

THE BIG GETS BIGGER: THE NEED TO CLOSELY MONITOR THE FACEBOOK-JIO DEAL THROUGH COMPETITION LAW

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ABSTRACT

The Competition Commission of India (“CCI”) has recently approved the acquisition of minority non-controlling shareholding of approximately 9.99% in Jio Platforms by Facebook. Analyzing this kind of arrangement between the world’s largest social media site and the biggest telecom operator in India requires not just the assessment of business aspects of the deal, but also the collection of huge amounts of consumer data by both the entities and raises the concern of protection of such data. Facebook has had a record of acquiring companies to acquire more data of users, which makes it important for the CCI to analyze the deal keeping in mind the dominance of Facebook in the collection of data. The article elaborates on this practice of Facebook by analyzing the Facebook/WhatsApp merger case to argue that the Facebook-Jio deal should be monitored by the competition law authority. This becomes more interesting when we look at the decision of the German Federal Court of Justice decided on the same date as the CCI order which has held that Facebook has abused its dominant position by illegally combining data from various third-party websites. The decision relied on the aspect of consumer choice to examine the behavior of dominant entities and stated that a dominant entity not giving its consumers the choice to decide how much data they want to share causes an abuse of its position. The article discusses the intervention required by competition and consumer protection law to ensure the effectiveness of consumer consent post Facebook-Jio deal.

I. INTRODUCTION

The Competition Commission of India (“**CCI**”) has recently approved the acquisition of minority non-controlling shareholding of approximately 9.99% in Jio Platforms Limited by Facebook’s indirect wholly-owned subsidiary, Jaadhu Holdings Limited (“**Jaadhu**”) on June 24, 2020 (“**CCI**

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Order”).¹ As per the CCI Order, since the acquisition is of a minority non-controlling stake and Facebook and Jio Platforms will continue to operate independently, it does not alter the competitive landscape in any potential relevant market. However, analyzing this kind of arrangement between the world’s largest social media site and the biggest telecom operator in India requires an assessment of the increase in the ability of both the entities to collect huge amounts of consumer data.

The CCI, while looking into the concern of potential data sharing between both the parties, has held that since the acquisition is only of 9.99%, it may not result in unrestricted access to each other’s resources including user data. Further, the CCI held that it has been clarified by Jaadhu that data sharing is not the purpose of the acquisition, nor will either side be acquiring ownership of the other’s data. However, for implementation of the arrangement, WhatsApp and JioMart will receive or send limited data for the purpose of facilitating e-commerce transactions on JioMart. The purposes for data sharing mentioned under the deal create a potential for misuse of consumer data. Facebook and Jio, both being dominant companies in their respective relevant markets i.e., social media and telecom respectively, have the potential to cause irreconcilable harm to the privacy of consumers. The article tries to analyze how the Facebook-Jio deal should be looked through the lens of competition law to prohibit Facebook and Jio from violating data protection and privacy obligations, especially since India does not have a legislation dealing with the data protection yet.

The article elaborates on the data sharing practice of Facebook by analyzing the Facebook/WhatsApp merger² to argue that the recent Facebook-Jio deal should be met with certain skepticism from the competition law authority, which should keep a close watch on the developments that happen as a result of the deal. This becomes more interesting when we look at the recent decision of the German Federal

¹ Jhaadu Holdings LLC v. Jio Platforms, Combination Registration No. C-2020/06/747, (Competition Commission of India, 24/06/2020).

² Facebook/WhatsApp Merger Procedure, Case No. COMP/M.7217, 03/10/2014.

Court of Justice,³ which has held that Facebook has abused its dominant position by combining user data from various third-party websites. This decision has paved the way for competition law authorities to examine the behavior of dominant entities based on their data collection practices.

The article is divided into four parts. Part II of the article analyses the aspects of the Facebook-Jio deal and how the two companies together have the potential to abuse their dominant position. Part III discusses the intervention required by competition and consumer protection law based on the Facebook/WhatsApp merger decision and the measures that can be taken to ensure consumer choice and consent while sharing of data based on the recent Facebook decision by the German Federal Court of Justice. Part IV concludes the work.

II. FACEBOOK-JIO DEAL

Through the acquisition of the largest minority shareholding in Jio, Facebook may have gained the potential to acquire large amounts of consumer data through the combined platform because of huge market shares of both the dominant entities. Under the CCI Order, Jio Platforms, WhatsApp Inc., and Reliance Retail Limited have also proposed to enter into a separate commercial arrangement. JioMart (commerce marketplace by Reliance Retail Limited) plans to integrate certain WhatsApp services with JioMart. While Reliance has been trying to get into the retail market in India, Facebook has been trying to introduce WhatsApp pay through WhatsApp. With Jio's 388 million users and WhatsApp's 400 million users in India,⁴ both the companies together can establish a platform which can compete with already established incumbent players of the market, both in the retail sector such as Amazon and Flipkart and e-wallet market such as Paytm, Google Pay etc.

