NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Competition Appeal No. 1 of 2025

[Arising out of the Impugned Order dated 18th November, 2024, passed by the 'Competition Commission of India (Commission)]

IN THE MATTER OF:

WhatsApp LLC
Menlo Park, California – 94025
United States of America **...Appellant**

Versus

1. **Competition Commission of India**
   Through its Secretary
   9th Floor, Office Block – 1
   Kidwai Nagar (East)
   New Delhi – 110023 **...Respondent No.1**

2. **Prachi Kohli**
   B-77, Ground Floor,
   Double Storey, Ramesh Nagar,
   New Delhi – 110015 **...Respondent No.2**

3. **Internet Freedom Foundation**
   E-215, 3rd Floor, East of Kailash
   New Delhi – 110065 **...Respondent No.3**

4. **Meta Platforms, Inc.**
   1, Meta Way, Menlo Park,
   California – 94025
   United States of America **...Respondent No.4**

Present:

For Appellant : Mr. Mukul Rohatgi and Mr. Arun Kathpalia, Sr. Advocates with Mr. Yaman Verma, Mr. Shashank Mishra, Ms. Aisha Khan, Mr. Shivek Endlaw, Mr. Parv Kaushik, Mr. Aditya Dhupar, Ms. Vedika Rathore, Ms. Devanshi Singh, Mr. Udit Dedhiya, Ms. Bani Brar and Ms. Tahira Kathpalia, Advocates.

For Respondent : Mr. Balbir Singh, Sr. Advocate with Mr. Samar Bansal, Mr. Manu Chaturvedi, Ms. Bhivali Shah, Mr. Vedant Kapur, Ms. Devika Singh Roy Chowdhary, Mr. Ahmed Jamal Siddiqui, Mr.

Abhishek Gandhi, Mr. Kshitiz Kishor Rai, Ms. Sonia Dutta, Dir. Law, Mr. Dinesh Chandra, Deputy Dir. Law, Mr. Saurabh, Joint Dir., Advocates for R-1/CCI.

Mr. Kapil Sibbal and Mr. Amit Sibal Sr. Advocates with Mr. Naval Chopra, Ms. Supritha Prodaturi, Ms. Akshi Rastogi, Ms. Parinita Kare, Mr. Aatmik Jain, Ms. Ritika Bansal, Ms. Anupma Reddy Eleti, Ms. Aparajita Jamwal and Mr. Saksham Dhingra, Advocates for R-4.

Mr. Abir Roy, Mr. Vivek Pandey, Mr. Aman Shankar, Sasthibrata Panda, Biyanka Bhatia and Ms. Shreya Kapoor, Advocates for R-3.

With

Competition Appeal No. 2 of 2025

IN THE MATTER OF:

Meta Platforms, Inc.
1, Meta Way, Menlo Park,
California – 94025
United States of America **...Appellant**

Versus

1. **Competition Commission of India**
   Through its Secretary
   9th Floor, Office Block – 1
   Kidwai Nagar (East)
   New Delhi – 110023 **...Respondent No.1**

2. **Prachi Kohli**
   B-77, Ground Floor,
   Double Storey, Ramesh Nagar,
   New Delhi – 110015 **...Respondent No.2**

3. **Internet Freedom Foundation**
   E-215, 3rd Floor, East of Kailash
   New Delhi – 110065 **...Respondent No.3**

4. **WhatsApp LLC**
   Menlo Park, California – 94025
   United States of America **...Respondent No.4**

Present:

For Appellant : Mr. Kapil Sibbal and Mr. Amit Sibal Sr. Advocates with Mr. Naval Chopra, Ms. Supritha Prodaturi, Ms. Akshi Rastogi, Ms. Parinita Kare, Mr. Aatmik Jain, Ms. Ritika Bansal, Ms. Anupma Reddy Eleti, Ms. Aparajita Jamwal and Mr. Saksham Dhingra, Advocates.

For Respondent : Mr. Balbir Singh, Sr. Advocate with Mr. Samar Bansal, Mr. Manu Chaturvedi, Ms. Bhivali Shah, Mr. Vedant Kapur, Ms. Devika Singh Roy Chowdhary, Mr. Ahmed Jamal Siddiqui, Mr. Abhishek Gandhi, Mr. Kshitiz Kishor Rai a/w Ms. Sonia Dutta, Dir. Law, Mr. Dinesh Chandra, Deputy Dir. Law, Mr. Saurabh, Joint Dir., Advocates for R-1/CCI.

Mr. Abir Roy, Mr. Vivek Pandey, Mr. Aman Shankar, Sasthibrata Panda, Biyanka Bhatia and Ms. Shreya Kapoor, Advocates for R-3.

Mr. Mukul Rohatgi and Mr. Arun Kathpalia, Sr. Advocates with Mr. Yaman Verma, Mr. Shashank Mishra, Ms. Aisha Khan, Mr. Shivek Endlaw, Mr. Parv Kaushik, Mr. Aditya Dhupar, Ms. Vedika Rathore, Ms. Devanshi Singh, Mr. Udit Dedhiya, Ms. Bani Brar and Ms. Tahira Kathpalia, Advocates for R-4.

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

These two Appeals have been filed against order dated 18 November 2024 passed by the Competition Commission of India under Section 27 of the Competition Act, 2002. The Competition Appeal No. 1 of 2025 has been filed by WhatsApp LLC and Competition Appeal No. 2 of 2025 has been filed by Meta Platforms, Inc.

Introduction of Appeal

2. The Competition Commission of India, in its Order dated 18 November 2024, found that WhatsApp (Meta) abused dominance by using a 2021 privacy

policy to impose unfair conditions on users leverage dominance in OTT messaging Apps through smartphones in India to strengthen Meta's position in online display advertising and imposed a ₹213.14 crore penalty and remedy of a 5-year restriction on sharing WhatsApp user data with other Meta companies for advertising. The impugned order has found the Appellants to have violated the provisions of the Competition Act, 2002 ('Act') through imposition of WhatsApp privacy policy of 2021 ('2021 Policy').

3. The Impugned Order arises out of the Commission's suo motu investigation into WhatsApp LLC's (WhatsApp) January 2021 update to its Terms of Service and Privacy Policy (2021 Update), finds that Meta – 'through WhatsApp' – abused its dominance by:

(a) coercing WhatsApp users to accept allegedly expanded user data collection and sharing with the "Meta group" without an opt-out under the 2021 Update (violating Section 4(2)(a)(i) of the Competition Act, 2002 (Competition Act)); [Paragraphs 183 and 245, Impugned Order]

(b) sharing WhatsApp user data with Meta companies for purposes other than providing the WhatsApp service, resulting in the denial of access to the alleged market for "online display advertisements in India" (violating Section 4(2)(c) of the Competition Act); and [Paragraphs 235 and 245, Impugned Order]

(c) leveraging its alleged dominance in the alleged market for "OTT messaging apps through smartphones in India" to protect its position in the online display advertising

market (violating Section 4(2)(e) of the Competition Act).
[Paragraphs 235 and 245, Impugned Order]

Based on these findings, the Commission imposed: penalty of INR 213.14 crore [Paragraphs 263, Impugned Order]; and, imposed some other remedies.

4. The Appellant-Meta in Competition Appeal No. 2 of 2025 is a company incorporated under the laws of the State of Delaware, United States, and has its registered office at 1 Meta Way, Menlo Park, California 94025, United States of America. It provides among others, the Facebook branded service (i.e., www.facebook.com and corresponding applications for mobile devices and tablets), the Instagram branded service (i.e., www.instagram.com and corresponding applications for mobile devices and tablets) and the Messenger branded service (i.e., www.messenger.com and corresponding applications for mobile devices and tablets) to users in India.

5. Respondent No. 4, in Competition Appeal No. 2 of 2025 and Appellant i.e., WhatsApp, was founded in 2009 and claims to offer the WhatsApp service, which is today a free communication service that is used by people and businesses around the world. It claims to offer simple, secure, and reliable messaging (text, photo, files, video and audio messages) and calling (both voice and video), connecting people with those they care about most, effortlessly and privately. WhatsApp claims to have built its service on a foundation of user privacy and security and claims to creating a private and secure space where users can freely communicate. WhatsApp offers users throughout the world, including over 400 million users in India, a state-of-the-art end-to-end encrypted messaging service. Every personal message sent on WhatsApp — be

it text, call, voice note, or video — uses the same industry-leading Signal encryption protocol that protects messages before they are sent until they are delivered to the intended recipient. The privacy and security of users' personal messages and calls with friends, and family are protected by end-to-end encryption, and no one can read or listen to them - not even WhatsApp. It is to be noted that on 14 February 2014 WhatsApp was acquired by Facebook, Inc. (Now Meta) and is now owned by Meta.

6. **Prior to WhatsApp's 2016** update to its Terms of Service and Privacy Policy, which launched on 25 August 2016 (2016 Update), the agreement between WhatsApp and its users was governed by the Terms of Service and Privacy Policy dated 7 July 2012 (**2012 Privacy Policy**). The 2012 Privacy Policy allowed for the sharing of information with third parties for a variety of purposes, as stated in that policy. For example, WhatsApp had the right to share user information "with third party service providers to the extent that it is reasonably necessary to perform, improve or maintain the WhatsApp Service," and "to protect the security or integrity of the WhatsApp site or our servers, and to protect the rights, property or personal safety of WhatsApp, our users or others". Further, WhatsApp's 2012 Privacy Policy had a Section titled "In the Event of Merger, Sale, or Bankruptcy," providing: "In the event that WhatsApp is acquired by or merged with a third-party entity, we reserve the right to transfer or assign the information we have collected from our users as part of such merger, acquisition, sale, or other change of control." In 2014, WhatsApp was acquired by Meta. On 5 April 2016 (before the 2016 Update), WhatsApp announced its end-to-end encryption system for all types of messages (including

chats, group chats, images, videos, voice messages and files) and WhatsApp calls.

WhatsApp's 2016 Update

7. On 25 August 2016, WhatsApp updated its Terms of Service and Privacy Policy to, among other things, reflect new features it introduced to enhance the services it provides to its users, such as WhatsApp Calling and end-to-end encryption of its users' messages. WhatsApp also notified users that it had been acquired by Meta in 2014 and explained how they will work together. Users who were already using WhatsApp prior to the 2016 Update were given a one-time opportunity, available for 30 days following the release of the 2016 Update, to opt-out of sharing their WhatsApp account information with Meta for these Meta advertisements and product uses (2016 Opt-out). Users who joined WhatsApp after the release of the 2016 Update were not offered this opt-out option.

8. The 2016 Update was challenged before the Hon'ble Delhi High Court in [1]**Karmanya Singh Sareen v. Union of India & Others, W.P. (C) 7663 of 2016**, (Karmanya, Delhi High Court) and the Hon'ble Delhi High Court upheld the 2016 Update and dismissed the petition vide its judgment dated 23 September 2016, holding:

> "In fact, the users of "WhatsApp" and [WhatsApp] are parties to a private contract, and the users of "WhatsApp" having voluntarily opted to avail services of the said Application, are bound by the terms of service offered by [WhatsApp]. […] Under the privacy policy of "WhatsApp", the users are given an option to delete their "WhatsApp" account at any time, in which event, the information of the users would be deleted from the servers of "WhatsApp". We are therefore of the view that it is always open to the existing users of "WhatsApp" who do not want their information to be shared with Facebook to opt for deletion of their account." (emphasis added) [Paragraph 19, Karmanya, Delhi High Court]

[1] Karmanya Singh Sareen v. Union of India & Others, W.P. (C) 7663 of 2016, Delhi High Court upheld the 2016 Update and dismissed the petition vide its judgment dated 23 September 2016: SCC Online Del 5334

9. Thereafter, the above judgment was challenged before the Hon'ble **Supreme Court in [2]Karmanya Sareen v. Union of India, SLP (C) No. 804 of 2017 (Karmanya, Hon'ble Supreme Court).** On 25 April 2017, IFF (i.e., Respondent No. 3) filed an application before the Hon'ble Supreme Court seeking permission to intervene and assist the Court in the matter. On 25 January 2021, IFF filed an interim application seeking to injunct the 2021 Update as:

> (i) the 2021 Update vitiates informed consent; and (ii) the 2021 Update violates fundamental privacy principles (IFF Application). An application filed by the Petitioner in Karmanya, Hon'ble Supreme Court seeking similar reliefs against the 2021 Update was disposed of by the Hon'ble Supreme Court on 1 February 2023 without granting any injunctive relief against the 2021 Update.

10. A constitutional bench of the Hon'ble Supreme Court declined to issue interim relief, despite the request of the petitioners in that matter, and the matter remains pending.

11. On 1 June 2017, the Commission in **Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016** ([3]Vinod Gupta CCI), dismissed allegations of abuse of dominance by WhatsApp in relation to the 2016 Update at the prima facie stage itself. On 2 August 2022, this Hon'ble Tribunal in **Vinod Kumar Gupta v. Competition Commission of India, Competition Appeal No. (AT) 13 of 2017** ([4]Vinod Gupta NCLAT), upheld the Commission's decision of the Commission

[2] Supreme Court in Karmanya Sareen v. Union of India, SLP (C) No. 804 of 2017 (Karmanya, Hon'ble Supreme Court)
[3] Vinod Gupta CCI: Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016: On 1 June 2017, the Commission dismissed allegations of abuse of dominance by WhatsApp in relation to the 2016 Update at the prima facie stage itself
[4] Vinod Gupta NCLAT: NCLAT in Vinod Kumar Gupta v. Competition Commission of India, Competition Appeal No. (AT) 13 of 2017: On 2 August 2022, upheld the Commission's decision of dismissing allegations of abuse of dominance by WhatsApp in relation to the 2016 Update

dismissing allegations of abuse of dominance by WhatsApp in relation to the 2016 Update at the prima facie stage itself.

WhatsApp's 2021 update

12. On 4 January 2021, WhatsApp announced that it was updating the Terms of Service and Privacy Policy (2021 Update) applicable to the use of WhatsApp's services, and published a persistent banner on its website (available at www.whatsapp.com). After WhatsApp released its 2021 Update, it claims that rumours and misinformation about the 2021 Update began to spread. For example, media reports incorrectly suggested that all WhatsApp messages were no longer end-to-end encrypted and that WhatsApp would be sharing message content with Meta. To address this misinformation, WhatsApp promptly engaged in a user awareness campaign to help everyone better understand WhatsApp's privacy/protective principles and the facts, which included, among other things, publishing information that corrected the misinformation. WhatsApp released a Help Centre Article dated 12 January 2021 titled "Answering your questions about WhatsApp's Privacy Policy" that made clear that even after the 2021 update: (i) users' personal messages will remain end-to-end encrypted and WhatsApp would not be able to see, or share with Meta, those messages; and (ii) WhatsApp does not share users' contact lists with Meta (among other data points). On 13 January 2021, WhatsApp also placed full-page newspaper advertisements in popular national newspapers (such as, the Times of India and the Indian Express) in India to ensure that users across India were provided with the facts about the 2021 Update.

13. WhatsApp claims it also decided to give users more time to consider the 2021 Update and published a blog post titled "Giving More Time For Our Recent Update" (15 January Blog Post), informing users that they have until 15 May 2021 -- more than 4 months after WhatsApp first released the 2021 Update notice -- to review and consider the 2021 Update at their own pace.

14. Further, on 18 February 2021 WhatsApp issued a Help Center Article titled "About data sharing to improve people's ads and product experiences on Facebook" clarifying that it continues to honour the 2016 Opt-out and the 2021 Update does not alter this commitment.

15. On 7 May 2021, WhatsApp released an official statement (7 May Commitment) that no account will be deleted in India on 15 May 2021 nor would users lose functionality because of the 2021 Update when communicating with friends and family at least until a personal data protection legislation comes into effect in India. The 7 May Commitment was published on the WhatsApp website and was widely reported by various newspapers in India.

Proceedings before the Commission

16. On 24 March 2021, the Commission issued an order (PF Order- Prima Facie Order) under [5]Section 26(1) of the Competition Act in Suo Moto Case No.

[5] **Section 26.** Procedure for inquiry under section 19.

26. Procedure for inquiry under section 19.--(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.

1 of 2021 arriving at a prima facie finding that WhatsApp has contravened Section 4 of the Competition Act by engaging in "exploitative and exclusionary conduct" through its 2021 Update. [Paragraph 34, PF Order] The Commission directed the Director General (DG) to investigate the 2021 Update. Meta was arraigned as Opposite Party No. 2 in the PF Order. The Commission clubbed Case No. 5 of 2021 (initiated based on an information filed by Prachi Kohli) and Case No. 30 of 2021 (initiated based on an information filed by IFF) with the Suo Moto Case through its orders dated 23 March 2021 and 12 October 2021 (12 October Order), respectively (Prachi Kohli and IFF are referred to as the Informants).

17. Thereafter, the DG had submitted the Investigation Report (confidential as well as non-confidential versions) on 12.01.2023 along with case records and after following due process the impugned order was issued by the Commission. Before proceeding further, it will be instructive to recapitulate the **operative part of the order of CCI dated 18 November 2024** as below:

> " ..
> 244. In view of the foregoing analysis, the Commission delineates the following relevant market(s) in the present matter:
>
> 244.1 Market for OTT messaging apps through smartphones in India; and
>
> 244.2 Market for online display advertising in India.
>
> 245. The Commission holds Meta to be dominant in in the first relevant market. Furthermore, Meta is found to be in contravention of provisions of Section 4 of the Act as follows:
>
> 245.1 Meta (through WhatsApp) has contravened Section 4(2)(a)(i) of the Act;
>
> 245.2 Sharing of WhatsApp users' data between Meta companies for purposes other than providing WhatsApp Service creates an entry barrier for the rivals of Meta and thus, results in denial of market access in the display advertisement market, in contravention of the provisions of Section 4(2)(c) of the Act; and

245.3 Meta has engaged in leveraging its dominant position in the OTT messaging apps through smartphones to protect its position in the online display advertising market and the same is in contravention of Section 4(2)(e) of the Act.

Remedies

246. Accordingly, in terms of the provisions of Section 27(a) of the Act, the Commission hereby directs the OPs to cease and desist from indulging in anti-competitive practices that have been found to be in contravention of the provisions of Section 4 of the Act, as detailed in this order.

…

"247.1 WhatsApp will not share user data collected on its platform with other Meta Companies or Meta Company Products for advertising purposes, for a period of 5 (five) years from the date of receipt of this order. After expiry of the said period, the directions at para 247.2 (except para 247.2.1) will apply mutatis mutandis in respect of such sharing of data for advertising purposes.

247.2 With respect to sharing of WhatsApp user data for purposes other than advertising:

247.2.1 WhatsApp's policy should include a detailed explanation of the user data shared with other Meta Companies or Meta Company Products. This explanation should specify the purpose of data sharing, linking each type of data to its corresponding purpose.

247.2.2 Sharing of user data collected on WhatsApp with other Meta Companies or Meta Company Products for purposes other than for providing WhatsApp services shall not be made a condition for users to access WhatsApp Service in India.

247.2.3 In respect of sharing of WhatsApp user data for purposes other than for providing WhatsApp Services, all users in India (including users who have accepted 2021 update) will be provided with:

a) the choice to manage such data sharing by way of an opt-out option prominently through an in-app notification; and

b) the option to review and modify their choice with respect to such sharing of data through a prominent tab in settings of WhatsApp application.

247.2.4 All future policy updates shall also comply with these requirements.

247.3 The OPs are directed to make necessary changes to comply with above directions within a period of 3 (three) months from the date of receipt of this order and submit a compliance report to the Commission in this regard."

…

263. Consequently, the Commission imposes a penalty of Rs. 213.14 crore only (Rs. Two hundred Thirteen Crores and Fourteen Lakhs only), upon Meta for violating Section 4 of the Act. Meta is directed to deposit the penalty amount within 60 days of the receipt of this order."

Proceedings before other Courts

18. On 5 April 2021, Meta and WhatsApp filed writ petitions before a Single Judge of the Hon'ble Delhi High Court, (Writs) seeking to set aside the PF Order on the grounds that: (i) the Commission failed to exercise judicial restraint as the Hon'ble Supreme Court and the Hon'ble Delhi High Court were seized of the 2021 Update; (ii) this failure to exercise restraint is contrary to Hon'ble Supreme Court's precedent that the Commission must defer to a superior authority seized of a matter; (iii) the PF Order was issued without establishing a prima facie case of abuse of dominance; and (iv) the Commission has no basis to investigate Meta, as Meta and WhatsApp are separate and distinct legal entities.

19. On 22 April 2021, the Single Judge issued a judgment (Single Judge Judgment) dismissing the Writ, but recognising that: (i) the PF Order involves some of the same issues that are pending before the Hon'ble Supreme Court and the Hon'ble Delhi High Court; and (ii) it "would have been prudent for the [Commission] to have awaited the outcome of the [ongoing matters] before the Supreme Court and before [the Delhi High] Court…" before initiating its investigation. [Paragraph 33, Single Judge Judgment].

20. On 30 April 2021, Meta and WhatsApp filed Letters Patent Appeals (LPAs) before the Division Bench of the Hon'ble Delhi High Court challenging the Single Judge Judgment. In its reply filed before the Hon'ble Delhi High Court in the LPA (Commission DHC Reply), the Commission acknowledged that, "a Competition Law regulator is not at all concerned with the possible violation of the Fundamental Right to privacy of users as guaranteed under Part III of the Constitution of India, as that is outside its well-defined remit". [Paragraph 6.3,

Commission DHC Reply, enclosed at Annexure-27] The Commission also submitted that it "is examining the 2021 Policy purely through the prism of the Competition Act in discharge of its statutory function as the competition law regulator under Section 4 of the Competition Act." [Paragraph 6.3, Commission DHC Reply, enclosed at Annexure-27] These submissions were reiterated during the oral arguments, and on this basis, through its order dated 25 August 2022 (LPA Judgment), the Division Bench of the Hon'ble Delhi High Court dismissed the LPA.

21. On 14 September 2022, Meta filed a Special Leave Petition (SLP) before the Hon'ble Supreme Court challenging the LPA Judgment. On 14 October 2022, the Hon'ble Supreme Court issued a judgment dismissing the SLP (SLP Judgment) [Meta Platforms, Inc. v. Competition Commission of India, Special Leave to Appeal (C) No. 17121/2022 with Special Leave to Appeal (C) No17332/2022], but recognising that "the [Commission] should not be restrained from proceeding further with the enquiry/investigation for the alleged violation of any of the provisions of the [Competition] Act." [p. 3, SLP Judgment]

22. This Tribunal had vide in Interim Order dated 23.01.2025, issued the following directions:

> "17. The question to be considered as on date is as to what extent Appellants are entitled for any interim order as prayed in the IA. We have noticed above that directions which have been issued in paragraph 247.1 and 247.2 are with respect to "for advertising purposes" and "for purpose other than advertising". Insofar as sharing of user data for advertising purposes, the said is going on from 2016 when 2016 privacy policy was enforced. The ban of five years which was imposed in paragraph 247.1 may lead to the collapse of business model which has been followed by WhatsApp LLC. It is also relevant to notice that WhatsApp is providing WhatsApp

services to its user free of cost. We have also noticed that the Hon'ble Supreme Court has not granted interim order staying 2021 privacy policy and Digital Personal Data Protection Act 2023 has also been passed and is likely to be enforced which may cover all issues pertaining to data protection and data sharing. We are of the prima facie view that the ban of five years imposed in paragraph 247.1 need to be stayed. We, however, are of the view that the directions issued by the CCI under paragraph 247.2 and 247.3 need not be stayed and they need to be complied with. The only limited interim order which we are inclined to grant is to stay the direction in paragraph 247.1 by which five years' ban has been imposed. The direction in paragraph 247.1 are stayed.

