

## Vinod Kumar Gupta v. Whatsapp Inc. (Case no. 99 of 2016)

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**Decision Date:** 01.06.2017

**Keywords:** *abuse of dominant position; relevant market*

**Issue:** Whether Whatsapp Inc. has contravened the provisions of the Competition Act, 2002 through abuse of dominant position?

**Rule:** Sec. 4 of the Competition Act, 2002

Shri Vinod Kumar Gupta (hereinafter 'informant') approached CCI under Section 19(1)(a) of the Competition Act, 2002 (hereinafter 'Act') against Whatsapp Inc. (WI) alleging violation of section 4 of the Act. The informant, as a concerned crusader for transparent society filed this complaint against WI which is a cross-platform communication application for messaging services. The primary contention was the predatory pricing by abuse of dominant position by WI which was acquired by Facebook Inc.(Facebook) on 19<sup>th</sup> February 2014.<sup>1</sup> Under the privacy policy modification by WI, users have been forced to share account details with Facebook.<sup>2</sup> The Informant has submitted that the relevant product market in the instant matter would be 'free messaging app available for various smartphones' and the relevant geographical market would be 'Global' as WI has 55.5 % global market share and is installed in 95% smartphones in India.

As per the Informant, by removing subscription fees, the OP has enlarged its consumer base substantially from 450 million to over 1 billion and it is providing the services by sourcing funds from its parent company *i.e.* 'Facebook'. Thus, the Informant has alleged that by indulging in the practice of predatory pricing, the OP is abusing its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act.<sup>3</sup> [SEP] prohibit the OP from sharing users' data with 'Facebook' and direct the OP not to discontinue its services to those users who have not agreed to 'opt in' the change in its privacy policy.<sup>4</sup>

The CCI, interpreting Section 2(r) of the Act stated that, 'relevant market' means the market which may be determined by CCI with reference to the 'relevant product market' or the

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<sup>1</sup> Para 3.

<sup>2</sup> *Id.*

<sup>3</sup> Para 5.

<sup>4</sup> Para 7.

‘relevant geographic market’ or both. In regard to the relevant product market, it held that ‘WhatsApp’, is a platform for instantaneous communication which cannot be compared with the traditional electronic communication services due to difference in service, suitability of devices, pricing etc.<sup>5</sup> With regard to the relevant geographic market, the CCI held that since the functionality provided by consumer communication apps through smartphones is inherently cross-border, the geographic scope for either demand or supply of consumer communication apps is not limited to any particular area and consumer communication functions are uniform across regions, countries, platforms or operating system. As the allegations of the Informant pertain to the alleged anti-competitive conduct of ‘WhatsApp’ within India and the conditions of competition in the market is homogeneous throughout India, the CCI is decided that the relevant geographic market be ‘India’.<sup>6</sup> Hence, the relevant market in this case was considered as ‘*the market for instant messaging services using consumer communication apps through smartphones in India*’.

The informant also alleged that WhatsApp’s act was in contravention of the IT Act, 2000 and the commission analysed the verdict of Hon’ble High Court of Delhi in W.P. (C) 7663/2016 in the matter of *Karmanya Singh Sareen and Others Vs. Union of India and Others* based on the same facts. The commission held that since WhatsApp had filed an appeal before the Supreme Court in this case and that the ruling on privacy rights being affected was not made due to lack of constitutional determination of the right by Supreme Court at the time of order, the allegations of breach of the IT Act, 2000 do not fall within the purview of examination under the provisions of the Act.<sup>7</sup>

The CCI also held that the scrapping of previously charged subscription fees by WI may be due to the presence of many other service providers who are offering the services for free of cost. CCI gave credence to WI’s submission that its revenue model is like other players in the industry/ business and it is evaluating the various modes to earn revenue while providing value to users.<sup>8</sup> Hence, the CCI held WI prima facie not liable for predatory pricing. With regard to dominant position, CCI held that the expansion of *Hike Messenger* to nearly 100 million user base within three years of launch into the market reflects that there are no significant barriers to entry and that its consumers were price sensitive. Hence, the CCI held that even though

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<sup>5</sup> Para 11.

<sup>6</sup> Para 12.

<sup>7</sup> Para 17.

<sup>8</sup> Para 18.

‘WhatsApp’ appears to be dominant in the relevant market, the allegations of predatory pricing could not be substantiated and WI had not contravened any of the provisions of Section 4 of the Act.<sup>9</sup>

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<sup>9</sup> Para 19.