³ KVR 69/19 (Federal Court of Germany), 23 June, 2020, available at <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html?nn=10690868>, last seen on 30/06/2020.

⁴ K. Parbat, *Facebook deal gives Jio a good leverage in WhatsApp: Experts*, The Economic Times (23/04/2020), available at https://economictimes.indiatimes.com/tech/internet/deal-gives-jio-a-good-leverage-in-whatsapp/articleshow/75305648.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last seen on 19/06/2020.

This becomes more concerning as after the Facebook-Jio deal, Jio has been able to attract huge investment by selling minority stakes in the company to various entities.⁵ Generally, e-commerce platforms have been known to adopt an initial loss-making strategy to become the dominant entity and exclude competitors through predatory pricing. This strategy works because of the heavy investments that these companies receive. With Reliance Jio gaining so much investment, it is possible for it to exclude competitors while making losses. Jio had earlier used the predatory pricing strategy to enter the telecommunications market. CCI did not hold the practice to be anti-competitive as Jio was not a dominant player at the time.⁶

Further, the approach that is generally taken by CCI while analyzing the claim of predatory pricing is that predatory pricing is harmful only if the entity engaging in such practice can recoup its losses later.⁷ Otherwise, it is considered as a legitimate strategy to enter the market. However, it has been seen that companies do not need to recoup the losses because they are backed by heavy funding. Due to their deep pockets, they can continue to dominate in the market with low costs. This could prove to be harmful to other players of the market who do not have that kind of investment. Because of these strategies, the market does not compete on merits anymore, which might push as efficient competitors out of the market. This dominant platform can then be used to collect large amounts of consumer data to make profits from targeted advertising. This in turn would lead to lower choice for consumers as there would be no alternative platform that the consumers would be able to choose from, thus limiting the incentives for the dominant platform to compete on the basis of better privacy policies.

⁵ *Saudi Arabia's PIF to invest Rs 11,367 crore in Jio Platforms for 2.32% stake*, The Economic Times (18/06/2020), available at https://economictimes.indiatimes.com/markets/stocks/news/saudi-arabias-pif-to-invest-rs-11367-crore-in-jio-platforms-for-2-32-stake/articleshow/76444288.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last seen on 19/06/2020.

⁶ *Bharti Airtel Limited v. Reliance Industries Limited*, Case no. 3 of 2017 (Competition Commission of India, 05/12/2018).

⁷ *Transparent Energy Systems (P) Ltd. v. TECPRO Systems Ltd.*, Case No. 09 of 2013 (Competition Commission of India, 11/06/2013).

One of the other consequences of the deal is the approval of WhatsApp Pay by the National Payments Corporation of India (“NPCI”).⁸ While NPCI has issued a cap of 30% on the volume of transactions, WhatsApp still has the potential of gaining huge amounts of financial data of consumers along with data on their spending patterns, which it can leverage to other services including using such data for the betterment of Jio services such as Jio mart, thus helping both the parties in further strengthening their dominant position excluding other competitors from the market.

III. INTERVENTION OF COMPETITION AND CONSUMER PROTECTION LAW

The need for intervention of competition law for compliance with data protection obligations can be seen through the WhatsApp/Facebook merger. While assessing the merger, the European Commission did not try to ascertain if Facebook can use data from WhatsApp but instead relied on the undertaking by Facebook that WhatsApp cannot serve as a potential source for data due to different identifiers i.e. an account on Facebook can be created through an E-Mail id, whereas contact number is required to create an account on WhatsApp.⁹ However, it was later seen that Facebook had provided misleading information to the Commission, since after the merger, WhatsApp changed its privacy policy to allow sharing of information on WhatsApp to other Facebook family of companies.¹⁰

When the same practice was challenged before the CCI,¹¹ it held that data sharing from WhatsApp to Facebook is to improve the experience on Facebook. WhatsApp gave the option to the consumers to delete their WhatsApp account within 30 days if they do not want their data to be shared. Consumers were given an ‘all or nothing’ option where they had no bargaining power if they wanted to continue using the services of

⁸ *NPCI gives approval for WhatsApp to 'go live' on UPI in phased manner*, CNBC (06/11/2020), available at <https://www.cnbc18.com/business/companies/npci-whatsapp-upi-live-7408451.htm>, last seen on 19/12/2020.