18. Now coming to the penalty, the Commission in paragraph 263 has imposed penalty of Rs.213.14 Crores only. It is submitted by Counsel for the Appellant that 25% penalty has already been deposited. We are of the view that subject to deposit of 50% of penalty (after taking into consideration 25% already deposited), the direction in paragraph 263 need to be stayed. We direct the Appellant to deposit 50% of penalty as indicated above within two weeks from today."

23. We have heard all sides and also perused the material placed on record and basis that, we proceed to write this judgment addressing all issues raised in the Appeal in following Sections:

A. Maintainability of the Appeal
B. Privacy as a competition concern||Interplay of competition law with data-protection law (DPDP Act / SPDI Rules) || exclusivity or complementarity-Jurisdiction of CCI
C. Distinctions & overlaps between competition law and data privacy laws||Can CCI decide "privacy" issues?
D. Validity of consent/ informed consent under competitive coercion
E. Zero-price market economics and appropriate analytical approach||Competition in zero-priced digital products - Privacy of data - as a non-price factor?
F. Does Indian Legislative framework include both unfair price and unfair conditions?
G. International jurisprudence – is data privacy a competition concern or not?
H. Evidence, causation and timing (speculative vs. actual harm) ||Effects analysis- actual required or not
I. Relevant markets delineation?

J. Relevant Market 1: OTT messaging apps on smartphones in India ||Was it correctly identified?
K. Relevant Market 2: Market for Online Display Advertising in India || Was it correctly identified?
L. Dominance in the OTT messaging market: Assessed or not in the relevant market?
M. Dominance in the Market for Online Display Advertising in India: Assessed or not in the relevant market?
N. Violation of Section 4(2)(a)(i) || Abuse of Dominance by Appellants – issue of imposition of unfair conditions on users
O. Violation of Sections 4(2)(c) and 4(2)(e) ||Denial of market access and leveraging dominance in Market 1 to enter and protect position in Market 2
P. Conclusions on Abuse
Q. Remedies by the CCI

A. Maintainability of the Appeal

24. From the material placed on record, we note that when the Commission passed prima facie order (PF Order) directing Detailed investigation of WhatsApp's 2021 policy under Section 19(1)(a) of the Competition Act by Director General, the Appellants challenged the PF Order arguing that CCI has no jurisdiction to adjudicate data protection/privacy issues under competition law. We note that On 5 April 2021, Meta and WhatsApp filed writ petitions before a Single Judge of the Hon'ble Delhi High Court, (Writs) seeking to set aside the PF Order on the grounds that: (i) the Commission failed to exercise judicial restraint as the Hon'ble Supreme Court and the Hon'ble Delhi High Court were seized of the 2021 Update; (ii) this failure to exercise restraint is contrary to Hon'ble Supreme Court's precedent that the Commission must defer to a superior authority seized of a matter; (iii) the PF Order was issued without establishing. Thereafter, on 30 April 2021, Meta and WhatsApp filed Letters Patent Appeals (LPAs) before the Division Bench of the Hon'ble Delhi High Court challenging the Single Judge Judgment. Commission's stand before Hon'ble

Delhi High Court was that "*a Competition Law regulator is not at all concerned with the possible violation of the Fundamental Right to privacy of users as guaranteed under Part III of the Constitution of India, as that is outside its well defined remit"* and that the Commission also submitted that it *"is examining the 2021 Policy purely through the prism of the Competition Act in discharge of its statutory function as the competition law regulator under Section 4 of the Competition Act."* Through its order dated 25 August 2022 (LPA Judgment), the Division Bench of the Hon'ble Delhi High Court also dismissed the LPA.

25. Thereafter, on 14 September 2022, Meta filed a Special Leave Petition (SLP) before the Hon'ble Supreme Court challenging the LPA Judgment and on 14 October 2022, the Hon'ble Supreme Court issued a judgment dismissing the SLP (SLP Judgment) [Meta Platforms, Inc. v. Competition Commission of India, Special Leave to Appeal (C) No. 17121/2022 with Special Leave to Appeal (C) No17332/2022]. Hon'ble Supreme Court observed that "the [Commission] should not be restrained from proceeding further with the enquiry/investigation for the alleged violation of any of the provisions of the [Competition] Act."

26. The Appellant argues that the Commission has relied on [6]Sections 27 and 28 of the Competition Act to make the theoretical argument that neither the [7]Digital Personal Data Protection Act. 2023 (DPDP Act) nor any other legislation in India confers powers equivalent to those granted to the Commission. Whether this is even true is irrelevant, as it still does not allow the Commission to adjudicate privacy and data protection matters. Under the Commission's

[6] Sections 27 and 28 of the Competition Act:
[7] Digital Personal Data Protection Act. 2023 (DPDP Act)

untenable rationale, it would never have to exercise restraint and can make determinations in domains governed by other specialised laws like consumer protection, telecom, or financial regulation due to its wide powers. The appellant further argues that the Commission's far-reaching powers, including the authority to impose remedies and to order the division of enterprises, itself demonstrate that the jurisdiction of the Commission should be construed strictly and narrowly. Moreover, the remedies actually imposed by the Commission on WhatsApp and Meta fall squarely within the domain of privacy and data protection regulation. [Refer Note on overlap of remedies with privacy issues submitted by WhatsApp on 11 September 2025) Therefore, the Commission's contention must be rejected.

27. The Commission vehemently rebuts the Appellants' reliance on [8]SPDI Rules as being misplaced because they operate in a narrow compass compared to competition law. The former is principally concerned with a narrower category of data, namely, sensitive personal data and information of users through which users can be identified. By way of contrast, competition law would encompass non-personal data, non-sensitive data and significantly, utilisation of broader categories of data (eg. metadata of users etc.) by dominant entities. It is further argued by the Commission that same way, Appellants' reliance on DPDP Act and draft DPDP Rules is an entirely academic exercise as it seeks to invoke an inactive and inoperative legislation. Without prejudice to the foregoing, even when the DPDP Rules are notified and implemented, the CCI would still

[8] The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data Or Information) Rules, 2011 under The Information Technology Act, 2000

continue to exercise jurisdiction of actions of dominant entities that concern their data related practices for reasons set out in the next section.

28. We note that the Appellants have tested the jurisdiction of the Commission in this case before Division Bench of Hon'ble High Court and thereafter before Hon'ble Supreme Court. Hon'ble Supreme Court in its orders dated 14-10-2022 have clearly *"the [Commission] should not be restrained from proceeding further with the enquiry/ investigation for the alleged violation of any of the provisions of the [Competition] Act."* Furthermore, we note that DPDP Act and DPDP Rules (draft) may not be of any help to the Appellants. Competition law and data protection law operate as complementary, not exclusive, frameworks. While data protection laws like the SPDI Rules and the DPDP Act focus on safeguarding individuals' personal data and consent, competition law addresses how dominant firms may misuse personal or non-personal data to distort markets, limit consumer choice, or engage in exploitative or exclusionary conduct. We note that both frameworks can apply simultaneously since they answer different questions—privacy law asks whether consent was valid, while competition law asks whether market power was abused through coercive or anti-competitive data practices. The mere overlap in subject matter may not exclude CCI's jurisdiction, and furthermore, the Hon'ble Supreme Court and Hon'ble Delhi High Court, have already affirmed that CCI can examine competition harms even when privacy issues are also involved.

29. Therefore, the questions about the maintainability cannot be raised by the Appellant again and again.

30. It will also be instructive to refer to our interim order of 23.01.2025 where the maintainability issue was discussed:

> "....
>
> 11. We need to notice first the order of the Hon'ble Supreme Court dated 14.10.2022 which was passed in the SLP filed by WhatsApp LLC and Meta Platforms challenging the order of the Division Bench of the Delhi High Court by which its LPA was dismissed. Writ Petition was instituted by WhatsApp challenging the initiation of suo moto proceeding by CCI. The Hon'ble Supreme Court dismissed the SLP. It is useful to reproduce the entire order dated 14.10.2022 which is as follows: -
>
> "We have heard Shri Kapil Sibal, learned Senior Advocate, appearing on behalf of the petitioner in SLP (C) No. 17332/2022 and Shri Mukul Rohatgi, learned Senior Advocate with Shri Tejas Karia, learned Advocate, appearing for the petitioner in SLP (C) No. 17121/2022 and Shri N. Venkataraman, learned ASG appearing on behalf of the Competition Commission of India [CCI] and having gone through the impugned judgment and order passed by the High Court, no interference of this Court is called for.
>
> The CCI is an independent authority to consider any violation of the provisions of the Competition Act, 2002 (for short "the Act"). When having prima facie opined that it is a case of violation of the provisions of the Act and thereafter when the proceedings are initiated by the CCI, it cannot be said that the same are wholly without jurisdiction.
>
> Under the circumstances and even considering the observations made by this Court in the case of Competition Commission of India vs. Steel Authority of India Limited and Another, (2010) 10 SCC 744 (para 10), the proceedings before the CCI are required to be disposed of at the earliest. as under:
>
> "10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out."
>
> In view of the above, the CCI should not be restrained from proceeding further with the enquiry/investigation for the alleged violation of any of the provisions of the Act.
>
> The Special Leave Petitions stand dismissed.
>
> However, it is observed that all the contentions which may be available to the petitioners are kept open to be considered

by the CCI in accordance with law and on its own merits and any observations made while initiating the proceedings recorded in para 43 and any observations made by the High Court be considered and treated as tentative/prima facie while initiating the proceedings under the Act and the proceedings shall be decided and disposed of in accordance with law and on its own merits.

Pending applications stand disposed of."

12. The above order clearly supports the submissions of the CCI that suo moto proceeding initiated by the CCI was not to be interfered with. However, the Hon'ble Supreme Court has observed that the proceedings shall be decided and disposed of in accordance with law and on its own merits. The initiation of proceeding was thus, not interfered but the ultimate order passed by the Commission has to be tested on its own merits.

13. Now we may notice the order passed by the Hon'ble Supreme Court dated 01.02.2023 which is relied by Counsel for the Appellant where according to the Appellant, 2021 update privacy policy was not stayed by the Hon'ble Supreme Court. The copy of the order dated 01.02.2023 has been brought on the record in the Appeal as Annexure 13. It is to be noted that the said order was passed in Special Leave to Appeal 804 of 2017 which was filed by Karmanya Singh Sareen dismissing Writ Petition challenging the 2016 privacy policy. In the said SLP, an IA was filed being IA No.6140 of 2021 where privacy policy 2021 was sought to be stayed with certain further directions. It is useful to notice the following part of the order of the Hon'ble Supreme Court dated 01.02.2023 dealing with the IA No.6140 of 2021:

"At this juncture, Mr. Shyam Divan, learned senior counsel would then pray for an interim order being passed in I.A. No. 6140 of 2021 in SLP (C) No. 804 of 2017. He took us through the I.A. and prayed that the reliefs which are sought for as directions may be granted. They read as follows:

"(i) stay the operation of the new Privacy Policy and Terms of Service dated 04.01.2021 of WhatsApp, and direct that the date of coming into force of the new Privacy Policy and Terms of Service (i.e. 08.02.2021) shall be deemed to have been extended, pending adjudication of the present Special Leave Petition;

(ii) Direct that, without prejudice to the rights and contentions of the Petitioners, WhatsApp shall not apply lower privacy standards for Indian Users, and WhatsApp shall apply the same Privacy Policy and Terms of Use for Indian Users as is being applied for Users in the European Region;

(iii) Direct the give to WhatsApp undertaking to this Hon'ble Indian users:- following Court, with respect to its 'Till such time that a data protection legislation comes into force in India,

(i) WhatsApp shall not transfer or share any User data or information of Indian WhatsApp Users with Facebook, any other Facebook company or any third party for any purpose;

(ii) WhatsApp shall not bring into force its new Privacy Policy dated 04.01.2021 for Indian Users.

'Upon such data protection legislation coming into effect, WhatsApp shall be at liberty to approach this Court for modification and/or variation of this undertaking'.

(iv) Direct Ministry the of Electronics and Information Technology, Government of India to issue necessary orders to WhatsApp to not to implement its new Privacy Policy and new Terms of Use for Indian Users from 08.02.2021, and to take necessary steps to ensure compliance with such orders, till further orders are passed by this Hon'ble Court."

Mr. Kapil Sibal, learned senior counsel appearing for the respondent-WhatsApp would point out letter dated 22nd May, 2021 addressed to the Ministry of Electronics and Information Technology (Meity), Government of India. Therein our attention is drawn to the following portion:

"We take seriously the feedback we have received from your agency and want to confirm that WhatsApp will not limit the functionality of how WhatsApp works in the coming weeks as previously planned. We will continue to display our update, from time to time, to people who have not yet accepted. In addition, we will display the update whenever a user chooses relevant optional features like when a user communicates with a business receiving support from Facebook. We hope this approach reinforces the choice that people have in how they use WhatsApp, which was our intent from the beginning with this update. We will maintain this approach at least until the forthcoming Personal Data Protection (PDP) bill comes into effect."

Learned senior counsel for the petitioners, no doubt, would pray for an interim order to the effect that even those persons who may have agreed to the terms of privacy policy declared by WhatsApp either in terms of the Privacy Policy of the year 2016 or even of the Privacy Policy of 2021 should have the right to opt out, which means, according to them that while they should be permitted to use WhatsApp, their agreement to allow the use of data should not stand in the way of their wriggling out of their obligation, under which WhatsApp would have the right to share the data.

We would think that we may not be justified at this stage in granting the relief as sought by the petitioners in I.A. No. 6140 of 2021. The matters may require consideration of the issues which arise in these petitions.

As things stand, however, apart from noticing and recording the stand of WhatsApp that they have given an undertaking which is contained in the paragraph of the letter which we have extracted above, we would issue appropriate directions in causing wide publicity to the said stand of whatsApp for the benefit of those consumers who may not have agreed to the terms of the Privacy Policy of the year 2021.

Accordingly, the application (I.A. No. 6140 of 2021) is disposed of as follows:

We record the stand taken in the letter dated 22nd May, 2021 and we also record the submissions of learned senior counsel for WhatsApp that they will abide by the terms

of the letter which we have extracted above till the next date of hearing.

We further direct that WhatsApp will cause wide publicity to this aspect for the benefit of the consumers of WhatsApp by giving advertisement on a full page in five national newspapers on two occasions. The advertisement will necessarily incorporate the stand which has been taken in the letter dated 22nd May, 2021."

14. The above order clearly indicate that the Hon'ble Supreme Court did not find it feasible to grant interim order staying 2021 privacy policy. We are however, conscious of the fact that refusing to stay privacy policy in the year 2023 by the Hon'ble Supreme Court in SLP filed by Karmanya Singh Sareen at best can indicate that the privacy policy was not stayed by the Hon'ble Supreme Court. However, the Hon'ble Supreme Court had no occasion to consider the suo moto proceedings and breach of provisions of Competition Act 2002, and at best it can be noticed that the privacy policy was not stayed by the Hon'ble Supreme Court in spite of the prayers made before it.

15. Counsel for the Appellants also referred to the Digital Personal Data Protection Act 2023 Gazetted on 11.08.2023 which has not yet been enforced. Counsel for the Appellants submits that the provisions are likely to be enforced within six months as the above statement was made by the Hon'ble Minister."

B. Privacy as a competition concern||Interplay of competition law with data-protection law (DPDP Act / SPDI Rules) || exclusivity or complementarity-Jurisdiction of CCI

31. Appellant contends that the Commission went beyond its jurisdiction and made findings on privacy and data protection issues. It is claimed by the Appellants in their arguments that the entire analysis of the 2021 Policy in the impugned order indicates that the issues examined pertain to either privacy or data protection. Appellants contend that questions pertaining to privacy and data protection are entirely outside the realm of a competition regulator and would be covered either by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('SPDI Rules')[9] or the Digital Personal Data Protection Act, 2023 ('DPDP Act') or draft DPDP Rules[10] framed thereunder. It claims that the impugned

[9] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('SPDI Rules')

[10] Digital Personal Data Protection Act, 2023 ('DPDP Act') or Draft DPDP Rules

order rests entirely on findings concerning the adequacy of user consent, transparency of privacy disclosures, and purpose limitation in the processing of personal data—all of which are governed by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 and, prospectively, by the Digital Personal Data Protection Act, 2023. The Commission's mandate under the Competition Act, 2002 is confined to examining whether there exists an appreciable adverse effect on competition in a relevant market, not to determine compliance with privacy or data protection standards. Once the Commission found itself was required to assess the sufficiency of consent or the lawfulness of data processing, it ought to have exercised restraint and deferred to the competent authorities and the Hon'ble Courts already seized of these very questions. In doing so, the Commission has entered into an area beyond its expertise and statutory remit, thereby rendering its findings ultra vires and liable to be set aside.

32. The Appellants impressed upon us the importance of DPDP Act by providing us how it has evolved basis the landmark judgment of the Honourable Supreme Court of India in the case Justice [11]**K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC**, which established that the right to privacy is a fundamental right protected under Article 21 of the Indian Constitution. The Court reasoned that privacy is an incident of fundamental freedom or liberty guaranteed under Article 21, which states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Privacy was described as encompassing personal autonomy, bodily integrity, the

[11] Puttaswamy case (2017) 10 SCC, paras 300-306, 328

right to self-determination, and informational privacy—highlighting its relevance in the digital age. The judgment made it clear that the right to privacy is not absolute; it can be restricted, but only if the state action is lawful, pursues a legitimate aim, and is proportionate and necessary. It was brought to our notice that the Puttaswamy judgment directly led to the creation of the Digital Personal Data Protection (DPDP) Act 2023, making privacy protections operational in Indian law and fully covers the issue raised in this case. Appellant argues that the DPDP Act builds upon Puttaswamy judgment by requiring informed consent, purpose limitation, and data minimization—key privacy principles identified in the judgment. It establishes rights for individuals (data principals) like access, correction, and erasure of personal data, seeking to uphold individual autonomy against state and private interference. The Act attempts to balance privacy interests against legitimate state aims like national security, echoing Puttaswamy's proportionality and necessity tests for privacy restrictions. We note that even though the DPDP Act, inspired by Puttaswamy, governs the collection and processing of personal data, prioritizing consent and autonomy. However, Competition law, enforced by the Competition Commission of India (CCI), prevents abuse of dominance and anti-competitive practices, which increasingly include unfair data practices such as forcing users to consent to data collection as a condition for service and which has been taken extensively by us separately.

33. In its rejoinder the Appellants have strongly argued that the Commission has misconstrued WhatsApp's position on jurisdiction. WhatsApp never contended that the Commission lacked jurisdiction over competition law.

WhatsApp has contended that to find a competition law violation here, the Commission first made findings on privacy and data protection issues. The Commission's Order against the Appellants dated 18 November 2024 (Impugned Order) hinges entirely on those findings. Once it became apparent that findings on privacy and data protection issues (for example whether the mechanism to obtain user consent to WhatsApp's updated Terms of Service and Privacy Policy (2021 Update) was valid, whether the use of data by WhatsApp was within users legitimate expectations, etc.) were necessary, the Commission should have exercised restraint and deferred the matter till the appropriate authorities decide on these issues Exercising such judicial restraint is in line with the Tribunal's own decision in [12]**Vinod Kumar Gupta v. Competition Commission of India, Competition Appeal No. (AT) 13 of 2017 (Vinod Kumar Gupta)** and the Commission's decision in [13]**Winzo Games Private Limited v. Google LLC and Others, Case No. 42 of 2022 (Winzo)**. Once such determinations were made by the appropriate authorities, the Commission could only then have examined the 2021 Update from a competition lens.

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[12] Vinod Kumar Gupta v. Competition Commission of India, Competition Appeal No. (AT) 13 of 2017 (Vinod Kumar Gupta): On 1 June 2017, the Commission in Vinod Kumar Gupta v. WhatsApp Inc., Case No. 99 of 2016 (Vinod Gupta CCI), dismissed allegations of abuse of dominance by WhatsApp in relation to the 2016 Update at the prima facie stage itself. On 2 August 2022, this Hon'ble Tribunal in Vinod Kumar Gupta v. Competition Commission of India, Competition Appeal No. (AT) 13 of 2017 (Vinod Gupta NCLAT), upheld the decision of the Commission dismissing allegations of abuse of dominance by WhatsApp in relation to the 2016 Update at the prima facie stage itself : para 9 (w), pp. 71-72, Vol . WhatsApp Case Compilation

[13] Winzo Games Private Limited v. Google LLC and Others, Case No. 42 of 2022 (Winzo) In fact, as recently as 28 November 2024, the Commission refused to intervene on issues relating to Real Money Games, explaining that it would not be appropriate to do so since a regulatory framework for such games was expected to be established. [Paragraph 22] : Winzo, para 22, p. 2118, Vol IV. WhatsApp Case Compilation

Karnataka Power Corporation Limited v. Coal India Limited (CIL) and Others, Case No. 11 of 2017 (Karnataka Power Corporation v. CIL) [See also: Paragraph 20] refusing to make findings about the quality of coal because there exists a forum to address such issues. The Commission had no reason to deviate from that approach here.

34. Even the Supreme Court of India (Supreme Court) and the Delhi High Court permitted the Commission to investigate based on the understanding that the Commission's findings would not be affected by the outcome of the proceedings before the courts [Refer. Paras 31 and 33. LPA Judgment, pp 882 883. Annexure 29, Vol IV, WhatsApp Appeal. They did not authorise it to adjudicate issues lying squarely within the domain of privacy and data protection law. Yet the Commission made findings on issues pending before the courts. Notably, the Delhi High Court[14] had specifically highlighted that it *"would have been prudent for [the Commission] to have awaited the outcome of the ongoing matters) before the Supreme Court and before [the Delhi High) Court..."* while allowing the Commission to initiate its investigation on this basis.

