

# **“DOMINANT” WHATSAPP NOT INDULGING IN PREDATORY PRICING IN INDIA**

In 2009, the Indian government implemented the provisions for prohibition of anti-competitive agreements and abuse of dominant position in India under the Competition Act, 2002 (the “Act”). More recently, antitrust litigation has picked up in India as the general public is becoming aware of various issues such as price fixing, cartel formation, tying arrangements and predatory pricing.

On June 1, 2017, the Competition Commission of India (the “CCI”) passed an order on a complaint made by Fight for Transparency Society against WhatsApp Inc. (“WhatsApp”) for abuse of dominant position by indulging in predatory pricing. This update discusses the order of the CCI and its relevance for dominant players in the Indian market.

## ***Abuse of dominant position***

Section 4(1) of the Act prohibits an enterprise from abuse of its dominant position. Further, Section 4(2) of the Act, *inter alia*, provides that imposing unfair or discriminatory price in sale of services, including, predatory pricing, shall be considered as abuse of dominant position. Predatory pricing is the practice of sale of goods or provision of services at a price which is below the cost, with a view to reduce competition or eliminate the competitors.

It must be noted that for an enterprise to be considered to be indulging in abuse of dominant position, first it must be established that the enterprise is “dominant” in the relevant market in India. “Dominance” of an enterprise can be established if it enjoys a position of strength in the relevant market in India which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Further, Section 19(4) of the Act also specifies certain factors to assess whether an enterprise can be held to be “dominant”, including, market share, size, resources, economic power of the enterprise, size and importance of competitors and entry barriers.

## ***CCI’s order on WhatsApp***

In its complaint against WhatsApp, Fight for Transparency Society alleged that WhatsApp had indulged in abuse of dominant position as: (i) January 1, 2016 onwards, WhatsApp had stopped charging any fee from its subscribers thereby indulging in predatory pricing which led to a significant increase in its subscriber base; and (ii) in August 2016, WhatsApp had implemented a new terms of service and privacy policy that compelled users to share account details and other information with Facebook.

At the outset, the CCI identified the relevant market as the market for instant messaging services using consumer communication apps through smartphones in India. Further, on the basis of several independent studies which *inter alia* highlighted that WhatsApp is installed on 96% smartphone devices in India, WhatsApp is the most popular communication app and has more daily active users than any other communication apps in India, the CCI held that WhatsApp can be considered to have a dominant position in the relevant market in India.

The CCI noted that there are several other communication apps in India such as Hike, Messenger and Viber which are available free of cost or at a very low price. Further, there were insignificant barriers for a subscriber to switch to any other similar apps as they are easily accessible, can be downloaded on most smartphones and can co-exist with other similar apps. Also, the CCI noted that Hike Messenger had expanded its consumer base in India to 100 million users within three (3) years of launching and therefore, there are no barriers for entry of competitors in the relevant market. Given the foregoing, the CCI held that although WhatsApp is a dominant player in the relevant market, it cannot be held that WhatsApp has indulged in predatory pricing. Also, the CCI noted that subscribers had the option of opting out of sharing account details and other information with Facebook after agreeing to the new terms of service and privacy policy. Further, whether the new terms of service and privacy policy were in contravention of the Information Technology Act, 2000 was not under the purview of the Act more so as this aspect was pending for adjudication by India’s Supreme Court.

## ***Relevance for dominant players***

The CCI’s order on WhatsApp reinforces the principle that merely being “dominant” cannot be held to be a contravention of the Act and that “dominance” has to be abused in order to constitute a contravention of the Act. Also, it reinforces the principle that provision of free services does not lead to predatory pricing and that the practice of competitors in the relevant market and consumer preferences have to be taken into consideration to assess whether dominance has been abused. This order will certainly be a breather for large players in India’s e-commerce and telecommunications industry where there has been significant consolidation recently.