shift to another platform in the absence of all or most of the social contacts agreeing to shift is a clear reflection of reality. Most WhatsApp groups are either on debate mode or some members in a group have refused to stay and some have refused to shift thereby creating serious challenges in communication. In the modern digital world, the role of social messaging platforms is significant and the concerns of the user cannot be ignored. One cannot simply call upon a user to take it or leave it since a user who leaves it may very well be deprived of valuable and timely information and could become a social outcast.

While various petitions have been filed before the Courts by users, the suo moto action by the Competition Commission is a significant development. Further, the Commission has clearly identified the point of distinction between the 2016 and 2021 privacy policy and has focussed on the non-availability of the opting out option. The procedure under the Act is well laid down and the Commission would pass its orders after considering the DG report and after hearing the parties concerned. As far as the users are concerned, technically there is no reprieve yet but it is presumed that WhatsApp would extend the due date further given the new development.