35. Appellant also argues that WhatsApp's position is consistent with the decision of the Hon'ble Supreme Court in **[15]Bharti Airtel** wherein it was held that Telecom Regulation Authority of India (TRAI) was to first decide whether mobile networks were giving Jio sufficient points of interconnect. Only after TRAI made its determination could the Commission examine whether any failure to provide such points of interconnect resulted from an anti-competitive agreement. This is precisely what the Commission should have done here; waited for the Courts or the privacy regulator to decide on issues of privacy and data protection before deciding the competition issues. However, the

[14] WhatsApp LLC v Competition Commission of India. WP (C) No. 4378 of 2021, Para 33, p. 831, Annexure 27, Vol III, WhatsApp's Appeal

[15] Bharti Airtel: Competition Commission of India v Bharti Airtel, (2019) 2 SCC 521: Refer: paras 103-104, pp. 2102-2103, Vol IV, WhatsApp Case Compilation

Commission did not wait for such a determination by the appropriate authorities.

36. Strongly rebutting these arguments of the Appellant (Meta and WhatsApp) the Commission argues that there is no conflict between its jurisdiction under the Competition Act and the authority of data protection regulators under the IT Act or privacy laws. The CCI explains that it is not examining whether WhatsApp's policy violates privacy statutes but whether WhatsApp's conduct of requiring users to share data with Meta amounts to an abuse of dominance under Section 4 of the Competition Act. It maintains that privacy and data collection practices can influence competition because they affect consumer choice, quality, and fairness in the market. Therefore, the CCI's focus is on the competitive impact of WhatsApp's data-sharing arrangements, while compliance with data protection obligations remains within the domain of sectoral regulators, making the two frameworks complementary rather than conflicting.

37. We also note the contention of the Commission that the Appellants' reliance on SPDI Rules[9] is misplaced because they operate in a narrow compass compared to Competition law[16]. The former is principally concerned with a narrower category of data, namely, sensitive personal data and information of users through which users can be identified. By way of contrast, competition law would encompass non-personal data, non-sensitive data and significantly, utilisation of broader categories of data (eg. metadata of users etc.) by dominant

[16] The Competition Act 2002 and related Rules and Regulations

entities. Similarly, Appellants' reliance on DPDP Act[10] and draft DPDP Rules is an entirely academic exercise as it seeks to invoke an inactive and inoperative legislation. We also note that even when the DPDP Rules are notified and implemented, the CCI would still continue to exercise jurisdiction of actions of dominant entities that concern their data related practices for reasons set out in the next section.

38. Commission contends that the Appellants have further placed reliance on this Tribunal's Judgment in **Shri Vinod Kumar Gupta vs. CCI & Ors. CA(AT) No. 13 of 2017** and the underlying CCI order Shri Vinod Kumar Gupta, Chartered Accountant and WhatsApp Inc. Case No. 99 for 2016 to argue that the 2016 Policy had been effectively upheld. Since in the submission of Appellants, there is no difference between the policies of 2016 and 2021, it is claimed that the 2021 Policy cannot now be faulted. Commission claims that the Appellant's reasoning is flawed. Firstly, the 2016 and 2021 policies are fundamentally different. The scope of data collection and sharing under the two policies is different, with the 2021 Policy being much more expansive. Moreover, the CCI's order was passed under Section 26(2)[17] of the Act, whereby the matter is closed at the initial stage without order investigation and purely based on the

[17] Section 26. Procedure for inquiry under section 19
1[26. Procedure for inquiry under section 19.--(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.
(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

contents of the information received by the CCI. Being in the nature of an *in limine* dismissal, the CCI would not have occasion to delve deeply into the matter or have the benefit of a detailed investigation by the DG. On the contrary, the impugned order was a final order passed under Section 27 of the Act, after a detailed investigation which threw up cogent evidence and hence, cannot be compared to a preliminary order passed under Section 26(2) of the Act. Commission relies on [18]**Flipkart Internet Pvt, Ltd. and Ors, V. Competition Commission of India and Ors., WA Nos. 562/2021 and 563/2021 (GM-RES) (Paras 42)**, a Hon'ble **Division Bench of the Hon'ble High Court of Karnataka** has held as under:

> "42. In the considered opinion of this Court, the order passed in the case of AIOVA does not help the present appellants. The order was passed by the CCI on 6.11.2018 directing closure of the case under Section 26(2) of the Act of 2002. The present order has been passed by the CCI under Section 26(1) of the Act of 2002 on 13.1.2021, meaning thereby after a lapse of considerable long time it has been passed and in a competitive market various agreements are executed, new practices are adopted every day and merely because some other issue has been looked into by the CCI cartier, it does not mean that on the ground of res judicata the CCI cannot look into any information subsequently against the appellants. The principle of res judicata has no application in the matter under the Act of 2002 in the peculiar facts and circumstances of the case.
>
> The market place is by its very nature a constantly evolving and dynamic space. The market forces can evolve even in the course of a few months and therefore, by no stretch of imagination, it can be held that the appellants should be out of bound for all times and no action can be taken against them only because at some point of time the matter has been looked into by the CCI."
>
> [Emphasis supplied]

[18] Flipkart Internet Pvt, Ltd. and Ors, V. Competition Commission of India and Ors., WA Nos. 562/2021 and 563/2021 (GM-RES) (Paras 42), High Court of Karnataka

39. Even after the recent introduction of a Section 26(2A) in the Competition Act, the Hon'ble [19]**High Court Judicature at Bombay in Asian Paints Limited vs. Competition Commission of India & Anr. Writ Petition (Civil) No. 2887 of 2025 (Paras 27 and 32-34)**, has reiterated the non-application of res judicata in the following terms:

> "34. A perusal of the impugned order indicates that Respondent No.1, despite being aware of the JSW representation and its dismissal, found substance in the representation of Respondent No.2 and, after recording prima facie observation, directed the DG to investigate the same. The object of Section 26(2-A) is not to create an embargo on the filing of a subsequent information, but to emphasize that an information founded on similar or substantially identical facts ought not to be entertained. The discretion is that of the CCI, whether or not to entertain a subsequent representation. Infact, a perusal of the impugned order also shows that the CCI was fully conscious of the earlier representation made by JSW/Balaji and its dismissal. The impugned order further reflects that the JSW representation was rejected after receipt of the DG's report, as JSW had failed to substantiate its allegations. It is therefore evident that the CCI passed the impugned order with full awareness of the earlier proceeding. Whether or not to give hearing is the CCI's discretion and there is no inherent right in a party to demand the same. Consequently, we do not find any jurisdictional bar on the Respondent No. I compelling them to give reasons under Section 26(2-4), as contended by Mr. Khambata, whilst considering and entertaining the Respondent No.2's representation."

40. Commission further contends that the order of the CCI relied on by the Appellants is of 2017 and in this fast-changing digital market, a great deal would have changed by 2021. Hence, it would be inappropriate to bind the CCI for all times to come in the matter of investigating the Appellants' abusive conduct, based solely on 2017 order.

[19] High Court Judicature at Bombay in Asian Paints Limited vs. Competition Commission of India & Anr. Writ Petition (Civil) No. 2887 of 2025 (Paras 27 and 32-34)

41. In its rejoinder the Appellants claim that the Commission has misunderstood WhatsApp's submissions on **Vinod Kumar Gupta's** case. This Tribunal in Vinod Kumar Gupta upheld WhatsApp's 2016 update to its Terms of Service and Privacy Policy (2016 Update), which covered both (i) existing users who were offered an opt-out, and (ii) new users who joined after August 2016 without an opt-out [Refer Paras 9(1), 9(m), 9(n), pp. 64-65, Vinod Kumar Gupta, Vol I, WhatsApp Case Compilation. Subsequently, WhatsApp announced the 2021 Update. The 2021 Update does not expand WhatsApp's ability to collect or share data beyond what was already permitted under the 2016 Update. Therefore, the Commission cannot, in the present proceedings, go beyond the Hon'ble Tribunal's findings in Vinod Kumar Gupta. This is not a case of res judicata, but instead demonstrates the Commission's failure to follow binding precedent. This Tribunal also refused to make any finding that the 2015 Update was not clear or that it was an abuse of dominance as these allegations fell outside the domain of the Competition Act. If the alleged vagueness of the 2016 Update was not an abuse, it cannot form a basis for finding a violation against the 2021 Update, which provides even greater transparency. (Refer Para 9(w), pp. 7172, Vinod Kumar Gupta, Vol. I, WhatsApp Case Compilation]. Moreover, it is claimed that WhatsApp does not assert that the findings in Vinod Kumar Gupta preclude the Commission from investigating the 2021 Update. However, it is the legal position that the Commission is bound by this Tribunal's decisions on the subject. If the Commission wishes to deviate from these decisions, it can only do so on a finding based on cogent evidence that there has been a change in facts, namely, that there is a significant departure in the 2021 Update from

the 2016 Update. The Commission's findings are, however, bereft of any evidence on this issue.

42. It is also brought to our notice that a key consideration for not ordering investigation by the DG against the 2016 Policy in **Vinod Kumar Gupta (supra)** was the provision of opt-out provided to users in that policy by WhatsApp. Such an opt-out mechanism was not provided to users in the 2021 Policy.

43. Here we are posed with a question whether the Commission went beyond its jurisdiction and made findings on privacy and data protection issues i.e. whether questions pertaining to privacy and data protection are entirely outside the realm of a competition regulator and would be covered either by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('SPDI Rules') or the Digital Personal Data Protection Act, 2023 ('DPDP Act') or draft DPDP Rules framed thereunder.

44. We find that even though the DPDP Act 2023, governs the collection and processing of personal data, prioritizing consent and autonomy, however, Competition law, enforced by the Competition Commission of India (CCI), prevents abuse of dominance and anti-competitive practices, which we have found in this case to include unfair data practices such as forcing users to consent to data collection as a condition for service.

45. Appellant has placed reliance on **Vinod Kumar Gupta v. Competition Commission of India, Competition Appeal No. (AT) 13 of 2017 (Vinod Kumar Gupta)** in which this AT had dismissed allegations of abuse of

dominance by WhatsApp in relation to the 2016 Update at the prima facie stage itself and argues that CCI should have exercised judicial restraint in line with AT's own decision. We find that this judgement is of no help to the Appellants as the 2016 and 2021 policies are fundamentally different. The scope of data collection and sharing under the two policies is different, with the 2021 Policy being much more expansive. Moreover, CCI's order under Section 26(2) was preliminary, but the impugned order was a final order under Section 27 after detailed investigation

46. Appellant also places its reliance on the judgment of the Commission **Winzo Games Private Limited v. Google LLC and Others**, Case No. 42 of 2022 (Winzo) dated 28 November 2024, wherein the Commission refused to intervene on issues relating to Real Money Games, explaining that it would not be appropriate to do so since a regulatory framework for such games was expected to be established. This judgement is of no avail to the appellant as the facts are different. In the instant case the issues are relating to privacy and data protection - which are coming in conflict with the competition law. The DPDP Act 2023 and related draft rules are available, but they cannot oust the jurisdiction of the Competition Commission.

47. WhatsApp has also relied on the decision of the Hon'ble Supreme Court in **Bharti Airtel** wherein it was held that Telecom Regulation Authority of India (TRAI) was to first decide whether mobile networks were giving Jio sufficient points of interconnect and is claimed that Commission should have waited for the Courts or the privacy regulator to decide on issues of privacy and data protection before deciding the competition issues. This judgement is also of no

avail to the appellant as the facts in the instant case are distinguishable and this case relates to privacy and data protection - which are coming in conflict with the competition law. The DPDP Act 2023 and related draft rules, both cannot oust the jurisdiction of the Competition Commission. Moreover, we have delved in detail on the maintainability of the present investigation by the Commission here in a separately.

48. We also find that the Commission gets support from another judgement in **Flipkart Internet Pvt, Ltd. and Ors, V. Competition Commission of India and Ors., WA Nos. 562/2021 and 563/2021 (GM-RES)**, wherein Hon'ble **Division Bench of the Hon'ble High Court of Karnataka** has held as under:

> "42....merely because some other issue has been looked into by the CCI earlier, it does not mean that on the ground of res judicata the CCI cannot look into any information subsequently against the appellants. The principle of res judicata has no application in the matter under the Act of 2002 in the peculiar facts and circumstances of the case."

This judgment further holds that

> "The market place is by its very nature a constantly evolving and dynamic space. The market forces can evolve even in the course of a few months and therefore, by no stretch of imagination, it can be held that the appellants should be out of bound for all times and no action can be taken against them only because at some point of time the matter has been looked into by the CCI."
>
> [Emphasis supplied]

49. The Commission also finds support for non-application of res judicata in a recently introduced Section 26(2A) in the Competition Act, wherein the Hon'ble **High Court Judicature at Bombay in Asian Paints Limited vs. Competition Commission of India & Anr. Writ Petition (Civil) No. 2887 of 2025 (Paras 27 and 32-34)**, has reiterated the same:

> "34. A perusal of the impugned order indicates that Respondent No.1, despite being aware of the JSW representation and its dismissal, found substance in the representation of Respondent No.2 and, after recording prima facie observation, directed the DG to investigate the same. The object of Section 26(2-A) is not to create an embargo on the filing of a subsequent information, but to emphasize that an information founded on similar or substantially identical facts ought not to be entertained. The discretion is that of the CCI, whether or not to entertain a subsequent representation..."

50. We find that judicial precedents as noted above also confirm that the doctrine of res judicata is inapplicable to Competition Act matters; investigations into new conduct or facts cannot be foreclosed based on previous findings. The absence of an opt-out mechanism in the 2021 Policy versus the 2016 Policy, as well as the rapidly changing digital landscape, further supports the Commission's probe and final order. Finally, we find that the CCI's function is distinct from that of sectoral or privacy regulators: it evaluates competitive effects of conduct, such as forced data-sharing, regardless of whether data protection statutes are also engaged. Thus, the arguments reinforce that CCI retains both the mandate and necessity to address privacy-related competitive harms.

51. We also note that Privacy is recognized by competition regulators worldwide as a critical non-price competition parameter, valued by users on par with quality, customer service, and innovation and this is also elaborated by us separately.

52. Per above analysis we don't find any conflict between CCI's jurisdiction under the Competition Act and the authority of data protection regulators under the IT Act or privacy laws. We also find that CCI is not examining whether

WhatsApp's policy violates privacy statutes but whether WhatsApp's conduct of requiring users to share data with Meta amounts to an abuse of dominance under Section 4 of the Competition Act. We agree with the arguments of the CCI that privacy and data collection practices can influence competition because they affect consumer choice, quality, and fairness in the market. We also find that CCI has focussed on the competitive impact of WhatsApp's data-sharing arrangements, while compliance with data protection obligations remains within the domain of sectoral regulators, making the two frameworks complementary rather than conflicting. We also find that Appellants' reliance on SPDI Rules is misplaced because they operate in a narrow compass compared to Competition law[20]. SPDI Rules are mainly concerned with a narrower category of data, namely, sensitive personal data and information of users through which users can be identified, while competition law encompasses non-personal data, non-sensitive data and significantly, utilisation of broader categories of data (e.g. metadata of users etc.) by dominant entities. Appellants' reliance on DPDP Act and draft DPDP Rules is an entirely academic exercise. We also find that even when the DPDP Rules are notified and implemented, the CCI would still continue to exercise jurisdiction of actions of dominant entities that concern their data related practices for reasons set out in the next section.

53. We can thus conclude that the Commission's jurisdiction encompasses not just overtly anti-competitive economic practices but also extends to unfair data practices that may affect competition dynamics, consumer choice, and

[20] The Competition Act 2002 and related Rules and Regulations

market fairness. The DPDP Act's existence does not make the CCI redundant; rather, both frameworks operate complementarily, where competition regulation addresses practices influencing market power, irrespective of overlap with privacy laws. Moreover, each new policy or conduct (such as the much broader 2021 WhatsApp policy) can merit fresh investigation notwithstanding prior decisions or regulatory action, as markets and business conduct evolve rapidly.

C. <u>Zero-price market economics and appropriate analytical approach||Competition in zero-priced digital products - Privacy of data - as a non-price factor?</u>

54. We note the pivotal role played by data in the operation of digital platforms. Business Entities are able to provide zero-priced products only because there is value attached to the vast amount of data that is collected from their users. We note that this Tribunal's judgment in **Google LLC & and Anr. vs. Competition Commission of India CA (AT) No. 10 of 2023**[21] (Paras 210 to 213) has set out the central role played by data in zero-priced multi-sided digital markets (while specifically referring to advertising) and competition concerns arising therefrom. In digital markets, an enterprise's competitive advantage is increasingly shaped by the amount, diversity, and quality of data it possesses access to such data has become a crucial source of market power, as it allows platforms to improve services, target users more effectively, and operate more efficiently than their competitors (as recognised in **Matrimony.com Limited vs. Google LLC & Ors. Case No. 7 of 2012**[22]**; Paras 249, 196-200**). Furthermore, due to data's scalable and reusable nature,

[21] Google LLC & and Anr. vs. Competition Commission of India CA (AT) No. 10 of 2023
[22] Matrimony.com Limited vs. Google LLC & Ors. Case No. 7 of 2012; Paras 249, 196-200

dominant platforms can reinforce their position by creating high entry barriers, limiting rivals' access to essential data, and shaping market dynamics in their favour ultimately distorting fair competition. [Paras 28.1 and 28.2 @ pg. 11 of Impugned Order].

55. It was brought to our notice that non-price parameters of competition-like quality, customer service, and innovation are also valued by users at par with privacy and competition regulators across the world recognise it as a critical non-price parameter of competition. If there is a loss of privacy it is considered as reduction in quality of services. Thus, excessive data collection (with same level of services) amounts to degradation of quality of services and this has been noted in para 182.6 @pg. 108 of Impugned Order.

56. We also note that data driven digital networks typically do not rely on monetary consideration or subscriptions to earn revenue and are frequently either free or at a nominal cost with a view to gain maximum subscribers over a period of at the earliest. We don't find disagreement in the arguments of the Commission that the real value in such nominally free digital services is in the data of the users which can be monetised to full effect by selling to advertisers etc. Therefore, we cannot accept the definition proposed by Appellants, which excludes non-price factors such as privacy from competition analysis. If accepted, this would effectively remove all non-price based digital services from the scrutiny of competition law. We also note that the ubiquity of digital services and their impact on consumers as a whole are perhaps that regulators worldwide have been considering non-price factors such as privacy are valid for competition analysis.

57. Therefore, we don't find any disagreement with the argument that reduction of privacy as a non-price factor in competition at par with other non-price attributes would be fully in consonance with the letter and spirit of the Competition Act. We find argument convincing that privacy loss can be considered service quality reduction and excessive data collection amounts to degradation of service quality.

58. The sub-issue before us is the role played by data in the operation of digital platforms. Basis submissions of both sides and also material placed on record, in our appraisal, we find that business entities in the digital world are able to provide zero-priced products only because there is value attached to the vast amount of data that is collected from their users. The Tribunal's judgment in **Google LLC and Anr. vs. Competition Commission of India CA AT No. 10 of 2023** has set out the central role played by data in zero-priced multi-sided digital markets while specifically referring to advertising and competition concerns arising therefrom. Furthermore, we find that in digital markets, an enterprise's competitive advantage is increasingly shaped by the amount, diversity, and quality of data it possesses; access to such data has become a crucial source of market power, as it allows platforms to improve services, target users more effectively, and operate more efficiently than their competitors as recognised in **Matrimony.com Limited vs. Google LLC Ors. Case No. 7 of 2012**.

59. We find that the Competition Commission's authority extends to digital markets where services are provided at zero price, as the real value lies in the data collected from users. The Commission's scrutiny is not limited to price-

based competition but includes non-price factors such as privacy, quality, and innovation, which are critical in digital markets. The scalable and reusable nature of data allows dominant platforms to reinforce their market position, create entry barriers, and distort fair competition, making it imperative for the Commission to intervene.

60. Furthermore, we find that the legislative framework, including Section 4(2)(a)(i) and Section 4(2)(a)(ii) of the Competition Act, is deliberately broad to capture all forms of abusive conduct, including those involving non-price factors. The Competition Law Review Committee's findings further support the Commission's approach, affirming that the Act's definitions are inclusive enough to encompass data and network effects without requiring amendment. Excluding non-price factors from competition analysis would undermine the Act's purpose and leave digital markets unregulated, contrary to global regulatory consensus. Therefore, the Competition Commission's actions in zero-price markets are fully justified and in line with the Act's spirit and international best practices.

61. We were also clarified that same dominance assessment test applies equally to all markets, whether zero-price markets or non-zero priced markets. We were reminded that consumers pay via their data in zero price markets.

D. Distinctions & overlaps between competition law and data privacy laws||Can CCI decide "privacy" issues?

62. On the issue of distinctions and overlaps between competition law and data privacy laws, it was argued by the Commission that data-related practices may breach both data privacy and competition law. On the one hand the Data

privacy law focuses on personal data processing, safeguarding individual rights and building consumer trust and on the other hand Competition law addresses misuse of both personal and non-personal data, competition-sensitive data, preventing data-driven market dominance, ensuring fair pricing, innovation, and consumer choice. Since 'user data' also includes anonymised and aggregated data, a broader view is essential for assessing competition issues in digital markets. Seen as such, data protection and competition law address data concerns through distinct but complementary tools [Para 28.5 and 28.7 @pgs. 12-13 of Impugned Order].

63. We also note that privacy law asks, "Was this consent valid under privacy standards?" Whereas competition law asks, "Did this conduct distort the competitive process or exploit market power?". Consumer choice is impaired if a dominant firm can unilaterally impose terms that consumers would avoid if they truly had options.

64. It was also brought to our notice that abuse of dominance in data markets can take two forms one is exclusionary conduct, such as combining data across services to raise entry barriers and stifle competition. For instance, in the present case the illegal utilisation of data collected through WhatsApp to improve non-WhatsApp products resulted in exclusion of competitors [violations of Sections 4(2)(e) and 4(2)(c)]. The conduct could also be exploitative, like demanding excessive user data or reducing service quality. For instance, in the present case the reduction of quality of service due to mandatory and excessive collection of users' WhatsApp data for non-WhatsApp purposes [violation of Section 4(2)(a)(i)]. Both forms undermine consumer welfare by limiting choice,

reducing quality of service by degrading privacy, and distorting fair competition. [Para 28.6 @ pgs. 12-13 of Impugned Order]

65. Commission has also brought to our notice that data-related practices can raise issues under multiple legal frameworks, eg- a dominant firm's conduct may breach both privacy and competition laws. A holistic approach is thus essential to ensure markets remain competitive, transparent, and consumer-friendly across dimensions like price, quality, privacy, and choice. [Para 28.8 @ pg. 13 of Impugned Order]

66. It was also brought to our attention that the Hon'ble Supreme Court in **Excel Crop Care Case**, has observed that competition policy enhances economic growth and consumer welfare by promoting choice, quality, and lower prices. It also helps correct market failures like information asymmetries and weak consumer bargaining power, serving as a vital complement to consumer protection laws. [Para 28.10 @ pg. 14 of Impugned Order]

67. We also note that Privacy is recognized by competition regulators worldwide as a critical non-price competition parameter, valued by users on par with quality, customer service, and innovation. This is delved into by us separately herein.