⁹ Facebook/WhatsApp Merger Procedure, Case No. COMP/M.7217, 03/10/2014.

¹⁰ *Supra* 2.

¹¹ *Shri Vinod Kumar Gupta v. WhatsApp Inc.*, Case No. 99 of 2016 (Competition Commission of India, 01/06/2017).

WhatsApp with better privacy provisions. The CCI held that users who do not want their data to be shared have the option to delete their WhatsApp account and therefore, it does not constitute an abusive practice. Further, CCI held that breach of privacy fell under the Information Technology Act, 2000 (“**IT Act**”) and so it does not have the jurisdiction to decide violations under the same.

The CCI completely neglected the impact of network effects of WhatsApp. Network effects occur when the value of the platform increases with the increase in the number of users on the platform.¹² Network effects make it difficult for consumers to shift to any other platform even if they do not like the new privacy policy as all their contacts are on the same platform. Therefore, the consumers are left with no option but to accept the privacy policies offered by the dominant platform on an ‘all or nothing’ basis. Due to this unequal bargaining position between the consumers and the platform, consumers are given no effective choice to negotiate the amount of data that they are willing to share with these platforms. Because of network effects, there is a potential for consumers to become so heavily dependent on the platform created through the Facebook-Jio deal that it does not leave room for any other competitors to enter the market and compete on privacy.

The data of the consumers can be protected under the new Consumer Protection Act, 2019 (“**CPA**”). The CPA establishes a new Central Consumer Protection Authority (“**CCPA**”)¹³ which has the right to inquire into violations of consumer rights or unfair trade practices, either *suo motu* or on a complaint received.¹⁴ ‘Unfair trade practice’ has been defined under the CPA to mean a trade practice which adopts any unfair method or unfair or deceptive practice.¹⁵ The section goes on to give an inclusive list of unfair trade practices. While excessive collection of data is not explicitly mentioned under the definition, the definition is broad enough to include any practices which are unfair for the consumers or violates their rights.

¹² A. Ezrachi & M. E. Stucke, *Virtual Competition: The problems and perils of algorithm-driven economy*, Harvard University Press (2016).

¹³ S. 10, The Consumer Protection Act, 2019.

¹⁴ *Ibid*, S. 18 (2) (a).

¹⁵ *Ibid*, S. 2 (47).

The CPA also covers providing unfair contracts to the consumers by imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.¹⁶

However, while assessing data-driven mergers, it is only the competition law authorities which can assess whether the merger would leave any incentives for the merged digital player to compete on privacy. This is the reason why there is a requirement for competition law to correct the practices of collection and usage of data by dominant companies. The CCI did not intervene in the data collection practices of WhatsApp because it felt that it does not have the jurisdiction to decide issues on privacy. This becomes more problematic since the Personal Data Protection Bill, 2019¹⁷ (“**PDP Bill**”) is yet to be passed. However, even if the PDP Bill is passed, companies can still acquire data through consent given by consumers. However, as seen above, this consent is not always meaningful as consumers are given an ‘all or nothing’ option.

The jurisdictional issue relating to intervention of competition authorities in data protection obligations of dominant entities and choice provided to consumers regarding usage of their data could be said to be rationalized by the Federal Court of Justice of Germany in its recent decision involving sharing of data by Facebook.¹⁸ The German competition law authority initiated proceedings against Facebook and found that the social networking platform was abusing its market power by violating data protection rules.¹⁹ While this decision was stayed by the Higher Regional Court²⁰ saying that violation of data protection rules does not fall within the jurisdiction of competition law, the Federal Court of Justice of Germany has rejected this stay and upheld the prohibition imposed by Federal Cartel Office by stating that Facebook was abusing its dominant

¹⁶ Ibid, S. 2 (46).

¹⁷ The Personal Data Protection Bill, 2019 (pending).

¹⁸ Supra 3.

¹⁹ *Facebook Inc. i.a.- The use of abusive business terms pursuant to Section 19 (1) GWB*, B6-22/16, Bundeskartellamt, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5, last seen on 16/12/2020.

²⁰ J. Gesley, *Germany: Higher Regional Court Suspends Restrictions Placed on Facebook*, Library of Congress, available at <https://www.loc.gov/law/foreign-news/article/germany-higher-regional-court-suspends-restrictions-placed-on-facebook/>, last seen on 17/12/2020.

position with the terms of use.²¹ The decision was based on the fact that the terms do not leave any choice for users between a more personalized experience based on combination of data from different sources or an experience based solely on the data disclosed on Facebook.²² The decision has given competition law a role that it can play in prohibiting dominant companies from abusing their dominant position by ensuring better privacy policies.