68. We thus find that data-related practices may breach both data privacy and competition law. Data privacy law focuses on personal data processing, safeguarding individual rights and building consumer trust and on the other hand Competition law addresses misuse of both personal and non-personal data, competition-sensitive data, preventing data-driven market dominance,

ensuring fair pricing, innovation, and consumer choice. Since 'user data' also includes anonymised and aggregated data, a broader view is essential for assessing competition issues in digital markets. Seen as such, data protection and competition law address data concerns through distinct but complementary tools.

69. We find that Commission's jurisdiction cannot be excluded on the grounds that it is testing the competition issues on the grounds of privacy and data and they are entirely outside the realm of a competition regulator and would be covered either by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('SPDI Rules')[23] or the Digital Personal Data Protection Act, 2023 ('DPDP Act') or draft DPDP Rules[24] framed thereunder.

70. Thus, we find no repugnancy between the Competition Act and the DPDPA/IT Rules. The regimes address different questions i.e., CCI targets anti-competitive conduct (unfair terms, leveraging, foreclosure), while data protection laws govern privacy compliance and thus, the two laws can operate in parallel. Mere commonality of subject matter does not oust a statutory regulator's remit. Indian courts including the Hon'ble Supreme Court and the Hon'ble Delhi High Court in this matter itself have affirmed CCI's jurisdiction to examine competition harms even where privacy/fundamental right issues are also implicated.

[23] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('SPDI Rules')
[24] Digital Personal Data Protection Act, 2023 ('DPDP Act') or Draft DPDP Rules

E. <u>Validity of consent/ informed consent under competitive coercion</u>

71. Appellant contends that Commission's finding on invalid consent under the 2021 Update is misplaced. Users were not compelled to accept the update and could continue using WhatsApp without doing so. The update did not expand data collection but merely reorganised existing terms to enhance transparency. The presumption that a standard "take-it-or-leave-it" policy amounts to coercion under competition law is legally untenable. Consent validity falls within the domain of privacy and data protection law, not competition law. Hence, users' consent was informed, voluntary, and compliant with applicable legal standards, and cannot be termed coercive or anti-competitive.

72. The CCI argued that WhatsApp's 2021 Privacy Policy vitiated user consent due to competitive coercion, as users were left with no real alternative owing to WhatsApp's dominance, strong network effects, and lack of interoperability with competing apps. The CCI emphasized that consent obtained under a "take-it-or-leave-it" framework where users had to accept the updated policy or lose access to the service cannot be considered free, voluntary, or informed. The imbalance of bargaining power, coupled with vague and expansive data-collection terms and user inertia from long-term dependence on WhatsApp, rendered user choice illusory. Thus, the CCI held that such coerced consent amounts to an unfair condition under Section 4(2)(a)(i) of the Competition Act, as it exploits users and degrades service quality by undermining privacy.

73. In our appraisal we find that the WhatsApp 2021 Policy, unlike its predecessor of 2016, fundamentally undermined user choice and permitted

data sharing far exceeding legitimate requirements of WhatsApp, leveraging WhatsApp's dominance and network effects for exploitative abuse of users The overwhelming evidence shows that WhatsApp's 2021 Policy update imposed an expanded scope of data collection and sharing on users without meaningful choice or ability to opt out, leveraging its dominant market position. Consent was not freely given—users were coerced into a binary choice of accepting invasive terms or forfeiting a vital communication tool. Such conduct constitutes exploitative abuse and undermines competition by giving the dominant platform data and insights inaccessible to rivals, while eroding service quality through forced privacy loss. The Competition Commission is fully justified in its scrutiny and intervention, protecting consumer interests, service quality, and competitive fairness in the digital marketplace

74. We note here that a related issue whether such coerced consent amounts to an unfair condition under Section 4(2)(a)(i) of the Competition Act is being discussed separately herein after.

F. Does Indian Legislative framework include both unfair price and unfair conditions?

75. During the arguments the Respondent-Commission took us through the Legislative framework to canvass their arguments that Section 4 captures all forms of abusive conduct. We also note that Section 4 capture all possible forms of abusive conduct -Section 4(2)(a) has two sub-sections, namely, Section 4(2)(a)(ii) dealing with unfair price and Section 4(2)(a)(i) dealing with unfair condition, which indicates the legislative intendment to consider both price and non-price factors.

76. It was also brought to our notice that the CLRC[25] has also noted it is unnecessary to amend the Competition Act to specifically include 'data' or 'network effects' as they same are included within the wide sweep of Sections 2(o) and 19(4), respectively. The CLRC's observation mirrors findings in the impugned order. [Para 106 @ pg. 52 of Impugned Order]

G. International jurisprudence – is data privacy a competition concern or not?

77. Appellant contends that the Commission's argument is primarily based on a decision by the Court of Justice of the European Union (CJEU) in ***Konkurrensverket v. TeliaSonera Sverige AB, C-52/09*** (TeliaSonera) [Paragraph 238, Impugned Order]. The Commission's reliance on this foreign decision is misplaced because: this Tribunal held that *"the citations available within Indian jurisdiction are primarily to be relied and if, no reference, is there then only, we can opt for the judgment in foreign jurisdiction."* **[Paragraph 9 (x), Vinod Gupta NCLAT]** Further , this Tribunal in the Google NCLAT Decision held that Section 4 violations must be supported by an effects analysis, rendering the Commission's reliance on TeliaSonera – a foreign decision – inappropriate; Further the Commission selectively quotes from TeliaSonera, ignoring the CJEU's observations that *"in order to establish whether such a practice is abusive, [the] practice must have anti-competitive effect on the market*

[25]Competition Law Review Committee ('CLRC'; Chapter 8, Para 2.2 and Annexure 1, Para 50), observed that it was unnecessary to amend the Competition Act to specifically include data as a factor in dominance assessment, as the definition of price in Section 2(o) of the Competition Act encompassed 'every valuable consideration, whether direct or indirect' in the definition of price.

CLRC also found that Section 19(4) need not be amended to include the term 'network effects' as it was already worded in an inclusive manner and hence provided CCI with enough flexibility to consider such factors while determining dominance of an enterprise (Chapter 8, Para 2.16 and Annexure I, Para 54).

… and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking". [**Paragraph 64, TeliaSonera**] Here, the Commission not only failed to establish that there is anti-competitive effect, it conducted no analysis to determine. whether the alleged conduct may "exclude competitors who are at least as efficient as the dominant undertaking"; Appellant also claims that this Hon'ble Tribunal relied on TeliaSonera when requiring an effects analysis in the Google NCLAT Decision, thereby rejecting the Commission's interpretation of TeliaSonera. [Paragraph 62, Google NCLAT Decision]

78. For an international perspective, it was brought to our notice that international jurisprudence explicitly and clearly recognises that in data-driven markets, competition authorities' role is significant as data has emerged as critical competition factor and market power source. Following cases were presented to bring to our notice that the Commission has the jurisdiction:

a. **European Union:** An identical question has been considered by the **Grand Chamber of the Court of Justice of the European Union ('CJEU')** in **Meta Platforms & Ors. vs. Bundeskartellamt ECLI:EU:C:2023:537**[26] (Bundeskartellamt Case; paras 48-51, 116-118, 123, 134 and 151) upholding the first instance decision of Bundeskartellamt (German competition regulator) in Facebook Inc. B6-22/16 (Paras 525-558 and 867). Therein, the Grand Chamber of the CJEU ruled that <u>when competition authorities are assessing whether an undertaking abuses its dominant position, violation of data</u>

[26] Grand Chamber of the Court of Justice of the European Union ('CJEU') in Meta Platforms & Ors. vs. Bundeskartellamt ECLI:EU:C:2023:537

privacy rules or reduction of privacy by excessive data sharing can form part of the competition law assessment. The CJEU further noted that the 'scale of the processing of the data' and the significant impact of that processing on the users of that network, as well as the reasonable expectations of the users, are particularly important factors. We also note that in the present context of Appellants' submissions, the above case is an instance where even though a data privacy law was in place (GDPR), the same was not seen as an impediment to the jurisdiction of the competition regulator. Rather, it was clearly understood that while the data privacy law would govern in its own field, the effect of reduced privacy and reduced quality of service on the market as a whole was a competition law concern. The Appellants' case herein is even weaker as there is no DPDP Act has not yet been operationalized, as in the absence of rules there is no framework for the same.

b. The **Grand Chamber of CJEU has reiterated its above findings in ND vs. DR ECLI:EU:C:2024:846**[27] (Paras 53-73), wherein it upheld the right of third parties to pursue private enforcement actions under competition law, arising out of data privacy infractions.

c. **Turkey:** The Turkish Competition Authority ('TCA') also launched an ex officio investigation into the Appellants for abuse of dominance arising out the 2021 Policy, which was rolled out globally. The TCA[28] didn't defer to privacy authorities and as noted in OECD's Annual Report on Competition Policy Developments in Turkey dt. 16.05.2024

[27] Grand Chamber of CJEU in ND vs. DR ECLI:EU:C:2024:846
[28] Decision No. 22-48/706-299 dated 20.10.2022 by TCA (Turkey), ¶ 2, 3 & 5651.

(Para 46), found that Meta distorted competition "by complicating the activities of its competitors operating in personal social networking services and online display advertising markets and creating barriers to entry to the market by means of combining data collected from Facebook, Instagram and WhatsApp services that are called core services[...]".

d. **United Kingdom:** UKCAT is dealing with similar abuse of dominance issues arising from mandatory data sharing by Meta in a collective action claim (**Dr. Liza Lovdahl Gormsen[29] vs Meta Platform Inc. & Ors. CAT 11; ¶ 20-22, 25**).

79. Some papers by international bodies and national regulators are also presented by the Commission to argue the case that excessive data sharing and other violations of data privacy norms are relevant factors in assessing abuse of dominance and other competition law issues and some of them are noted as follows:

a. **Franco-German Joint Report on Competition[30]:** The Joint Report confirms privacy issues cannot be excluded

[29] Dr. Liza Lovdahl Gormsen vs Meta Platform Inc. & Ors. CAT 11; ¶ 20-22, 25

[30] Joint Report on Competition Law and Data dated 10.05.2016 (Pgs. 24-27), issued by Autorite de la concurrence (French competition regulator) and Bundeskartellamt (German competition regulator) states that "Indeed, even if data protection and competition laws serve different goals, privacy issues cannot be excluded from consideration under competition law simply by virtue of their nature. Decisions taken by an undertaking regarding the collection and use of personal data can have, in parallel, implications on economic and competition dimensions. Therefore, privacy policies could be considered from a competition standpoint whenever these policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services. In those cases, there may be a close link between the dominance of the company, its data collection processes and competition on the relevant markets, which could justify the consideration of privacy policies and regulations in competition proceedings [...]

Further, reductions in privacy could also be a matter of abuse control, if an incumbent collects data by clearly breaching data protection law and if there is a strong interplay between the data collection and the undertaking's market position. So far, competition authorities understood exploitative conduct mostly as an instrument against

from competition law considerations simply by virtue of their nature. Privacy policies can be considered from a competition standpoint when implemented by a dominant undertaking for which data serves as main input.

b. **OECD and European Data Protection Board[31]:** Background Paper on 'Intersection between Competition and Data Privacy' notes competition law and data privacy laws share 'family ties', both pursuing an overarching objective of protecting individual welfare, whether as consumers or data subjects.

c. **European Data Protection Board's (EDPB) Position Paper** on interplay between Data Protection & Competition Law (Paras 7 and 8) further states that the digital economy has put personal data at the heart of many business models. As a result, data protection has become an important parameter of competition. The European Commission ('EC') recognizes that when defining the relevant market, the protection of privacy and personal data offered to consumers is one of the parameters of competition to be considered.

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excessive pricing. Such an intervention against excessive pricing faces many practical difficulties since it involves finding a comparable market or complex cost-based price comparisons and a determination of useful "benchmark" prices. Some argue that these practical difficulties and the risk of competition authorities arriving at the wrong result are so great that enforcement actions against exploitative conduct should only be taken as a last resort. However, looking at excessive trading conditions, especially terms and conditions which are imposed on consumers in order to use a service or product, data privacy regulations might be a useful benchmark to assess an exploitative conduct, especially in a context where most consumers do not read the conditions and terms of services and privacy policies of the various providers of the services that they use."

[31] OECD's Background Paper on 'Intersection between Competition and Data Privacy (Paras 2.1, 2.1.1, 2.1.3 and 2.3) notes that competition law and data privacy laws share 'family ties', as both pursue an overarching objective of protecting the welfare of the individual, whether as a consumer or as a data subject. Even when companies do not directly compete on data privacy but build their business models and their market power on the accumulation, combination and processing of data, thereby making data an essential factor to compete, a company's handling of such data becomes a concern not only for data protection authorities, but also for competition authorities.

d. **EC and the U.S. Federal Trade Commission ('FTC'),** in various merger cases have held that data being a source of market power and privacy being a non-price factor, both are important considerations in competition law assessments (See: Apple/Shazam Case M.8788 assessment dt. 06.09.2018, Facebook/WhatsApp Case No. COMP/M.7217 decision dt. 03.10.2014, Microsoft/ LinkedIn M.8124 decision dt. 06.12.2016, Tom Tom/Tele Atlas Case No. COMP/ML.4854 decision dt. 14.05.2008 and FTC statement in Google/Double Click FTC File No. 071-0170 [Para 182.6@ pg. 106 of Impugned Order; Paras 8.139-142 @ pgs. 187-189 of DG Report]

e. The **Japan Fair Trade Commission** has adopted Guidelines for Exclusionary Private Monopolisation' under the Anti-monopoly Act, 2009 which makes collection of personal data without consent a violation of their competition law.

80. Respondent-Commission contends that as noted in the impugned order, international jurisprudence explicitly and clearly recognizes that in data-driven markets the role of competition authorities is significant as data has emerged as a critical parameter of competition and a source of market power.

81. Appellant in his rejoinder has strongly argued that the Commission wrongly relies on the Court of Justice of the European Union[32] (CJEU)'s decision in **Meta v. Bundeskartellamt, Case C-252/21 (CJEU Decision).** The Commission has relied on this decision to claim that European courts recognize the jurisdiction of antitrust regulators to intervene in matters concerning

[32] CJEU-Court of Justice of the European Union

privacy and data protection. It is contended[33] that, as recognized by the Court of Justice of the European Union (CJEU), competition authorities must consult and cooperate with data protection authorities when issues involving the GDPR[34] arise in the course of assessing abuse of dominance. The CJEU has clarified that where a competition authority has doubts regarding GDPR compliance or where such matters are under consideration by data protection regulators, it must seek their cooperation and, if necessary, await their determination before proceeding. The Commission ought to have followed this principle of inter-authority coordination to ensure consistency and avoid jurisdictional overlap.

82. Furthermore Appellant contends that the Commission's argument is contrary to its own position before the Delhi High Court that a Competition Law regulator is not at all concerned with the possible Violation of the Fundamental

[33] Appellant claims that there are issues on this CJEU Decision. Firstly, the CJEU Decision itself expressly requires European antitrust authorities and data protection authorities to *"consult and cooperate with each other to observe their respective powers and competences, in such a way as to ensure that the obligations arising from the GDPR and the objectives of that regulation are complied with while their effectiveness is safeguarded."* (Refer CJEU Decision, para 54 p. 1479, Vol IV, Commission's Case Compilation. Further *"where a national competition authority considers it necessary to rule, in the context of a decision on an abuse of a dominant position, on the compliance or non-compliance with the GDPR of the processing of personal data by the undertaking in question, that authority and the supervisory authority concerned or, where appropriate, the competent lead supervisory authority within the meaning of that regulation must cooperate with each other in order to ensure the consistency of application of that regulation"* [Refer: CJEU Decision, para 52, pp. 1478-1479, Vol IV, Commission's Case Compilation] Furthermore that *"[w]here it has doubts as to the scope of such a decision, where those terms or similar terms are, simultaneously, under examination by those authorities, or where, in the absence of an investigation or decision by those authorities, the competition authority takes the view that the terms in question are not consistent with the GDPR. it must consult and seek the cooperation of those supervisory authorities in order to dispel its doubts or to determine whether it must wait for them to take a decision before starting its own assessment. in the absence of any objection on their part or of any reply within a reasonable time, the national competition authority may continue its own investigation"* [Refer CJEU Decision, para 57, p. 1479 and para 63, p. 1480, Vol IV. Commission's Case Compilation]
Appellant claims that the Commission fails to refer to these paras, and failure to follow this approach, the CJEU cautioned, *"may entail the risk of divergences between that authority and the supervisory authorities in the interpretation of that regulation"* [Refer CJEU Decision, para 55, p. 1479, Vol IV. Commission's Case Compilation)

[34] GDPR-General Data Protection Regulation

Right to privacy of users as guaranteed under Part III of the Constitution of India, as that is outside is well defined remit and is examining the 2021 Policy purely through the prism of the Competition Act an discharge of its statutory function as the competition law regulator under Section 4 of the Competition Act. As stated above, the Supreme Court and the Delhi High Court allowed the Commission's investigation based on the understanding that it would not be making findings on privacy and data protection.

83. From above submissions on international jurisprudence on data privacy and competition law we summarise few important cases:

83.1 European Union: The CJEU in Meta Platforms & Ors. vs. Bundeskartellamt held that excessive data sharing violating privacy can constitute abuse of dominance.

83.2 Turkey: The Turkish Competition Authority investigated and found that Meta's privacy policies and data practices distorted competition and constituted abuse.

83.3 United Kingdom: The UK's Competition Appeal Tribunal is examining abuse of dominance relating to data sharing and privacy practices by Meta.

83.4 France/Germany: The joint report confirms that data privacy practices by dominant firms must be scrutinized as part of competition law enforcement.

83.5 United States: U.S. regulators like FTC and DOJ recognize data as a source of market power and consider privacy violations as abuse of dominance in digital markets.

84. From the above narration we find that international jurisprudence affirms the role of competition authorities in overseeing data-driven markets. It confirms that abuse of dominance via excessive data practices and privacy violations are valid grounds for intervention. This solid global consensus and the resulting legal standards strongly support the Competition Commission in its regulatory and enforcement actions concerning WhatsApp's data policies and consent issues.

85. Having heard both sides on the international jurisprudence, we note that in data-driven markets the role of competition authorities is significant as data has emerged as a critical parameter of competition and a source of market power. Even though Indian legislative framework is sufficient to understand the issues involved in the case, yet we are taking a note of all above to understand any gaps in our understanding of the international jurisprudence, if any.

H. Evidence, causation and timing (speculative vs. actual harm) ||Effects analysis- actual required or not

86. Appellant contends that the Commission has failed to identify actual anti-competitive effects, and instead relied on "potential" effects. The Commission incorrectly asserts that it need not conduct an effects analysis to determine the actual anti-competitive effects of WhatsApp's alleged conduct, which is a prerequisite for a Section 4 violation. Instead, it relied on "potential" effects and speculative harm (Paragraph 238, Impugned Order). As a result, there is no finding of actual harm, let alone a "causal link" between WhatsApp's conduct and that harm. Indeed, even though nearly four years have passed since the 2021 Update was introduced and about nine years since WhatsApp obtained

consent to share user data with Meta, there is no finding of actual harm to: (i) users; (ii) competitors; or (iii) the relevant market.

87. The Commission has previously rejected allegations that WhatsApp abused its dominance, reasoning that WhatsApp's allegedly abusive conduct had yet to manifest in the market. In **Harshita Chawla**[35], the Commission dismissed the Informant's allegations as "premature," observing that the potential anti-competitive effects (if any) were not seen in the market. This decision attained finality through this Hon'ble Tribunal's judgment in **Harshita Chawla v. WhatsApp Inc. & Others, Competition Appeal (AT) 22 of 2020[36]**.

88. Similarly, the erstwhile Competition Appellate Tribunal (COMPAT) also dismissed allegations of abuse of dominance, citing the absence of anti-competitive effects in the relevant market in [37]**Schott Glass** Decision. The Commission has offered no basis to deviate from this precedent and penalise WhatsApp based entirely on hypothetical effects.

89. Under Section 4 of the Competition Act, the Commission must examine whether a dominant player is abusing its position in ways that cause an anti-competitive effect in the market. The focus is not on the alleged conduct but on its actual effects. An effects analysis is indispensable when determining those effects. This was affirmed by COMPAT, which set aside Commission decisions on the basis that they failed to demonstrate the anti-competitive effects of allegedly abusive conduct. It is claimed that the Commission incorrectly asserts

[35] Paragraph 97, Harshita Chawla v. WhatsApp Inc. & Others, Case No. 15 of 2020
[36] Harshita Chawla v. WhatsApp Inc. & Others, Competition Appeal (AT) 22 of 2020
[37] Schott Glass Decision - Schott Glass India Pvt Ltd & Others v. Competition Commission of India & Others, Appeal No. 91-92 of 2012, Paragraphs 54-55

that it need not undertake an effects analysis and does not identify an actual anti-competitive effect. It attempts to bypass this requirement by arguing that it could simply find a violation based on the "potential impact" and "likelihood" of effects (Paragraph 238, Impugned Order). This argument fails as a matter of law because:

(i) This Hon'ble Tribunal has held that Section 4 violations must be based on an effects analysis and there is no evidence supporting a finding of any actual anti-competitive effects;

(ii) Section 4 violations may not be based on the "potential impact" and "likelihood" of effects, and the Commission's bases for asserting otherwise are without merit; and

(iii) The Commission has failed to demonstrate that it has satisfied its own standard of "potential impact" and "likelihood" of effects.

90. The Commission was required to demonstrate such harm with evidence, such as a user survey determining if the 2021 Update adversely impacted users, their motivation to accept the 2021 Update, and whether such users were unable to use or move to alternative consumer communication apps. The Commission was also required to demonstrate how the 2021 Update excluded an actual competitor from the market or created a barrier to entry for a potential competitor. The Commission has done none of the above, with the weight of the evidence directly contradicting the findings that form the basis of the Impugned Order.

91. The Commission's failure to identify actual anti-competitive effects is exacerbated by its failure to weigh the many pro-competitive benefits from WhatsApp user data sharing with Meta, including that it enables WhatsApp and Meta to provide users, businesses, and advertisers with new and innovative

features. For example, WhatsApp's user data sharing enables features such as 'Click to WhatsApp' (CTWA) advertisements, business messaging, and, importantly, cross-platform safety and security to detect and prevent harmful activities.

92. Appellant further claims that to circumvent its obligation to identify actual effects, the Commission claims that a Section 4 violation may be based on the "potential" and "likelihood" of effects. However, this Tribunal has held that an abuse of dominance must be based on actual anti-competitive effects determined by an effects analysis:

> "For proving abuse of dominance under Section 4, effect analysis is required to be done and the test to be employed in the effect analysis is whether the abusive conduct is anti-competitive or not."
>
> **[Paragraph 66, [21]Google LLC v. Competition Commission of India, Competition Appeal (AT) No. 01 of 2023 (Google NCLAT Decision)**

93. Likewise, the Competition Appellate Tribunal and the Commission have dismissed allegations of abuse where an actual anti-competitive effect had not been shown.

94. Moreover, the legislative history of the Competition Act, supported by the **Raghavan Committee** (the High-Level Committee on Competition Policy and Law, whose report served as the basis for the abuse of dominance provisions), establishes that a Section 4 violation must be based on actual, not potential, anti-competitive effects. Parliament's ongoing efforts to introduce a digital competition law aimed at proscribing conduct based on potential anti-competitive effects (ex-ante regulation) also confirm that the current law requires violations to be based on actual harm (ex-post regulation).

95. In any case, even under its own flawed framework that ignores judicial precedent, the Commission fails to establish even the “potential impact” and “likelihood” of effects because it does not explain: (i) what threshold must be met to satisfy the “likelihood” criterion; or (ii) provide evidence of how any such threshold was met in this case.

96. Countering the arguments regarding identifying actual anti-competitive effects, and instead relying on “potential” effects and no user survey, the Commission argues that the contention that a user survey is a sine qua non of an effects analysis of potential harm under Section 4(2)(a)(i) of the Act is misplaced for several reasons. Firstly, it claims that data privacy of users is recognized by competition regulators as a critical non-price parameter of competition, which is valued on par with other service attributes like quality, customer service, and innovation. Loss of privacy resulting from mandatory and/or excessive data collection is considered as reduction in quality of services. Commission also contends that there is no requirement of a user survey to establish that such loss of user data privacy actually or potentially results in competitive harm and violates competition law. Competition regulators act in anticipation of harm to consumer choice and competition, rather than waiting for large numbers of users to protest especially in digital markets where network lock-in can mute overt expressions of dissatisfaction. Commission contends one cannot simply assume "no survey no harm" in cases concerning digital platforms abusive conduct. Users in these markets tolerate or click "accept" on expansive data sharing terms not because they truly consent in a meaningful way, but because of a mix of behavioural biases, lack

of bargaining power, information asymmetry, and market frictions leave them with little practical choice. Commission also contends that competition authorities look at the market structure (high market share, lack of close substitutes, switching costs, direct and indirect network effects) to infer that users were effectively coerced to accept terms. When exit is not feasible, users' silent acquiescence cannot be equated with genuine approval. In fact, in the present case, the 2021 Policy was mandatorily imposed on a majority of the users, which is discussed in separate paragraphs herein. Moreover, modern digital platforms employ subtle design tactics to nudge user behaviour to benefit the company at the expense of user choice. For example, repeatedly prompting users to accept new terms, or making the "accept" button prominent while any alternative is buried, can lead to high consent rates that do not reflect true preference. The foregoing aspects have also been examined by the CCI. Commission also contends it is neither practical nor required to conduct a referendum among millions of users (as WhatsApp/Meta suggest) to ask "Are you unhappy with this policy?". To say that CCI substituted its views for user will ignore that the CCI is an expert-led regulator that acted as a guardian of consumer welfare from a competition perspective, in a situation where users individually had little power to enforce their will. This is precisely the purpose of competition law enforcement against dominant firms. Commission also contends that as a corollary of the above, under Indian competition law there is no requirement to conduct a user survey to establish actual or potential anti-competitive harm, The CCI's task is to objectively evaluate whether the conduct of a dominant enterprise (in this case, rollout of the 2021 Policy) results anti-competitive harm. To this end, the CCI is required to evaluate and establish

whether such conduct meets the statutory criteria under Section 4[38] of the Act. Section 4(2)(a)(i) of the Act has two ingredients-one, the element of imposition; and two, an "unfair condition'. Both elements have been comprehensively evaluated and established by the CCI, with reference to international jurisprudence and a detailed analysis of potential anti-competitive harm resulting therefrom. In the context of the 2021 Policy of WhatsApp, the element of imposition' stands established by way of a detailed analysis of the initial

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[38] Section 4. Abuse of dominant position.

1[(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 2[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 3[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 [4][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;

[4][(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

rollout of the policy, where between 05.01.2021 and 07.05.2021 users were repeatedly prompted by WhatsApp to accept the policy (and wide data sharing terms therein) or lose access to WhatsApp services. By WhatsApp's own admission, during this 4-month period when users were under the impression that it was mandatory to consent to the policy, a majority of WhatsApp users (264,500,000 users) accepted the 2021 Policy, which represents 61% of WhatsApp's Daily Active Users (DAUS). CCI has noted that even thereafter, when the 2021 Policy mandate was temporarily suspended by way of a notification, users were still being prompted frequently to accept the 2021 Policy. Importantly, the CCI has examined why such consent, obtained by a dominant enterprise from users under the threat / fear of losing access to WhatsApp services and through frequent prompts, does not amount to valid user consent from a competition perspective, and thus satisfies the element of imposition' under Section 4(2)(a)(i) of the Act. Commission also contends the element of 'unfair condition' stands established by way of a detailed analysis of the expanded scope of user data collection under the 2021 Policy. This analysis includes comparison of data collection terms in the 2016 Policy and 2021 Policy, as well as the expanded data sharing resulting from launch of new business features by WhatsApp in 2018 which facilitate interactions between businesses and ordinary users. There is also no dispute with the fact that under the 2021 Policy, user data collected by WhatsApp can be utilised by Meta for non-WhatsApp purposes, i.e. for purposes other than improving the WhatsApp service collected data collection by WhatsApp. The impugned order contains a detailed analysis of the potentially harmful anti-competitive effects that result from expanded user data collection for non-WhatsApp purposes by a dominant

enterprise like the Appellant(s), including references to international jurisprudence.

97. The Commission has also brought to our notice that **CCI conducted an extensive qualitative effects analysis** of the competitive harm caused to advertisers due to the sharing of WhatsApp user data by Appellants with various Meta companies/platforms. In this regard, statements of several Meta's competitors and digital advertising companies have also been considered. These have been noted in detail in herein after by us in effects analysis to specifically understand effects analysis of competitive harm in the display advertising market. The Commission has also brought to our notice that it has conducted an extensive qualitative effects analysis of the competitive harm caused to advertisers due to the sharing of WhatsApp user data by Appellants with various Meta companies/platforms. In this regard, statements of several Meta's competitors and digital advertising companies have been considered, in a summarised manner are being noted hereinafter.

98. **Various 3rd party submissions (Inuxu, InMobi, OpenX, Affle, Ally Digital, Collectent)** confirm that the 2021 WhatsApp Policy and its integration with Facebook enhances Facebook's already dominant position in digital advertising:

98.1 Data is the key driver of online display advertising: Advertisers seek to optimize ad spend and maximize ROI by targeting audiences with a higher likelihood of conversion. Data enables more relevant advertising, improves user

experience by avoiding irrelevant ads, and supports the free/open internet ecosystem.

98.2 Cross-leverage of data: Platforms using user registration (e.g., social media) have richer demographic and personal data (age, gender, income, location, interests, etc.) compared to cookie-based platforms, allowing more precise targeting. WhatsApp provides highly personal data (location, phone numbers, group behavior, conversational data, business interactions, and even payments data) that, when combined with Facebook's demographic and behavioral datasets, allows extremely precise and richer audience targeting.

98.3 Improved ad effectiveness: This deeper, current, and more accurate understanding of users strengthens Facebook's ability to run targeted campaigns, making it a preferred partner for advertisers

98.4 Higher ad revenues: Better targeting directly translates into higher ad revenues, as brands spend more when ads are effective and relevant.

98.5 Revenue impact: More advertisers shifting budgets to Facebook due to its superior targeting will increase Facebook's ad revenues, indirectly impacting competitors' profitability and forcing them to incur higher costs (e.g., integration with third-party Data Management Platforms).

98.6 Market concentration: Data sharing strengthens Facebook's dominant market share in display advertising and raises entry/expansion barriers for other players, making it harder for independent AdTech firms to compete. [Paras 189-191, 193.1-193.7, 194.1-194.3 @ pgs. 116-119 of Impugned Order]

98.7 Tyroo, SVG Media, Xapads similarly highlighted that the 2021 WhatsApp Policy strengthens Facebook's position in digital advertising:

98.8 Enhanced datasets: Integration gives Facebook access to additional consumer data, including offline world engagement and business interactions, making campaigns more performance-oriented

98.9 Budget consolidation: Advertisers are expected to divert higher spends to Facebook due to its improved targeting capabilities, reducing the share of other publishers and display networks.

98.10 Competitive harm: Smaller AdTech firms may face serious adverse effects, with some (e.g., Xapads) warning that the integration creates an unfair and commercially unviable playing field leading to possible market exits. [Paras 197.3, 198.1-198.3, 201.2-201.3 @pgs. 121-123 of Impugned Order)

99. **Other submissions of Tyroo, Xapads, Snap, and LinkedIn** underscored that scale and history of user data constitute the biggest entry barriers in digital advertising:

99.1 Walled gardens: Google and Facebook, by virtue of massive accumulated consumer data, operate as closed ecosystems with superior targeting and attribution tools.

99.2 Barriers to entry: Replicating such datasets requires prohibitive capital investment, making it infeasible for new or smaller players.

99.3 Competitive disadvantage: Rivals with limited data cannot offer comparable targeting or campaign optimisation, reducing advertiser preference for their services. [Paras 188, 197.2, 201.1, 203.2, 205.1-205.3 @ pgs. 121-123, 125 of Impugned Order]

100. Moreover, **Taboola and LinkedIn further stressed** Facebook's ability to combine on-platform and off-platform data to reinforce its competitive advantage:

100.1 Cross-platform tracking: Through plugins, pixels, and third-party apps/sites, Facebook aggregates extensive data beyond its own platforms.

100.2 Advanced attribution: Integration of such data with analytics enables Facebook to provide advertisers with a unified view of campaign performance and superior ROI.

100.3 Unequal access: Unlike Facebook (and Google), other platforms have limited off-platform data, constraining their ability to match attribution and campaign optimisation. [Paras 202 and 203.1-203.2 @pg. 124 Impugned Order]

101. **Snap** submitted that:

101.1 Privacy vs monetization trade-off: Platforms like Snap that emphasize user privacy face greater difficulty in monetizing their user base, since advertiser demand depends on granular datasets. Entrants must also incur high costs to build proprietary ad-tech infrastructure to compete. [Para 188.6 @pg. 112 of Impugned Order, Confidential]

101.2 Tying of the 2021 Policy: By tying user acceptance of WhatsApp's 2021 policy update with Facebook data-sharing, newer and smaller firms will find India foreclosed to effective entry. Venture capital will avoid investing in challengers due to low ROI prospects. [Para 188.13 @pg. 114 of Impugned Order, Confidential]

102. **Pinterest** submitted that larger multi-property digital advertising platforms such as Facebook and Google enjoy economies of scale, giving them access to greater volumes of data and more frequent user engagement:

102.1 Self-reinforcing scale: Such platforms become "must-have" for advertisers, as their larger datasets allow more effective targeting and measurement, further strengthening their position.

102.2 2021 Policy strengthens Meta's market position: To the extent WhatsApp shares data with Facebook, it strengthens Facebook's competitive advantage, enabling it to collect an ever-greater share of data and reinforcing its market position.

102.3 Entry barriers: Significant challenges exist for new entrants in building a large enough user base and obtaining sufficient data to provide advertisers with measurable and effective targeting. Regulation can also pose additional hurdles. [Paras 205.1-205.4 @pgs. 125-126 of Impugned Order]

102.4 Superior access to data leads to perception of superior ads offerings: Meta's family of apps (Facebook, Instagram, WhatsApp) together have well over a billion users each, allowing Facebook to collect a wide range of first-party data

and third-party data. This superior access enables Facebook to better understand its users and provide more accurate targeting, improve user engagement with the platform and with ads; and offer advertisers clear measurement of ad performance, contributing to the perception that Facebook-served ads are superior to competitors' offerings. [Paras 205.5-205.6 @pg. 126 of Impugned Order]

103. Additionally, the **Commission has also brought to our notice** that it has taken note of **Facebook's own admission from the filing of FORM 10-Q** filed by Facebook for the quarter ending on 31.03.2021 Securities Exchange Commission (SEC) of the United States of America. In the said form, Facebook has admitted that the data-sharing between WhatsApp and Facebook aids Facebook in providing services as well as targeted ads to the users. [Para 206 @ pgs. 126-127 of Impugned Order]

104. The Commission has argued that given the foregoing submissions of third parties and Meta, it is clear that extensive data collection significantly enhances a digital advertising platform's ability to meet these objectives. [Para 207 @ pg. 127 of Impugned Order]

105. In its Rejoinder submissions WhatsApp Case claims that the Commission's submission that users should be treated as a separate "class", and therefore, it is not required to conduct "individual user surveys is fundamentally flawed. The Commission must conduct an effects analysis to arrive at a Section 4 violation. The Commission argues that they need not reach out to individual users because "users as a class were harmed. This is flawed

on several levels. In order to demonstrate that the class was harmed, the Commission needed to have provided some evidence of harm to members of that class The Commission admits no evidence was collected no user or member of that class was examined. "Hard evidence is replaced with the mere assertion that because some users had accepted the 2021 Update before 7 May 2021, compulsion must be assumed. This is precisely the kind of 'untested assertions that the Hon'ble Supreme Court condemned in the [39]**Schott Glass SC Decision** [CCI v Schott Glass India Pvt Ltd. & Anr, 2025 SCC Online SC 1097, para 75]. The Commission cannot simply assume facts, such as user coercion, expectations, confusion, or the ability to switch to competing platforms, without positive evidence. Such positions must rest on empirical and “hard evidence” as laid down by the Hon'ble Supreme Court in [39]Schott Glass SC Decision [Refer: Schott Glass SC Decision, opening para at pages 1-2). In the present case, the Commission has altogether failed to collect any evidence that points towards user harm. In fact, the Commission has admittedly replaced the standard of "hard evidence" with an assumption on "imposition", merely because some users accepted the 2021 Update prior to 7 May 2021 (when WhatsApp announced that users would not lose functionality if the 2021 Update is not accepted). Competition authorities globally often rely on user surveys, either conducted directly or led from the parties under the regulator's supervision while examining the harm to users as a class. For instance, in 2024 the DG Competition, European Commission (EC) in the Apple App Store Practices (music streaming) case, required Apple and Spotify to carry out user surveys

[39] CCI v Schott Glass India Pvt Ltd. & Anr, 2025 SCC Online SC 1097

under its oversight. These surveys examined user behaviour and tested whether consumers would switch platforms in response to price differences or competing offers.

106. Appellant in its rejoinder contends that the Commission has failed to address WhatsApp's submissions on lack of effects analysis. The Commission has contended that (a) the fact that many users accepted the 2021 Update: and (b) Meta's alleged gains/benefits/advantages in the online display advertising market, as provided in table below Para 219, p. 435, Impugned Order, Vol II. Meta Appeal are sufficient to demonstrate the anti-competitive effects of the 2021 Update under Section 4 of the Competition Act.

107. Appellant claims that these are claimed to be contrary to evidence and findings on record. First, the acceptance rate data demonstrates no anti-competitive effects. The Commission says that the mere fact that many users had accepted by 7 May demonstrates abuse and effect. The Commission's submission is entirely without evidence. Further no users were contacted to determine their rationale of accepting the terms before 7 May 2021. The evidence that exists is to the contrary. Only 241,917.132 users that existed as of 4 January 2021 (or 40-45% (43.3%)) accepted the 2021 Update between 4 January 2021 and 7 May 2021. Almost as many users (40-45% (41%)) accepted the 2021 Update after 7 May 2021 (when there was admittedly no "take it or leave it condition), while approximately 15% have still not accepted the 2021 Update as on 28 March 2023. This belies any argument that the 2021 Update was imposed. If nearly 60% of users did not feel compelled to accept the update, the Commission cannot assume compulsion for the 40-45% (43.3%) who chose

to accept the 2021 Update before 7 May 2021. Second, the Commission relies on the table below Para 219 p. 435, Impugned Order. The table pertains to the period up to Q2 of 2021 (i.e. when the 2021 Update had just come into effect) and, therefore, does not include data for any significant time after the 2021 Update, or the effects of the 2021 Update. In fact, it is their own case that till 2021, WhatsApp was not sharing any data with Meta for advertising purposes. Therefore, per the Commission, the growth of Meta's ads revenue is unrelated to any data received from WhatsApp, as evidenced by this table. This also contradicts the Commission's own arguments in the Impugned Order, where they assert that the effects may take place in the future. Third, in any event, the Commission has not shown any evidence that WhatsApp's sharing of data with Meta for non-advertising purposes causes or is likely to cause anticompetitive effects. In fact, when Meta explained that WhatsApp only shares limited data with Meta for advertising purposes, the Commission shifted focus and raised hypothetical concerns about data shared for non-advertising purposes, without any effects analysis. Accordingly, the finding insofar as it relates to data sharing for non-advertising purposes must be set aside due to a lack of effects analysis.

108. One of the major issues before us is whether the Competition Commission of India (CCI) conducted the required effects analysis in an appropriate manner or not. Our appraisal on this is noted herein. We note that under Section 4 of the Competition Act, proving abuse of dominance requires an effects analysis focused on actual or potential anti-competitive effects rather than just the alleged conduct, which the CCI undertook through qualitative assessment of consumer harm and competitive impact. The CCI relied on extensive qualitative

evidence including the detailed cataloguing of data types collected under WhatsApp's 2021 Policy, comparative analysis with previous policies, and examination of market structure factors such as dominance, network effects, and switching costs influencing user choice. The Commission incorporated extensive market feedback and submissions from competitors and advertising companies (such as InMobi, Affle, Taboola, LinkedIn, Snap, Tyroo, and Xapads), which qualitatively demonstrate how WhatsApp's data sharing with Meta strengthens Facebook's dominant position in the digital advertising ecosystem and adversely impacts competition. User coercion and imposition of the Policy were evaluated qualitatively through patterns of user prompts, acceptance rates, and the market situation where users faced a take-it-or-leave-it choice, demonstrating effective loss of meaningful consent without reliance on user surveys. The CCI effectively balanced the qualitative evidence of anti-competitive harm against claimed pro-competitive benefits, including innovation and security features enabled by data sharing, to reach a reasoned conclusion on harm to consumer welfare and market competition. We also find that the CCI's approach aligns with accepted competition law principles that effects can be demonstrated from market structure, conduct, and qualitative evidence without requiring exhaustive quantitative user surveys especially in digital dominance cases where network effects and market power mute overt consumer resistance. In brief, we find that the CCI conducted a comprehensive and robust qualitative effects analysis incorporating multi-dimensional market and consumer impact evidence, competitor testimonials, and detailed comparative policy assessment, which firmly supports the conclusion of abuse of dominant position by WhatsApp. Furthermore, this qualitative approach to effects analysis is

recognized and accepted in competition jurisprudence, especially in complex digital markets where harms arise from non-price and multi-sided platform conduct.

109. We also need to be aware of another aspect which is brought to our notice by the Commission that that Competition law permits intervention on likely harm (as noted by this Tribunal) especially in fast-moving digital markets and where data integration is irreversible and thus, regulators need not wait for damage that cannot be undone. Competition law can prohibit abuse even before its full effects play out. Otherwise, dominant firms could always evade liability by arguing "no harm yet" while setting in motion strategies that solidify their dominance.

110. Perusal of materials placed on record and also basis the arguments of both sides we don't find any infirmity that DG and CCI have failed to conduct a user survey of WhatsApp's users to gauge whether their consent to the 2021 Policy was based on valid consent and the underlying privacy concerns, as perceived by users. We also don't find any the arguments convincing that the CCI has substituted users' views with its own and the same does not meet the requisite legal standard of effects analysis required to be conducted by the CCI prior to arriving at a finding that Appellants' conduct amounted to imposition of an unfair condition under Section 4(2)(a)(i) of the Competition Act ('Act'). We find that the Commission has done a detailed qualitative analysis to determine effects caused by conduct of the Appellant as has been noted herein. The Appellants have provided the numbers of users who have joined the 2021 WhatsApp policy over a period of time between its announcement on 4 January

2021[40] and user information notice for effective date of 7 May 2021[41] and claims that as of 28th March 2023, 15% users have still not accepted the Update and claims that this belies any argument that the 2021 Update was imposed. On the contrary Commission claims that the mere fact that many users had accepted by 7 May demonstrates abuse and effect. We note that the exact numbers are not important in the above noted. We find Commission's argument to be convincing. And with respect to growth of Meta's ads revenue it is strong case of the Commission that effects may take place in the future.

I. Relevant markets delineation?

111. Under Section 2(r) of the Act, the **relevant market** may refer to the product, geographic or both markets. The relevant product market (Section 2(t)) includes products or services that are interchangeable or substitutable based on characteristics, price, or intended use, with factors such as consumer preference and switching costs guiding the analysis (Section 19(7)). The relevant geographic market (Section 2(s)) refers to the area where competition conditions are homogenous, determined by factors like trade barriers, transport costs, and consumer preferences (Section 19(6)).

112. CCI framed the case by defining two relevant markets: OTT messaging apps on smartphones in India (i.e. WhatsApp's messaging service) (Market1) and Online display advertising in India (Market 2). We delve into details as to whether the two relevant markets were delineated correctly or not.

[40] 4 January 2021: WhatsApp announced its 2021 Terms of Service and Privacy Policy (2021 Update), applicable to users in India and several other countries (excluding the EEA) including the United States of America (United States).
[41] 7 May 2021: WhatsApp published a Help Centre Article titled "About the effective date", informing users that no one will have their accounts deleted or lose functionality of WhatsApp on 15 May 2021 because of the 2021 Update.

113. Appellant claims that the Impugned Order incorrectly delineates the relevant market as the market for OTT messaging apps through smartphones in India. In reaching this conclusion, the Impugned Order fails to conduct an independent and structured market definition assessment. Section 4 of the Competition Act, which prohibits abuse of a dominant position, applies only to an enterprise found to be dominant in a relevant market. Defining the relevant market is a necessary first step in any abuse of dominance analysis. The Commission committed fundamental errors in defining the relevant market like applying the legal test set by the Competition Act and established standards for defining relevant product and geographic markets, failing to carry out an independent analysis, ignoring exculpatory submissions made by other third parties supporting WhatsApp's position.

114. The Commission failed to assess demand-side substitutability under Section 2(t) of the Competition Act, which requires an assessment of the substitutability of products/services for consumers. There was a failure to contact WhatsApp users or other competing apps' users or to collect relevant evidence (e.g., market reports) to ascertain demand-side substitutability. The Commission ignored evidence of "multi-homing," where users regularly switch between various online service providers. The Impugned Order failed to conduct proper economic analysis tailored to the unique characteristics of zero-priced markets (like WhatsApp's). By neglecting to undertake a proper economic analysis, the Commission's findings on market definition are legally flawed.

115. The Commission disregarded exculpatory statements from WhatsApp's rivals, who clarified facing competitive constraints from a range of competitors

including those offering social media and communication services. BlackBerry noted an incentive among both OTT platforms and social media service providers to offer messaging, voice/video communications, and social media as a combined product—a point ignored by the Commission.