As has been seen from the Facebook-WhatsApp case in India, the present data protection framework in India does not prevent sharing of data between two entities. This becomes more alarming when the issue relates to sharing of data between two of the most dominant entities. In the CCI order, on the aspect of potential data sharing between the parties, the CCI has held that since the acquisition is only of 9.99%, it may not result in unrestricted access to data. The CCI has relied on the submission of the parties that data sharing is not the purpose of the acquisition. However, the arrangement still raises questions as WhatsApp and JioMart will receive or send limited data for the purpose of facilitating e-commerce transactions on JioMart.

It must be noted that similar commitments were given by Facebook during the Facebook/WhatsApp merger.²³ From the past experience, it can be speculated that Facebook would try to benefit from the data that Jio has on consumers. Even if data sharing is not the purpose of acquisition and it has been committed by Facebook that the data sharing will be limited, there is ambiguity with respect to how much sharing of data is limited. While the General Data Protection Regulation (“**GDPR**”) in Europe or the PDP Bill in India provide for principles such as minimization in collection of data²⁴

²¹ J. Dreyer, A. Köhler & K. Pauls, *Germany: Federal Court summary judgment: FCO achieves stage victory against Facebook*, Privacy Matters, DLA Piper (25/06/2020), available at <https://blogs.dlapiper.com/privacymatters/germany-federal-court-summary-judgment-fco-achieves-stage-victory-against-facebook/>, last seen on 27/06/2020.

²² R. Polley, L. M. Baudenbacher, R. Kaup & F. A. Konrad, *German Federal Court of Justice Provisionally Finds Facebook’s Data Collection Practices Abusive*, Cleary Gottlieb, available at <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/german-federal-court-of-justice-provisionally-finds-facebooks-data-collection-practices-abusive.pdf>, last seen on 01/07/2020.

²³ Supra 2, Facebook / WhatsApp merger.

²⁴ Art. 5 (1) (c), The General Data Protection Regulation, 2016 (European Union).

and collection of data in a fair and reasonable manner,²⁵ there is still no objective criteria to ascertain what amount of data is limited or necessary for the purpose mentioned by the parties. Therefore, even if Jaadhu and Jio will not be owning each other's data in entirety, they can still make use of the shared data to the detriment of the consumers.

The CCI order states that any anti-competitive conduct resulting from any data sharing in the future could be taken up by the Commission under Section 3²⁶ and/or Section 4²⁷ of the Competition Act, 2002 having due regard to the dynamics of the concerned markets and position of the parties. However, the CCI in the present case could have taken certain commitments from the parties with respect to data sharing in more objective terms as was done by the European Commission in the Facebook/WhatsApp merger. The purpose mentioned by the parties, i.e., "*purposes connected with RJIO's business operations*", is too broad as it could include, among other things, usages that users may consent to even if it is not absolutely essential for purposes connected with business operations. As has been seen above, due to the unequal bargaining position of the consumers, the platforms can take consent from the consumers for sharing of huge amounts of their data without giving them any choice as to what data they actually want to share. This can be a cause for potential harm to the personal data of the consumers.

However, since the CCI has not taken into account the potential harm that can be caused due to the deal, it is important that the CCI keeps a close watch on the developments from the deal, especially, due to the limitations of the data protection law in India. As a result, it becomes necessary that CCI intervenes at the right time to the extent necessary to correct any abusive practices that the platform might be indulging in, post the merger. This would require active monitoring on the part of CCI.

²⁵ The Personal Data Protection Bill, 2019 (Draft Bill 2018).

²⁶ S. 3, The Competition Act, 2002.

²⁷ Ibid, S. 4.

IV. CONCLUSION

As demonstrated from the above discussion, robust regulatory oversight over the recent Facebook-Jio deal is required since the acquisition has the potential of misusing consumers' data and causing irreconcilable harm. Consumers need to be provided with a choice on the amount of their data that the companies should be allowed to collect and use. As per the CCI Order, through JioMart, Reliance wants to connect customers with Kirana stores and other small and micro local Indian businesses. While the deal may prove to be beneficial for local vendors and consumers, it is necessary to ensure that there are other platforms in the market who can compete with the large market shares that Facebook and Jio possess.

Stronger data protection laws are required to ensure that dominant platforms make arrangements for protection of consumer data and do not collect or share data among themselves beyond the level that is required for the fulfillment of the lawful purpose. Vigilance on the privacy policies and collection of data by Jio and Facebook can also be exercised by CCPA to ensure that consumers are given effective choice and negotiation powers under the terms and conditions for the usage of these dominant platforms to decide how much of their data they want to share.