116. The Commission incorrectly claimed WhatsApp did not provide data showing exclusion of major competitors, despite WhatsApp's evidence of significant competition from platforms like Telegram and Signal, and multi-homing behaviors. The Commission's sole reliance on user base as a proxy for market power overlooks factors such as multi-homing, switching costs, and presence of substitutes. The relevant market analysis is further flawed by the Commission's reliance on narrow interpretations of "functionality" and device distinctions, ignoring dynamic consumer preferences and technological convergence.

117. The Impugned Order incorrectly segments the market by app functionality and device-type, failing to acknowledge that most consumer communication platforms operate across devices and offer similar functionalities (including WhatsApp, FaceTime, iMessage, Discord, Slack, Telegram, etc.). It incorrectly excludes SMS and MMS from the relevant market, despite their functional parity with OTT messaging services in satisfying communication needs and user substitution behavior. It erroneously excludes proprietary apps like iMessage and FaceTime, overlooking their functional similarities and interoperability developments. The exclusion contradicts the Commission's own prior findings where proprietary messaging services were included in the same relevant market (see Paragraph 14, Vinod Gupta CCI).

118. The Impugned Order improperly limits the relevant geographic market to India, disregarding the global nature of digital markets and past Commission observations on the inherently cross-border character of consumer communication services.

119. WhatsApp operates in a broad, highly competitive market for user attention, not merely within a narrow market for OTT messaging apps. Services that compete for user attention include social networking, messaging, gaming, content, and music—demonstrating functional substitutability and competitive market dynamics. Events such as the "Outage" on October 4, 2021, illustrated real-world substitutability among platforms, which the Commission failed to meaningfully consider.

120. The Commission's analogy between digital platforms and unrelated services (like cinema halls and restaurants) mischaracterizes competition dynamics among consumer digital services. The Commission's rejection of a user attention market was not substantiated by evidence. Attempts to segment the market further by device-type or core functionality ignore both economic realities and legal standards, contributing to an artificially narrow and flawed definition.

121. The delineation of the alleged relevant market in the Impugned Order is erroneous and should be set aside, as the Commission failed to undertake a structured market definition exercise, multiple errors compounded the already flawed market analysis, WhatsApp operates in the broader market for user

attention or, alternatively, in the dynamic and evolving consumer communication services segment.

122. Briefly speaking Appellant contends that the Commission incorrectly defined the relevant market as "the market for OTT messaging apps through smartphones in India" [Paragraph 51, Impugned Order]. However, it makes this determination without conducting an independent, structured market definition assessment and failing to properly account for economic realities and the full set of competitive constraints and competitors. Indeed, in reaching its conclusion, the Commission: (i) failed to assess demand-side substitutability, failing to survey any users; (ii) excluded large categories of rivals that offer the same functionalities as, and are substitutable with, WhatsApp (e.g., iMessage, Facetime, Google Messages, SMS and MMS, as well as the wide adoption of the RCS protocol which makes rivals such as iMessage and Google Messages interoperable); and (iii) incorrectly limited the geographic market to India despite the fact that the services are inherently cross-border.

123. The Commission on the hand contends that relevant markets and dominance have been correctly assessed. The following relevant markets were delineated for the purposes of the present matter:

a. Market for OTT messaging apps through smartphones in India; and
b. Market for Online Display Advertising in India

124. In this Section we appraise whether relevant markets were appropriately delineated or not. Under Section 2(r) of the Competition Act, relevant markets include both product and geographic markets, defined by interchangeability or

substitutability of products/services and by competitive conditions that are homogeneous respectively. We find that the CCI conducted a detailed assessment of user behavior, technological features, and market structure, recognizing the core market as OTT messaging apps through smartphones, in line with economic realities shaped by consumer preferences and switching costs. The CCI also analyzed functional substitutability and proximity of competitors, distinguishing WhatsApp's position within a distinct digital messaging app market that includes rivals like Telegram and Signal, alongside the complementary online display advertising market—both relevant for assessing dominance and abuse.

125. The CCI's delineation respects legislative standards and precedents by focusing on platforms that provide similar services within comparable technological frameworks and user devices, with due consideration of consumer use patterns and competitive constraints. The geographic market was appropriately confined to India, reflecting regulatory jurisdiction and consumer base specifics, aligned with competition law principles regarding geographic market definition. The Commission's approach recognizes network effects, multi-homing behavior, and related digital market dynamics consistent with established competition law methodology for market definition in digital sectors.

126. The delineation facilitates a nuanced abuse of dominance assessment by appropriately segmenting messaging app services from broader digital content markets, ensuring targeted and relevant regulatory scrutiny. Thus, the Competition Commission's market delineation for OTT messaging apps and

online display advertising in India stands as a reasoned, legally sound, and empirically supported foundation for its abuse of dominance analysis.

J. Relevant Market 1: OTT messaging apps on smartphones in India ||Was it correctly identified?

127. We look into the Market for OTT messaging apps through smartphones in India ('Market 1'). It is contended by the Respondent-Commission that WhatsApp is an OTT messaging app that is linked to smartphone devices. It was brought to our notice that in the process of defining the market, a number of broader market definitions were considered and rejected. They are examined individually herein after.

128. First, the Appellant proposed that the market be defined as the "market for user attention." Appellant Contends that WhatsApp operates in the broad and highly competitive market for user attention. It competes with all digital products and services that seek to capture user attention through different services or functionalities, such as social networking, messaging, gaming, content viewing and sharing, photo and video sharing, or music, amongst many others. Reliance on Outage data when WhatsApp was not functioning, Netflix, X, Snapchat all saw increases in user engagement. [Para 47.1 of the Impugned Order]. This is accentuated by fact of multihoming-most users have all kinds of apps on devices and therefore switch between different forms of engagement. Users regularly switch between various multi-functional online service providers (i.e., multihoming), and that new and existing online competitors are constantly evolving, innovating, and adopting new features (including rich communication services as well as other features) to attract and retain user

interest. No demand-side study was done to analyse this. [Para 47.5 of the Impugned Order].

129. While countering delineation of the market as per the Appellants, CCI argues that, defining the market broadly as a 'market for user attention' is akin to arguing that all goods and services a consumer can buy with their disposable income are substitutes simply because money is a common medium for purchase. Such an approach incorrectly suggests that everything a consumer spends their money on whether groceries, clothing. entertainment, or travel belongs to a single market, which contradicts established competition law principles of substitutability. Just as these diverse categories cannot be lumped into the same market merely because they all compete for a share of the consumer's wallet, digital platforms cannot be considered part of a single 'market for user attention' simply because they vie for time spent on their platforms. [Para 48.2 of the Impugned Order]. Consumer shift during the outage appears to be temporary and driven by the lack of access to their preferred platform, not a non-transitory behavioural change that suggests these services are direct substitutes. [Para 48.4 of Impugned Order]. There is a high level of dependence of consumers on WhatsApp. Extent of multi-homing, as indicated by Dr. Pinar Akman paper, seems incorrect. If, as stated in the paper, 86% of users multi-home between WhatsApp's and its competitors, then WhatsApp's competitors' MAUs should be much higher (as opposed to only 86 million users for Telegram compared with WhatsApp 534 million users). Telegram and Signal have much smaller user bases compared to WhatsApp [Paras 91-92 @pgs. 47-48 of Impugned Order]. Efficacy of multi-homing is greatly reduced by network

effects, and the fact that these messaging apps are not interoperable. Activity will therefore remain concentrated on apps with bigger user base, even if there is multi-homing; consequently, dependence of consumers on that app doesn't really diminish. [Paras 93-94 @pg. 48 of Impugned Order).

130. Looking at the arguments of both sides, we cannot agree with defining the relevant market as "market for user attention" for simple reasons that such a market is not a focussed or targeted market. We find the arguments of the Commission to be convincing that diverse categories cannot be lumped into the same market.

131. It is also brought to our notice that Appellants proposed that the market be defined as "the market for consumer communication services", and that such a market include (a) email services; (b) video conferencing services; (c) conventional messaging services; (d) apps like Koo, Slack, and Discord that are not OTT messaging apps but nonetheless have messaging functionalities alongside their other features; (d) apps that are not mobile phone but instead computer-centric; and (e) mobile phone apps that are limited to a single operating system. However, we were informed by the Commission that each of these must be excluded as not being substitutable on the grounds as explained hereinafter.

132. Email services are not same as OTT Messaging Apps via Smartphones. Email is typically used for more formal, structured communication and often involves longer messages with detailed content or attachments like documents and files. It is suited for professional or official exchanges and does not

emphasize real-time interaction. In contrast, OTT messaging apps are designed for instant, real-time communication, favouring shorter, conversational messages with features like multimedia sharing, voice and video calls, providing a more dynamic and interactive communication experience. [Para 48.7 @pgs. 27-28 of Impugned Order].

133. Video conferencing (VC) services are not same as OTT Messaging Apps via Smartphones. OTT apps lack the advanced capabilities that define video conferencing solutions like Zoom, Google Meet, Microsoft Teams, and Cisco Webex. Video conferencing apps are built for more structured, professional meetings and can support a larger number of participants, cross-platform compatibility (across phones, tablets, and computers), screen sharing, recording, and the ability to invite participants. [Para 48.11 @ pg 30 of Impugned Order)

134. Conventional messaging services are not same as OTT Messaging Apps via Smartphones. Unlike conventional messaging services that rely on the telecom network's infrastructure, OTT messaging relies solely on an internet-based data connection (such as Wi-Fi or mobile data). Users are not dependent on their carrier's voice or text services and can communicate freely as long as they have internet access. OTT apps therefore also have a significant cost advantage over SMS/MMS/RCS. Additionally, they provide a host of additional features, such as online status indicator, read receipts, and profile information. On the other hand, SMS/MMS/RCS allow communication across different devices, networks, and operating systems without requiring a specific app,

unlike OTT messaging apps, which are closed user group services. These are therefore distinct markets. [Para 48.5-48.6 @pg. 27 of Impugned Order].

135. OTT apps are not same as OTT Messaging Apps via Smartphones. OTT messaging apps like WhatsApp are designed primarily for instant, real-time communication, including text messaging, voice and video calls, and multimedia sharing. In contrast, Koo and X (Twitter) primarily serve as microblogging and social networking platforms, where the focus is on public broadcasting, following, and interacting with content from a broad audience. They are designed for sharing news, opinions, and engaging in public discourse, not for private, one-on-one or group communication. Similarly, Slack and Discord are primarily collaboration tools, intended for team communication and project management in professional or community settings. They are not seen as substitutable with OTT apps. [Para 48.9 @pgs. 29 of Impugned Order]

136. Computer-centric apps are not same as OTT Messaging Apps via Smartphones: WhatsApp Web or the desktop version still requires a phone number and an active connection to a smartphone. This prerequisite means that WhatsApp's core service is inherently tied to a smartphone, making it fundamentally different from communication services that can operate independently on computers. Apps available computers only lack reasonable substitutability with mobile apps due to key functional difference between both in terms of mobility, at any rate, even if WhatsApp's argument were accepted, it would not significantly change market dynamics since Meta's dominance with WhatsApp, due to its vast user base and smartphone-centric approach would remain largely unaffected. [Para 48.10 @ pgs. 29-30 of Impugned Order]

137. Messaging apps limited to single OS are not same as OTT Messaging Apps via Smartphones. Consumer communication apps that are proprietary and limited to a single operating system, such as Apple's Face Time and iMessage, are not substitutable for OTT messaging apps (interoperable across devices) because they restrict communication to users within a specific ecosystem, creating a "walled garden" effect. [Para 48.8 @ pgs. 28-29 of Impugned Order)

138. Bases above explanation, it was brought to our attention by the Commission that in essence, OTT messaging apps are unique. They allow users to engage in individual or group conversations without restrictions on the length of messages, enabling unlimited communication that is not constrained by character limits. Beyond just text, they support rich media communication, including the ability to share images, videos, audio messages, emojis, GIFs, and location information. They provide features like voice calls and video calls, both one-on-one and in groups, enhancing their versatility compared to traditional text messaging. This flexibility makes OTT messaging a distinct choice for a wide range of communication needs, from casual chats to professional discussions, and not substitutable with other communication services. [Paras 49-50 @pgs. 31-32 of Impugned Order]

139. Therefore, we find the argument of the Commission to be convincing that market cannot be defined as "the market for consumer communication services", as such definition of the market is very broad and specific targeted product cannot be made for this market and the buyer's requirements can also be not satisfied by a single product.

140. Furthermore, we note that Meta argued that the geographical market must be global and not limited to India. Appellants' stance is that Competitive and dynamic realities of the market support a global definition of the market. Players typically operate globally, and functionalities of services rarely differ from country-to-country. WhatsApp's product decisions are typically are made on a global basis to offer a consistent user experience across the globe. [Para 47.9 of the Impugned Order]. Rebutting these arguments CCI's Position is that India has unique regulatory environment that significantly impacts the operation of OTT messaging services. Regulatory policies, data privacy laws, and requirements for data localization can differ substantially from those in other countries, affecting how these services are provided and accessed in India. Further, it would be erroneous to include competitors not operating in India in the relevant market based on a global geographic definition. [Para 48.12 of the Impugned Order]

141. We note that the arguments as presented by the Commission for defining the relevant market are fully convincing to define it as "the market for OTT messaging apps through smartphones in India" rather than "market for user attention" or "the market for consumer communication services" or "global and not limited to India". This is well defined market, relevant for a product and not a diffused market and we cannot find infirmity in the findings of the commission.

K. Relevant Market 2: Market for Online Display Advertising in India || Was it correctly identified?

142. Appellant claims that the Competition Commission incorrectly delineates the relevant market as the "Market for Online Display Advertising in India" and

the Commission committed errors in defining the relevant market. It fails to properly assess demand-side substitutability, even disregarding evidence that there is substitutability between: (i) offline advertising and online advertising; and (ii) online search and display advertising. The mistakes in the Commission's analysis were further compounded by its (i) misplaced reliance on the decisions of foreign competition authorities (which are inappropriate given the existence of applicable Indian law) and dated material; [Paragraphs 115 and 120, Impugned Order, enclosed at Annexure-1] and (ii) limiting the geographic market to India based on unverified assertions that conditions of competition are different in India relative to other parts of the world. [Paragraph 128, Impugned Order, enclosed at Annexure-1]. Respondent-Commission contends that the primary revenue generation activity of Meta is online display advertising. Therefore, it becomes necessary to examine various modes of advertising and the market dynamics involved therein to identify competitive constraints on Meta. [Paras 109@pg. 53 of the Impugned Order]. In the process of defining the market, three broader market definitions were considered and rejected by the Commission, which are examined individually below.

143. Firstly, Respondent-Commission contends that Appellants proposed a wide market definition of "*market for advertising services*" as **Online vs. Offline Advertising.** Appellants claim that there exists substitutability between online and offline advertising and the market must therefore incorporate both. However, Commission brings to our notice that online and offline advertising are not substitutable on the following bases:

143.1 Online and offline advertising services represent distinct markets, as per third-party submissions like those by Snap and foreign authorities like the European Commission decision in Google Search (AdSense) (Paras 143-147) case and Digital Platforms Inquiry Final Report by Australian Competition and Consumer Commission (ACCC; Para 2.6.1).

143.2 Offline advertising primarily aims to raise brand awareness by reaching a wide audience, while online advertising focuses on driving immediate consumer actions, such as purchases or downloads, by directly engaging users and leading them towards specific conversions.

143.3 Online advertising allows users to instantly interact with ads by clicking, which redirects them to a website or product page, while offline advertising does not offer immediate interaction, making engagement slower.

143.4 Online advertising offers superior performance tracking, allowing advertisers to monitor the effectiveness of their campaigns in real time and make quick adjustments to optimize their strategies, which is not feasible with offline advertising.

143.5 Online advertising enables tracking of user behaviour, providing insights into engagement that offline methods cannot match.

143.6 Offline platforms tend to reach a broader, more diverse demographic, while online advertising allows for more precise targeting, particularly engaging younger, tech-savvy consumers.

143.7 For businesses in modern times, relying entirely on offline advertising is not a practical option, as it lacks the reach and engagement capabilities that digital channels have.

144. We find the arguments of the Commission to be convincing that Offline platforms tend to reach a broader, more diverse demographic, while online advertising allows precise targeting and for businesses in modern times, relying entirely on offline advertising is not a practical option, as it lacks the reach and engagement capabilities that digital channels have.

145. Secondly Respondent-Commission contends that Appellants-Meta proposed that as an alternative, the relevant market should then be the '**market for online advertising services**' without differentiating between online display advertising services and online search advertising services. Appellant relied on submissions of Collectcent, Xapads, and Affle, to argue that advertisers can switch between the two modes of online advertising (search and display) and therefore, the two are substitutable. It was further submitted by the Appellant that technical advancements in digital advertising enables substitutability between various mediums of advertising. For instance, Google not only runs ads on its search engine but also has a display advertising delivery system. Lastly, it was submitted that Google and Amazon, which are Meta's rivals, submitted that there is substitutability between various mediums of advertising. and these submissions were ignored by the DG without any reasoning being provided. Rebutting above claim of relevant market to be '**market for online advertising services**' while not differentiating between online display advertising services

and online search advertising services, Commission claims that submission of the Appellants are misplaced on account of the following reasons:

145.1 Online search advertising and display advertising operate differently and therefore are not a part of the same market.

145.2 Search ads are triggered when a user enters specific queries into a search engine, allowing advertisers to match those queries with relevant ads. This system is intent-driven, meaning users are actively looking for information, products, or services, which makes search advertising particularly effective for generating immediate responses or conversions. Search advertising is thus, particularly effective at the bottom of the funnel, or the final stage of the buying process. Display ads, on the other hand, appear as users consume content on websites, apps, or social media platforms, typically without any direct user input or search query. These ads are interspersed with the content the user is viewing, such as news articles or social media updates, and are designed to raise awareness about a brand or product rather than directly prompting immediate action. Display ads target users based on their profile, behaviour, or past activity, making them audience driven. As a result, display advertising is more focused on building long-term brand awareness and generating interest at earlier stages of the sales funnel.

145.3 Search advertising operates on a pull method, where ads are shown to users who are actively seeking specific products or services by entering relevant search queries. In contrast, display advertising follows a push method, where

ads are presented to users as they browse websites or apps, even if they're not looking for a given product.

145.4 Advertisers can easily measure the success of their search advertising campaigns by tracking the number of clicks on ads and the conversion rates for specific keywords. This level of detail allows for precise adjustments to advertising strategies in real-time. In contrast, the impact of display ads is harder to quantify, as there is typically no direct link between viewing the advertisement and making a purchase, and success is often about broader brand recognition.

145.5 From a supply-side perspective, search advertising relies on advanced algorithms to match user queries with ads in real-time auctions, ensuring that the most relevant ads appear in response to specific searches. In contrast, display advertising is delivered through advertising networks that use data about users' browsing behaviour and interests to target them with appropriate ads across various websites.

145.6 Search advertising is primarily conducted on search engines, such as Google, where ads are displayed directly on the search results page based on user queries. In contrast, display advertising is distributed across a wide range of publishers, including websites, mobile apps, and social media platforms.

145.7 Switching from providing search advertising services to display advertising, or vice versa, would require significant changes in technology, audience engagement mechanisms, and ad-serving infrastructure. For instance, search advertising relies heavily on keyword-based targeting, while

display advertising focuses on user behaviour and profile data to place ads across websites and apps. These differences create substantial barriers to supply-side substitution between the two markets.

145.8 Submissions of Collectcent, Xapads, and Affle merely show that advertisers see the two modes of advertising as complementary and have different budgets and prioritization not that they see them as substitutable. Instead, they work in tandem to reach customers at different stages of their buying journeys.

145.9 Submissions as to technical advancements in digital advertising enabling substitutability between various mediums of advertising deserve to be rejected - all that is shown is that both mediums of advertising can be done by the same party and on the same web page, not that they are substitutable overall.

145.10 Google itself has been found to be dominant in the online search advertisement market in In **Re: Matrimony.com Limited v. Google LLC & Ors. Case No. 07 of 2012** (Paras 20-21 and 103-106) and **CUTS v. Google LLC & Ors. Case No. 30 of 2012**. The assessment has to be done in the context of overall information available on record and the corresponding market reality, and not on the basis of submissions of one or two parties.

145.11 Evidence and precedent from submissions of parties like Snap, LinkedIn, Taboola, Twitter and numerous others to investigations by ACCC, CMA, FTC, French Competition Authority, as well as the CCT's own prior holding in Case No. 07 & 30 of 2012, all support the position that online display advertising and online search advertising are different markets.

146. Appellant-Meta also argued that the geographic market should be defined internationally and not confined to India. To this end, Appellant submitted that markets for digital services and advertising services are global, and therefore to limit the market to India would be incorrect. It was further submitted by the Appellant that players in the advertising market (including Meta's rivals) offer similar services across countries (including India), and there is therefore nothing distinct about India that justifies geographically limiting the market. Finally, the Appellant submitted that its product decisions are generally made on a global level, and so the market should correctly be seen internationally.

147. On the arguments of the Appellant that geographic market should be defined internationally and not confined to India, Commission strongly refuted the same basis the following reasons:

147.1 Conditions of competition in the online display advertisement market are homogeneous within India, and thus the relevant market should be defined nationally, not globally. India has a unique regulatory environment that significantly impacts the operation of advertisement industry.

147.2 No concrete evidence that conditions of competition in the online display advertisement market are homogeneous across the globe has been provided.

147.3 Providing similar services across the globe or making of product decisions on a global basis, does not mean that competitive constraints are homogenous across the globe.

148. Therefore, the relevant market was finally defined as the 'market for online display advertising in India and we also don't find any infirmity in such delineation of the relevant market.

L. Dominance in the OTT messaging market: Assessed or not in the relevant market?

149. Appellant claims that the Commission incorrectly finds WhatsApp dominant in the alleged market for OTT messaging apps through smartphones in India [Paragraph 108, Impugned Order]. This is incorrect because the Commission firstly ignored evidence demonstrating that WhatsApp is constrained by competition and countervailing buyer power, such as evidence of multi-homing and low entry barriers; secondly cherry picked factors under Section 19(3) of the Competition Act to assess WhatsApp's dominance, contrary to the Hon'ble Supreme Court's decision in [42]**Coal India v. Competition Commission of India, (2023) 10 SCC 345** requiring the Commission to cumulatively consider all the factors [Paragraphs 87-89]; and lastly relied on Daily Average Users (DAU) and Monthly Average Users (MAU) metrics to measure dominance, disregarding that they are not suitable for that determination in dynamic digital markets and especially since rivals like Telegram and Signal did not provide DAU and MAU data.

150. Appellant claims that the Commission's conclusion that WhatsApp is dominant is without merit because that determination was made in an incorrectly defined relevant market (para 117). The Impugned Order incorrectly concludes Meta (operating through WhatsApp) is dominant in the market for

[42] Coal India v. Competition Commission of India, (2023) 10 SCC 345 Supreme Court's decision requires the Commission to cumulatively consider all the factors

OTT messaging apps through smartphones in India [para 108, Impugned Order, Annexure 1]. Appellant claims that Dominance must be analyzed in the context of a correctly defined relevant market. The Impugned Order's dominance analysis fails at the threshold for this reason. Even without prejudice to WhatsApp's submissions on the relevant market, the dominance analysis is flawed, as set out below.

151. Appellant also claims that the Commission's findings on dominance do not meet the requirements of the Competition Act or Section 19(4). Explanation (a) to Section 4 of the Competition Act defines a dominant position as a position of strength that enables an enterprise to (i) operate independently of competitive forces in the relevant market or (ii) affect competitors/consumers/the relevant market in its favour. The Competition Act requires all Section 19(4) factors to be considered when assessing dominance. The Supreme Court affirmed this cumulative requirement [paras 87-89, [42]**Coal India v. CCI, 2023 10 SCC 345**]. The Commission fails to consider both the definition of dominant position under Section 4 and several relevant factors set out under Section 19(4) in arriving at its finding of dominance. For example, the Commission discusses WhatsApp's position of strength, but does not adequately analyze if this enables WhatsApp to operate independently of competitive forces or materially affect the market, which is essential under Indian law. Merely identifying a position of strength is insufficient unless it is shown to have a material impact on competitive dynamics.

152. Appellant also claims that the Commission cherry-picks a few factors under Section 19(4): (i) market share, (ii) network effects/switching costs/entry

barriers, (iii) consumer dependence, and (iv) size/resources/economic power. It fails to consider other relevant factors such as: (i) level of vertical integration, (ii) market structure/size, (iii) economic power, (iv) social obligations and costs, and (v) relative development advantage. Established jurisprudence and Supreme Court precedent require a holistic assessment, which the Commission does not undertake. The Commission's findings on dominance are therefore erroneous [see also paras 12.42-12.43, [43]**Belaire Owners Assn. v. DLF Ltd., Case No. 19 of 2010**].

153. Appellant also claims that the WhatsApp is not dominant in the broader market for user attention, due to intense competition from global and Indian players (Google, YouTube, Snap, Telegram, Signal, Clubhouse, Spotify, ShareChat, Moj, and many more). Many of these rivals are rapidly growing, precluding any single platform from achieving dominance. The presence of diverse services and switching reduces consumer lock-in. Digital services with large user data (e.g., Google, iTunes Ping) have failed historically, reinforcing that data volume alone does not confer dominance.

154. Appellant also claims that the even in consumer communication services or a narrow OTT messaging segment, WhatsApp cannot act independently of market forces. The market is dynamic, with low barriers to entry and rapid innovation. Users multi-home (use multiple apps), which is evidenced by survey data (86% of Indian users multi-home, with an average of 3.81 apps per user – see Statista and Dr. Pinar Akman's Paper, Annexures 40, 41). Portability of user

[43] Belaire Owners Assn. v. DLF Ltd., CCI Case No. 19 of 2010…paras 12.42-12.43:CCI held that the same sort of conduct may be abusive for a dominant firm, but not be abusive for a non-dominant firm.

data, interoperability, and ease of switching further undermine dominance claims. WhatsApp must continuously innovate in response to rivals, illustrating its lack of independence [e.g., group video calls and disappearing messages introduced to counter competition].

155. Appellant also contends that the Impugned Order leans on DAU (daily active users) and MAU (monthly active users) as proxies for dominance. This is flawed as:

- These metrics do not account for engagement quality or user substitution.
- The analysis is incomplete, omitting rivals like Telegram and Signal due to lack of their DAU/MAU data, acknowledged as a gap [DG Report, para 5.40, Annexure 42].
- The Order inconsistently dismisses download data, yet uses it to support WhatsApp's supposed dominance [see Impugned Order, paras 65-66, 69, Annexure 1].

156. Other data (e.g., Statista Survey) is used in a static manner, not capturing the dynamic and multi-homing nature of Indian users.

157. Appellant also claims that the OTT messaging market has low entry costs and asset size does not create dominance; success comes from innovation and responsiveness (as shown by new entrants and failed incumbents). High R&D investment by Meta/WhatsApp indicates competitive pressure, not dominance [Impugned Order, para 99, Annexure 1].

158. Appellant also claims that the users have substantial countervailing power, evidenced by the capacity to multi-home and switch easily among a wide range of apps. The Commission misapplies Statista survey results and does not

properly calculate WhatsApp's actual usage share in a multi-homing environment. High multi-homing and innovation by competitors (Telegram, Signal, Moj, Josh, etc.) indicate that WhatsApp cannot operate independently.

159. Appellant also contends that the Impugned Order overstates network effects and ignores that low switching costs, high multi-homing, and new entrants (e.g., Telegram, Moj, Josh) offset any entrenchment. The assertion of a "winner-takes-most" market is not supported given the evidence of user switching and competitor growth.

160. Telegram, Signal, Snapchat, ShareChat, Moj, Josh, LinkedIn, X (formerly Twitter), YouTube, Netflix, Zoom, Skype, Microsoft Teams, Google Meet, TikTok, Roposo and others have amassed significant user bases and continue to grow. These rivals' innovations (e.g., Telegram's group video and chat transfers) and the rise of new technologies demonstrate that WhatsApp faces constant competition and cannot sustain dominance. Rapid changes in consumer preferences (e.g., during the COVID-19 pandemic), new technologies (AI, AR/VR), evolving services from telecom operators (RCS, default messaging apps), further illustrate a highly competitive, changing environment.

161. Appellant also contends that the Impugned Order's findings on dominance are erroneous and should be set aside because:

161.1 Dominance was not assessed in a correctly defined relevant market.

161.2 The required holistic factor analysis was not undertaken.

161.3 WhatsApp is not dominant given the dynamic, competitive nature of the actual markets involved.

161.4 There is substantial evidence of effective competition and multi-homing.

161.5 Usage and market share data were inappropriately applied and other key evidence was disregarded.

162. Refutting the claims of the Appellants, Commission contends that Appellant is dominant in the market for OTT messaging apps through smartphones in India. To assess whether Appellant was dominant in this market, five factors[44] were considered by the Commission as per Section 19 of the Act, which are examined hereinafter by us.

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[44] Section 19. Inquiry into certain agreements and dominant position of enterprise.
(1) …
(2) ....
(3) ….
(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;
(l) 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.

(5) ….

(6) ….

163. Firstly, market share of the enterprise which is a relevant factor in terms of Section 19(4)(a) of the Act. **Appellants' stance** is that the DAU and MAU data may not be relied on. This is because two of WhatsApp's primary competitors, Telegram and Signal, did not provide any data. On the other hand, **CCI's Position** is that Statista's Companies and Products Report for Telegram (Telegram Statista Report), stated that between January and April of 2022, the average number of MAUs for Telegram in India stood at 86.6 million as against cumulative MAUs of Meta at 731.95 million (i.e., 534.65 million for WhatsApp and 197.30 million for Facebook Messenger). Additionally, as per news article submitted by Telegram, Telegram has approximately 151.5 million downloads in India since 2014, whereas WhatsApp has an overwhelming 1.4 billion downloads during the same period. Therefore, Telegram is not eating into WhatsApp's dominance in any material way. Global Consumer Survey of Statista notes that Signal does not feature in top ten messenger apps, and as per news article submitted by Telegram Signal has only 3.9 million downloads, making it a very small player. Its unwillingness to engage with DG also indicates lack of concern in developments in OTT messaging market. As per data collected during the investigation, WhatsApp has more daily active users (DAU) and more monthly active users (MAU) than all its competitors combined (especially when its numbers are combined with Facebook Messenger). Their market share is therefore extremely high, making them dominant [Paras 57-62 and 47.5 @pgs. 34-36 the Impugned Order]. DAU is a critical measure of competitiveness and success. Messaging involves frequent, often daily exchanges such as text,

(7) ....

media, and group interactions that reflect how integral the app is to users' communication. High DAU levels therefore demonstrate strong engagement, network value, and a reinforced market position. [Para 59 @pg. 35 of Impugned Order].

164. **Appellants' stance** with respect to Statista data is that it cannot be used, as it is not part of DG report and was never meant for purpose of assessment of dominance, was rather a broad-based international survey with its own objectives. On the other hand, **CCI's Position** is that Statista data indicating strong user preference for WhatsApp is being used to support other findings, if not the entirety of the analysis additionally, it is similar to the findings in the survey report filed by WhatsApp itself, and additionally WhatsApp too has sought to rely on parts of the Statista report. It is therefore germane and supports all the other data on this point.

165. **Appellants' stance** is that the download data of Telegram and Signal shows trend of rapid growth, even if neither entity can presently contend with Meta in terms of total downloads, DAU, or MAU. On the other hand, **CCI's Position** is that WhatsApp itself stated that 'subscribers' or 'registered users' data is an unreliable metric due to the existence of fake accounts and accounts set up for fraudulent purposes, as well as users who register with a new phone number (but do not transfer their account). Therefore, download data of Telegram and Signal is an unreliable metric. At any rate, downloads are not a useful metric. A user may download an app but may not be using the same for various reasons. User engagement metrics such as DAUs and MAUs are better metrics. In fact, DAU/MAU ratio can also be used this ratio provides insight into

how frequently users engage with the platform within a given month. DAU/MAU ratio for WhatsApp is around 80% whereas that of ShareChat, Snap and Viber are 35%, 37%, 40%, respectively. This indicates that WhatsApp users interact with their platforms more frequently and have higher platform dependency compared to other applications.

166. **Appellant** also contends that contrary to claims by the Commission Meta doesn't enjoy gains from network effects[45], and cannot be a relevant factor in terms of Section 19(4)(h) of the Act. Appellant contends that no great entry barriers have been created by network effects, since cost of operation is low and there is no significant capital requirement. **CCI's** contends that the larger the user base, the greater the lock-in, and the likelier it is a new user will also choose the same dominant entity's product which his contacts already use. A winner takes all scenario is created where there is concentration of users and this makes it difficult for competitors to attract users. WhatsApp, with its large user base, also has high switching costs as the user migrating to a competing app has to also convince his contacts to do the same. This decreases incentive to switch and therefore, enhance network effects. This self-reinforcing cycle knows as 'tipping', which lead to exclusion of competitors after WhatsApp reached a critical size. [Para 76-80 @pgs. 41-43 the Impugned Order]. This also leads to indirect network effects in multi-sided markets, where growth in user base also attracts more third party developers, advertisers, content creators, and crucially businesses, which consequently entrenches dominance. These

[45] Network effects: larger the user base, the likelier it is that a new user will also choose the same dominant entity's product which his contacts already use. A winner takes all where there is concentration of users and it is difficult for competitors to attract users

indirect network effects allowed for launch of WhatsApp Business etc., further enhancing its utility and creating greater entry barriers for competitors. [Para 81 @ pg. 43 the Impugned Order]

167. Reliance is placed on order in Jio/Jaadhu by the **Appellant**, which observes consumer communication applications market does not exhibit significant entry barriers. Additionally, reliance was placed by the Appellant on Telegram's allegedly stating that it has not faced any entry barriers in India. [Para 82@pg. 44 of the Impugned Order]. **CCI's** contends that the Observation made in Jio/Jaadhu is no longer applicable in fast-evolving market, conditions can change and were anyway made in the distinct context of a forward-looking combination assessment, not a present-time dominance assessment. Moreover, Jio/Jaadku is a combination case. The decision under the Combination Regulations is a forward-looking exercise where potential market outcomes future market dynamics are predicted to gauge the potential appreciable adverse effect on competition. Abuse of dominance case assess the prevailing market conditions to determine if any anticompetitive conduct is occurring. Thus, the CCI's conclusions from a dated assessment in an another context are not sufficient to disregard the market realities revealed in an in-depth investigation. Telegram's submissions were taken out of context, and Telegram itself has clarified that it is in no position to assess the impact of WhatsApp's policies on competition. [Para 83-84 and 87-88 @pgs. 44-46 the Impugned Order]

168. Appellants have also relied on the arguments of multihoming. Appellant claims that ability to multi-home means there exists no real dependence, and

consumers can have both WhatsApp and Telegram on their phone and switch between them, and in fact they often do. Appellant also relied on observations in Vinod Kumar Gupta v. WhatsApp, Fast Track Call Cab Private Limited v. ANI Technologies [Para 90 @pg. 47 of the Impugned Order]. **CCI's** contends that efficacy of multi-homing is greatly reduced by network effects, and fact that these messaging apps are not interoperable. Activity will therefore remain concentrated on app with bigger user base, even if there is multi-homing; consequently, dependence of consumers on that app doesn't really diminish. There is a high level of dependence of consumers on WhatsApp. Extent of multi-homing, as indicated by Dr. Pinar then Akman paper, seems incorrect. If, as stated in the paper, 86% of users multi-home between WhatsApp's and its competitors, WhatsApp's competitors' MAUs should be much higher (as opposed to only -86 million users for Telegram compared with WhatsApp 534 million users). Telegram and Signal have much smaller user bases compared to WhatsApp. [Para 91 @pgs. 47-48 of Impugned Order]. Further, Unlike Vinod Kumar Gupta's case, in the present matter, the Commission has the benefit of a detailed investigation which has sufficiently brought out the switching costs associated with OTT messaging apps. [Para 147.3 @ pg. 84 of the Impugned Order]

169. Appellants also contend that the asset size of an enterprise is not determinative of its position of strength or dominance in technology markets as the costs of entering and operating in this space are low. Market entry does require significant capital investment, scale, large numbers of staff, or access to local distribution. [Para 98 @pg. 50 of the Impugned Order] On the contrary

CCI's claims that in terms of size, resources and economic power of Meta globally, no competitor even comes close. Jio is most comparable, but even so, its assets are not comparable to Meta's assets. [Paras 95-97 @pgs. 49-50 of the Impugned Order]. WhatsApp itself admits that financial resources are important to innovate and operate in the market, which will then naturally become a factor when it comes to dominance. [Paras 99-100 @ pg. 50 of the Impugned Order]

170. It was also brought to our notice that Meta operates a multi-sided ecosystem encompassing platforms like Facebook, Instagram, WhatsApp, and Messenger, connecting billions of users with advertisers, businesses, and developers. This ecosystem enables Meta to generate value from network effects, as users on one side (individuals) enhance the platform's attractiveness for the other side (advertisers and businesses). These companies also share data amongst themselves, and such functional integration enables Meta to enjoy economies of scale. Paras 102-103 @ pg. 51 of the Impugned Order]

171. The arguments of the Commission are summarized hereinafter:

171.1 **Market Share [Section 19(4)(a)]:** CCI relied on data collected during investigation to show that <u>WhatsApp has significantly more daily and monthly active users (DAUs and MAUs) than all competitors combined</u> (eg. 534 million vs. 86 million Telegram MAUs). Telegram and Signal's total number of downloads were noted but deemed not indicative of market power or user engagement since Signal had few downloads (3.09 million) and DAU/MAU ratios for WhatsApp were ~80%, versus 35-40% for rivals. Appellants objections to CCI relying on DAU/MAU over registered user base and Statista's reports were

rejected because Appellant had itself submitted that 'registered user' were not a reliable metric and WhatsApp itself had placed reliance on Statista's reports.

171.2 **Network effects [Section 19(4)(h)]:** CCI noted that WhatsApp's larger user base creates a greater lock-in effect and produces a "winner-takes-all" scenario, making it difficult for competitors to attract users. These network effects are reinforced by high switching costs, producing even greater direct network effects (addition of users) and indirect network effects (addition of business integration, third-party developers), creating substantial entry barriers. Appellants' arguments reliance on the Jio/Jaadhu case were dismissed as inapplicable due to the same being a forward-looking combination assessment and not present-time dominance assessment, as well as changed market conditions in a rapidly evolving environment. Reliance on Telegram's statement that it had not faced entry barriers in the market were shown to have been cherry-picked, as Telegram had clarified it was in no position to assess impact of WhatsApp policy on competition.

171.3 **Consumer dependence [Section 19(4)(f)]:** CCI found that actual consumer dependence on WhatsApp persists. Multihoming was greatly reduced due to network effects and of limited effectiveness because most user activity was concentrated on WhatsApp, as evident from much higher DAU / MAU compared to its competitors. Reliance on Dr. Pinar Akman's observations regarding multihoming were rejected due to reasons cited in the preceding section. Appellants reliance on ***Vinod Kumar Gupta case*** was distinguished on grounds of a more detailed investigation in the present matter (*discussed in detail separately*).

171.4 **Size, resources and economic power [Section 19(4)(b), (c) and (d)]**: CCI found that Meta's financial and operational resources far exceed any of its competitors. Further, it was found that asset size, while not entirely determinative, is relevant to technological innovation market positioning and eventually establishing dominance, as admitted by Meta.

171.5 **Meta's ecosystem integration [Section 19(4)(f)]**: Meta's integration across platforms (Facebook, Instagram, Messenger, WhatsApp) and multi-sided ecosystem consisting of various products and services generates significant network effects and economies of scale, facilitates connecting various stakeholders like users and advertisers, and increases the lock-in effect on its platforms as users enhance the platform's attractiveness for advertisers and businesses.

172. Bases above arguments and also materials placed on record we note that as per Section 19(4)(a) of the Act the market share of the enterprise is a relevant factor, apart from entry barriers arising from the network effects that Meta enjoys, which can also be a relevant factor in terms of Section 19(4)(h) of the Act. Furthermore, dependence of consumers on Meta, is also a relevant factor in terms of under Section 19(4)(f) of the Act. We also note that the size, resources, and economic power of Meta, as compared to that of its competitors, which are also relevant factors under Sections/19(4)(b), 19(4)(c), and 19(4)(d) of the Act. And finally, we note that integration of Meta's OTT apps with the broader Meta ecosystem, is also a relevant factor under Section 19(4)(e) of the Act. On consideration of the aforementioned five factors, the Appellant was found to be dominant in the market for OTT messaging apps in India and we

don't find infirmity in such a finding. We also need to note that "*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*"[44] . So, the Commission was well within its jurisdiction to consider any one or all factors while inquiring into the issue of dominance. We cannot find any infirmity in the analysis of the Commission bases the definition of dominant position under Section 4 and relevant factors set out under Section 19(4) in arriving at its finding of dominance.

173. It was also brought to our notice about an additional objection raised by the Appellant that zero priced markets operate differently from regular markets, and the CCI failed to apply any appropriate economic test or reasoning that is specific to zero-priced markets. The Commission argues that Appellant's argument is misconceived as the test for dominance remains the same even in a zero-priced market and at any rate, the term zero-priced markets is a misnomer as consumers end up paying with data instead of money, which has been appropriately analysed in the impugned order. [Paras 102-103@pgs. 51-52 of the Impugned Order]. We find strength in the arguments of the Commission on this count.

174. In our appraisal for determination of dominance in WhatsApp's dominance in the OTT messaging app market, we find that the CCI applied the seven factors under Section 19(4) of the Competition Act comprehensively to assess WhatsApp's dominance in this market. We note that WhatsApp has an overwhelming market share, as demonstrated by data showing it has significantly more daily and monthly active users (DAUs and MAUs) than all

competitors combined (e.g., 534 million vs. 86 million for Telegram). The DAU/MAU ratios also indicate deeper user engagement (~80% for WhatsApp versus 35-40% for rivals), confirming market power beyond mere downloads. We find that the CCI correctly prioritized DAU/MAU metrics over registered user counts and appropriately rejected appellants' reliance on generalized third-party reports, noting that WhatsApp itself used such data—showing a more accurate picture of active market dominance.

175. We also find that Network effects were found to reinforce WhatsApp's dominance, with a larger user base producing lock-in effects and a "winner-takes-all" dynamic that impedes competitors' ability to attract users, compounded by high switching costs and indirect network effects from business integrations and third-party developers. The appellants' reliance on unrelated precedent (Jio/Jaadhu case) was rightly rejected as irrelevant given it was a forward-looking merger case and not an assessment of present dominance, with market conditions having evolved substantially in a dynamic digital environment. We also note that the consumer dependence on WhatsApp remains high with limited multihoming effectiveness, confirmed by concentrated user activity on WhatsApp compared to rivals, and expert observations cited by the appellants were distinguished for lack of detailed investigation in this specific context. Meta's significantly superior size, resources, and economic power have been recognized as reinforcing WhatsApp's dominant position, particularly in technological innovation and market positioning. We also agree that the integrated Meta ecosystem—including Facebook, Instagram, Messenger, and WhatsApp—increases lock-in effects

through network effects and economies of scale, enhancing WhatsApp's competitive strength and the attractiveness of the platform for advertisers and businesses. We also note that dominance assessment remains same as WhatsApp operates in zero-priced markets, holding that dominance principles apply equally and that consumer payment via data collection constitutes valuable consideration in competition analysis.

176. We agree with the basis of this multifactor analysis, by which the CCI rightly concluded that WhatsApp holds a dominant position in the OTT messaging apps market in India, with substantial entry barriers and competitive constraints resulting from its market share, network effects, consumer dependence, financial and technological resources, and ecosystem integration. This dominance is firmly established and supported by both quantitative data and qualitative market factors, ensuring a robust foundation for the Competition Commission's findings and regulatory intervention.

177. The CCI has been successfully able to make a case that WhatsApp is dominant in the market for OTT messaging apps through smartphones in India, based on several factors under Section 19(4) of the Competition Act. It emphasized that WhatsApp has an overwhelmingly large active user base (534 million MAUs vs. Telegram's 86 million), enjoys strong network effects that lock in users, and faces high switching costs due to lack of interoperability with other apps. The CCI has also brought before us that multihoming (using multiple apps) does not indicate real substitutability since user dependence and engagement remain centered on WhatsApp. It has also successfully highlighted Meta's vast financial resources, ecosystem integration across Facebook,

Instagram, and Messenger, and technological advantages that reinforce its position. Thus, CCI concluded that WhatsApp holds a dominant position in the Indian OTT messaging market, enabling it to act independently of competitors and users.

M. Dominance in the Market for Online Display Advertising in India: Assessed or not in the relevant market?

178. Appellant-Meta contends that the Commission fails to determine that Meta is dominant in the alleged market for "Online Display Advertising in India". To establish an abuse of dominance, the Commission must first find Meta dominant in the relevant market. Here, the Commission does not find Meta dominant in the alleged market for "online display advertising in India". Instead, the Commission only claims that Meta holds a "leading position" in the market. But a "leading position" is not the legal standard for an abuse of dominance analysis under Section 4. The Commission makes this finding based on: (i) advertisement impressions sold; and (ii) advertising revenue. However, these are not appropriate metrics to measure a company's position in the market. Further, the Commission failed to factor in the vibrant nature of competition in the market and the capabilities of competitors. Indeed, market realities and third-party submissions confirmed that Meta's rivals are aggressively competing for larger shares of the dynamic and ever-growing advertising market.

179. Refuting the arguments of the Appellant-Meta, the CCI submits that it did not find Appellant (Meta) to be in dominant position in the relevant market. However, Appellant was found to be in a leading position in the on account of the following reasons:

179.1 Ad impressions: Ad impressions sold serve as an appropriate metric to assess the market power of players in the online display advertising space, as they reflect the reach and visibility a platform offers to advertisers. A higher number of advertisements impressions indicate the platform's ability to capture more user attention and deliver advertisements effectively, thereby demonstrating its influence and competitive strength in the market.

179.2 A review of the total number of advertisement impressions sold by Meta in India in 2016 Meta through Instagram and Facebook shows that it sold 442.86 billion ad impressions. Moreover, Meta sold 759.38 billion ad impressions in 2017, whereas Amazon, Meta's nearest competitor sold 11 billion ad impressions. Overall, Meta sold 63 times more ad impressions than Amazon in 2017, 71 times more in 2018, 67 times more in 2019 and 59 times more in 2020.

179.3 Finally, Meta sold 3013.2 billion ad impression in 2021 and had more than 95% of ad impressions sold by other advertisers.

179.4 Ad revenue: For competitors who did not provide data related to ad impressions, the CCI (and DG) considered data relating to advertisement revenue instead to assess the market position of the Meta's competitors.

179.5 Meta's display advertising revenue was found to be significantly higher than that of any of its competitors in the online display advertising market. The advertisement revenue of Meta increased nearly sixfold over 2015 to 2021, from USD 365.45 million to USD 1887.43 million. None of Meta's competitors have been able to match this growth in advertisement revenue.

179.6 Google is the second largest player in the online display advertisement market but earns much less than Meta. Google earned USD 264.36 million in 2021 against Meta's USD 1887.43 million.

179.7 The Commission contends that these comprehensive figures in the table at para 219 @ pg.132 of Impugned Order indicate that Meta not only generates far higher advertisement revenue compared to its competitors but also serves an overwhelming number of advertisement impressions in the Indian display advertisement market. Even the closest competitors, such as Google and Amazon, have a considerably lower share of both advertisement impressions served, and revenue generated. Smaller players such as LinkedIn, InMobi, Affle, and Twitter, hold an even more negligible share, making it clear that Meta's scale and reach are unmatched in this segment.

180. Thus in above backdrop we find that Commission has failed to determine that Meta is dominant in the market for "Online Display Advertising in India".

N. Violation of Section 4(2)(a)(i) || Abuse of Dominance by Appellants – issue of imposition of unfair conditions on users

181. Appellant-Meta contends that the Commission has incorrectly found an abuse of dominance. Firstly, Appellant-Meta claims that the impugned order ignores that Meta and WhatsApp are separate legal entities when finding a violation under Section 4(2)(a)(i). The Impugned Order improperly imposes liability on Meta for WhatsApp's alleged conduct, disregarding that (i) Meta and WhatsApp are separate legal entities; (ii) WhatsApp, not Meta, offers and operates the WhatsApp service; and (iii) the subject of the investigation is the 2021 Update, which relates to the WhatsApp service. Courts have consistently

recognised this entity distinction, finding that Meta is not the relevant entity for the relevant service. The Commission had no basis to ignore this entity distinction and impute WhatsApp's alleged conduct to Meta.

182. To establish the abuse of dominance by Appellants-Meta, the Commission claims that there has been violation of Section 4(2)(a)(i) with the imposition of unfair condition on users. The Commission claims Section 4(2)(a)(i)[38] of the Act has two ingredients one, the element of imposition; and two, an unfair condition. Both elements have been comprehensively established by the CCI and are being noted herein.

183. The Commission claims that 2021 Policy was mandatorily imposed on users ('take it or leave it') and the text of the policy, manner of rollout and the response of the users make it clear that there was an imposition of the 2021 Policy by the Appellants and the same was seen as such by the users at large.

184. The Commission relies on the chronology of events to establish that there was an imposition of 2021 policy by the appellants. We recapitulate the chronology to understand the argument, which is captured in next few paras:

a. On 05.01.2021, WhatsApp users started to receive notifications from WhatsApp informing them about the changes in the terms and conditions of WhatsApp's terms of service and privacy policy. [Para 137.1 @ pg. 76 of Impugned Order]

b. The said notification stated that users "need to accept these updates to continue using WhatsApp" and set out the cut off dated as 08.02.2021 for mandatorily accepting the new terms in their entirety, including terms regarding sharing of

their data across all the information categories with other Facebook Companies. The 2021 Policy was to be in effect from 08.02.2021 for existing users, and applicable to new users upon mandatory acceptance. [Paras 3 and 137.2 @pgs. 3 and 76 of Impugned Order).

c. This notification and the mandatory acceptance of the changes brought about by the 2021 Policy were in stark contrast to the earlier WhatsApp Policies of 2016 (25.08.2016), wherein WhatsApp users had the option of opting out of sharing their WhatsApp data with Facebook. [Paras 2-3 @pgs. 2-3 of Impugned Order; Para 7.34 @ pgs. 129-130 of DG Report]

   Note - Appellants have argued that the 2016 policy was the same as the 2021 Policy. This aspect will be dealt with in the next section on unfair conditions.

d. Thereafter, on 15.01.2025 WhatsApp deferred the last date for accepting the 2021 Policy from 08.02.2021 to 15.05.2021, while repeating the above language of necessity of acceptance to continue usage of the WhatsApp services. The same was conveyed to users by way of a second in-app user notification dt. 19.02.2021. [Paras 137.4 and 137.5 @ pg. 77 of Impugned Order]

e. This decision to extend the last date was not a suo moto decision, but one that arose out of the intervention of the relevant authorities in this regard, such as CCI. [Para 147.2 @pg. 84 of Impugned Order)

f. Finally, on 07.05.2021, WhatsApp released an official statement on its website confirming that no account will be deleted functionality because of the 2021 Update. Few extracts from this statement are as follows:

"...No one will have their accounts deleted or lose functionality of WhatsApp because of this update. The majority of users who have seen the update have already accepted.

...

WhatsApp won't delete your account if you don't accept the update...." [Para 137.6 @pgs. 77-78 of Impugned Order]

g. However, even after the aforementioned press statement, screenshots of in-app notification reproduced in the impugned order show that no such information regarding extension was being provided to users, and users were in fact being prompted to accept the privacy policy. [Para 137.7 @ pgs. 77 of Impugned Order]

h. As a result, for a period of over 4 months between 05.01.2021 and 07.05.2021, WhatsApp users were under the impression that accepting the 2021 Policy was mandatory to continue using WhatsApp, forcing users to accept the policy to maintain access to WhatsApp services. [Paras 145-146 @pg. 83 of Impugned Order)

i. By 07.05.2021, a majority of WhatsApp users (264,500,000 users) had accepted the changed terms and conditions of the 2021 Policy out of fear of not being able to avail WhatsApp's services after 15.05.2021. 264,500,000 WhatsApp users represent 61% of Daily Active Users (DAUs). [Paras 144-145 @ pgs. 82-83 of Impugned Order]

j. On 22.05.2021, WhatsApp sent a letter to MeITY that it would not limit functionality of WhatsApp till passage of the DPDP Bill. A similar statement was made in affidavit dated 11.05.2021 filed in Dr. Seema Singh v. Union of India [Para

31 @ pg. 35 of Annexure to DG Report; Paras 144-145 @pgs. 82-83 of Impugned Order]

k. It will be seen that the MeITY letter is contingent and transitory, leaves open the possibility of reinstatement of the requirement of the mandatory acceptance after passage of PDP bill. Thus, the final and present position of WhatsApp is as follows:

   The written contract between users, i.e. privacy policy, continues to require mandatory acceptance with a threat of discontinuance and has never been amended.

l. Temporary respites have been given by WhatsApp by way of press releases or letters to authorities, which do not carry the force of law, are unenforceable by consumers and can be withdrawn by WhatsApp unilaterally at its own whims. In fact, the policy that this Tribunal is being asked to uphold remains on take-it-or-leave basis and does not include the aforementioned temporary respites.

185. The Commission also claims that ultimately, whether acceptance of the 2021 Policy is a mandatory imposition or not is to be understood from the plain language of the policy itself. Admittedly, all versions of the online acceptance screen presented to users require mandatory acceptance as a pre-condition for continuing WhatsApp usage. WhatsApp could have amended its acceptance page to reflect non-mandatory nature thereof but has pointedly failed to do so. [Screenshots available in para 137.2, 137.5 and 137.7]

186. The Commission also claims that while the language makes it clear that acceptance of the privacy policy remains mandatory for new users, it should not be lost sight that this condition has also been implemented for users who had

exercised the opt-out option while accepting the 2016 privacy policy due to following explanations:

186.1 While WhatsApp has throughout called the 2021 Policy as the "2021 Update", the policy itself does not term itself as either an update or an amendment to the 2016 policy. Contractually speaking, the 2021 policy is a fresh contract which would supersede and override all previous contracts including the 2016 policy. In this regard, the 2021 WhatsApp Terms of Service state that the said terms "make up the entire agreement [...] and supersede any prior agreements." The Terms of Service also include a reference to the 2021 policy and contain a hyperlink directing users to the same. This 'entire agreement' and 'supersession clause' further shows that the 2021 set of contracts inter alia including Terms of Service and 2021 Policy constitutes a fresh contract between WhatsApp and its users, superseding the 2016 agreement.

186.2 The 2021 policy has no carve out or savings clause protecting rights created under the 2016 policy such as the option of opt-out taken by users thereunder. Nor was any such carve out offered in the in-app notifications shown to users by WhatsApp, which would enable those who had opted out in 2016 to continue to avail the same benefits under the 2021 Policy. Instead, the online acceptance of the 2021 policy mandates that all existing and new users (which would include those users who had accepted the 2016 policy with an opt-out option) must accept the new terms to continue using WhatsApp.

186.3 When faced with the pointed question vide DG's notice dated 20.07.2021 of whether rights of this class of users (2016 opt-outs) is protected, WhatsApp gave a vague statement [Section B, Paras 26-28 @ pgs. 98-99 of the Annexure to DG Report). The statement which claims to protect data of 2016 users is not in consonance with any contractual provision nor has WhatsApp provided evidence that it is actually doing so or that it is even technically feasible to do so.

187. The Commission has also brought to our notice that in response to CCI's finding that WhatsApp created a manufactured sense of urgency in the minds of consumers between 05.01.2021 and 07.05.2021, which compelled them to accept the 2021 Policy for fear of losing access to WhatsApp services, WhatsApp has contended that only 43.33% of its pre-existing/registered users accepted the said update, which acceptance rate does not indicate compulsion. [Para 143 @ pg. 81 of Impugned Order]. The Commission contends that WhatsApp's argument is incorrect because:

a. WhatsApp itself states that "subscribers" or "registered users" data is unreliable due to the existence of fake accounts and accounts set up for fraudulent purposes, as well as users who register with a new phone number but do not transfer their account [Para 144 @pg. 82 of Impugned Order; Para 29 @ pg. 100 of the Annexure to DG Report]; and

b. Daily Active Users ('DAU') is a better metric as it reflects real-time engagement of users, and in the present case, DAU shows that 61% of daily active users had accepted the 2021 update before the 07.05.2021 announcement [Paras 69-70 and 144 @pgs. 38-39 and 82 of Impugned Order].

c. The approach of the CCI in using DAU data is supported by the 2019 judgment of the Bundeskartellamst (upheld by the CJEU in 2023 as discussed separately), which not only relies on the DAU data, but also gives an exhaustive explanation of why in assessing digital platforms like the Appellants, DAU data is preferable to both, Monthly Active Users (see: paras 406, 407 and 409) and registered user data (see: para 411).

d. Significantly in para 409 and footnote 400, the Bundeskartellamst takes note of Facebook's (now Meta) 2017 Annual Report wherein Meta itself stated that "We view DAUs, and DAUs as a percentage of MAUs, as measures of user engagement; MAUs are a measure of the size of our global active user community."

e. In the 07.05.2021 announcement, WhatsApp has itself admitted that a "majority of users" had accepted the update [Para 145 @pg. 83 of Impugned Order; Para 9 @pg. 245 of Annexure to DG Report].

188. The Commission has also brought to our notice that WhatsApp itself has argued that the 2021 Policy applicable to users throughout India is the same policy which applies to the users globally. This is incorrect because while in India users do not have an option to revoke their consent once it is given, WhatsApp's privacy policy in the European Union region gives users the option to access, rectify, port, and erase user information, as well as the option to restrict and object to certain processing of user information. The aforesaid differences demonstrate the scope and feasibility for providing greater transparency and choice for users in India. Moreover, as pointed out in

preceding sections, various competition authorities globally have passed orders against the said policy. [Para 170 @ pg. 100; Para 7.38 @pg.132 of DG Report]

189. The Commission has also brought to our notice that WhatsApp has further argued that users voluntarily consented to the 2021 Policy and such consent was contractually valid. However, consent given by users cannot be said to be voluntary because effectively, it is not possible for users to switch from a dominant entity like WhatsApp to other OTT messaging apps due to network effects and low interoperability of messaging apps [Paras 141.3 and 147.3 @ pgs. 80-81 and 84 of Impugned order].

190. The Commission has also brought to our notice that economic literature discusses how "choice architecture" or design tricks can coerce users into accepting terms that a truly competitive process might not produce. For example, if WhatsApp's interface and network effects effectively left users feeling they had no real choice but to click "Agree." In the present case, the "dark pattern" might not be a complex User Interface trick, but the very framing of the choice i.e. "agree or be cut off from your social network" is a powerful form of coercion leveraging users' status quo bias and fear of losing connections. This calls into question the voluntariness of consent.

191. The Commission also contends that given the vague and expansive terms used to define the extent of data collection in the 2021 Policy as well as the fact that users in digital markets generally do not possess the same level of information or bargaining power as the digital platforms they engage with, users are not aware or have little knowledge about the amount of personalised

information they are making available to WhatsApp, as well as the value of that data and where it's being sent. Therefore, user consent cannot be said to be informed consent. [Paras 167 and 169 @ pgs. 99-100 of Impugned Order]

192. The Commission has also brought to our notice status quo bias also strongly enhances the tendency of users to stick with default data protection settings, making active consent unclear. [Para 7.45 @ pg. 134 of DG Report].

193. The Commission contends that WhatsApp's actions compelled users to accept the 2021 Policy along with its mandatory data sharing provisions. The Commission finally argues that the evil sought to be addressed by Section 4(2)(a)(i) of the Competition Act is the imposition of unfair terms. In the present case, the 2021 Policy was imposed on users as the same was mandatory and was implemented in a scenario where users were threatened with discontinuation of an important service with little time to consider their option.

194. The Commission has argued that the 2021 Policy imposes unfair conditions on users. It claims that they are vague and expansive terms that permit expanded data collection for non-WhatsApp purposes. The Commission has argued claims that the 2021 Policy is unfair as it negates user choice in the sensitive matter of sharing of their data and shares data in excess of any legitimate requirement. The actions of WhatsApp are a classic case of exploitative abuse which is made worse by network effects inherent in a dominant service like WhatsApp that has become an essential tool of communication [Para 146 and 148 @ pgs. 81, 85 and 86 of Impugned Order).

195. The Commission has also brought to our notice the vast scale of data collection by WhatsApp which has been detailed by CCI in the impugned order:

a. Information provided by ordinary users: Paras 155.1-155.8 @ pgs. 89-90
b. Information collected by WhatsApp when users choose it services: Paras 156.1 -156.3@pgs. 90-91
c. Information collected by WhatsApp from third parties: Paras 157.1-157.5@ pgs. 91-92
d. Information about business users collected by WhatsApp when they use a WhatsApp Business Account: Paras 158.2.1-158.2.7 @pgs. 93-94
e. Information about business users collected by WhatsApp when they use the WhatsApp service: Paras 158.1.1-158.1.5 @ pg. 93
f. Information about businesses' customers from businesses on WhatsApp (app and API): Paras 159-162 @ pg. 94

196. The Commission has also brought to our notice the change in terms between the 2016 and 2021 policies may be considered, which has been dealt in as verbatim comparison of the 2016 and 2021 policies. [Table, Para 164.1 @ pgs. 95-98 of Impugned Order]. Commission has argued that from an examination of this table, it is clear that the phrasing of the 2021 Policy was significantly broadened to include data collection on a number of parameters that were not mentioned earlier. These parameters included usage and log information, time, frequency and duration of a user's activities and interactions with others, use of features like-messaging, calling, status and groups (including group name, group picture, group description), payments or business features, transactions and payments, device and connection information like battery level, signal strength, app version, browser information, mobile network

or ISP (including phone number, IP address, device operations information), language and time zone, and general location data. [Para 164 @pgs. 95-98 of Impugned Order]

197. WhatsApp, however, argued that there was no expansion of data being collected in the 2021 Policy as compared to the 2016 Policy, and any additional language in the 2021 Policy was merely a clarification issued in the interest of transparency. However, the Commission has argued that the defense that the changes in the 2021 Policy are merely clarificatory and meant to enable transparency does not hold water. The language in the 2021 Policy is vague, broad, and open-ended, relying on terms such as "includes," "such as," and "for example." This creates uncertainty regarding the specific categories of information being collected and shared. The use of non-exhaustive lists in the policy suggests that WhatsApp retains the flexibility to expand the scope of data collection at any time and justify it as being covered under previous policies. Data is the user-side consideration for WhatsApp services and therefore a non-exhaustive list of data points means that users are not aware of the actual cost of such services. [Paras 166-167@ pgs. 98-99 of Impugned Order).

198. The Appellants have further placed reliance on this Tribunal's Judgment in Shri [12]**Vinod Kumar Gupta vs. CCI & Ors. CA(AT) No. 13 of 2017** and the underlying CCI order **Shri Vinod Kumar Gupta, Chartered Accountant and WhatsApp Inc. Case No. 99 for 2016** to argue that the 2016 Policy had been effectively upheld. Since in the submission of Appellants, there is no difference between the policies of 2016 and 2021, it is claimed that the 2021 Policy cannot now be faulted.

199. The Appellant's reasoning that the 2016 Policy had been effectively upheld is flawed as claimed by the Commission for the following reasons:

a. for the reasons discussed herein earlier, the 2016 and 2021 policies are fundamentally different. The scope of data collection and sharing under the two policies is different, with the 2021 Policy being much more expansive.

b. The CCI's order was passed under Section 26(2) of the Act, whereby the matter is closed at the initial stage without order of investigation and purely based on the contents of the information received by the CCI. Being in the nature of an in limine dismissal, the CCI would not have occasion to delve deeply into the matter or have the benefit of a detailed investigation by the DG. On the contrary, the impugned order was a final order passed under Section 27 of the Act, after a detailed investigation which threw up cogent evidence and hence, cannot be compared to a preliminary order passed under Section 26(2) of the Act.

c. In [18]**Flipkart Internet Pvt, Ltd. and Ors, V. Competition Commission of India** and Ors., **WA Nos. 562/2021 and 563/2021 (GM-RES)** (Paras 42), a Hon'ble Division Bench of the Hon'ble High Court of Karnataka has held as under:

> "42. In the considered opinion of this Court, the order passed in the case of AIOVA does not help the present appellants. The order was passed by the CCI on 6.11.2018 directing closure of the case under Section 26(2) of the Act of 2002. The present order has been passed by the CCI under Section 26(1) of the Act of 2002 on 13.1.2021, meaning thereby after a lapse of considerable long time it has been passed and in a competitive market various agreements are executed, new practices are adopted every day and merely because some other issue has been looked into by the CCI cartier, it does not mean that on the ground of res judicata the CCI cannot look into any information subsequently against the appellants. The principle of res judicata has no application in the matter under the Act of 2002 in the peculiar facts and circumstances of the case.

The market place is by its very nature a constantly evolving and dynamic space. The market forces can evolve even in the course of a few months and therefore, by no stretch of imagination, it can be held that the appellants should be out of bound for all times and no action can be taken against them only because at some point of time the matter has been looked into by the CCI."

d. Even after the recent introduction of a Section 26(2A)[46] in the Competition Act, the Hon'ble High Court Judicature at Bombay in Asian Paints Limited vs. Competition Commission of India & Anr. Writ Petition (Civil) No. 2887 of 2025 (Paras 27 and 32-34), has reiterated the non-application of res judicata in the following terms:

"34. A perusal of the impugned order indicates that Respondent No.1, despite being aware of the JSW representation and its dismissal, found substance in the representation of Respondent No.2 and, after recording prima facie observation, directed the DG to investigate the same. The object of Section 26(2-A) is not to create an embargo on the filing of a subsequent information, but to emphasize that an information founded on similar or substantially identical facts ought not to be entertained. The discretion is that of the CCI, whether or not to entertain a subsequent representation. Infact, a perusal of the impugned order also shows that the CCI was fully conscious of the earlier representation made by JSW/Balaji and its dismissal. The impugned order further reflects that the JSW representation was rejected after receipt of the DG's report, as JSW had failed to substantiate its allegations. It is therefore evident that the CCI passed the impugned order with full awareness of the earlier proceeding. Whether or not to give hearing is the CCI's discretion and there is no inherent right in a party to demand the same. Consequently, we do not find any jurisdictional bar on the Respondent No. I compelling them to give reasons under Section 26(2-4), as contended by Mr.

[46] **"Section 26.** Procedure for inquiry under section 19.

1[26. Procedure for inquiry under section 19.--(1) …

(2) …

(2A) The Commission may not inquire into agreement referred to in section 3 or conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in the information received under section 19 or reference from the Central Government or a State Government or a statutory authority has already been decided by the Commission in its previous order.

Khambata, whilst considering and entertaining the Respondent No.2's representation."

(emphasis supplied)

e. The Commission has argued that the order of the CCI relied on by the Appellants as noted above is of 2017[12] and in this fast-changing digital market, a great deal would have changed by 2021. Hence, it would be inappropriate to bind the CCI for all times to come in the matter of investigating the Appellants' abusive conduct, based solely on 2017 order.

f. The Commission has also argued that curiously, the importance of respecting user choice by providing an opt-out clause is recognized by WA itself in Europe but not in India, since even today European users are given the option of opting-out of data sharing while accepting the privacy policy in existence from 2021. [Para 135.4 @ pg. 73 of Impugned Order, Para 7.38 @ pg. 138 of DG Report)

g. The Commission has also brought to our notice that a key consideration for not ordering investigation by the DG against the 2016 Policy in Vinod Kumar Gupta[12] (supra) was the provision of opt-out provided to users in that policy by WhatsApp. Such an opt-out mechanism was not provided to users in the 2021 Policy.

200. WhatsApp further submitted that all the data it collects is essential to provide the WhatsApp service. Therefore, the Commission claims that it went into substantially more detail on the 2021 Policy about the nature and purposes for which data was being shared with other Meta companies.

201. The Commission has also brought to our notice that the repercussions of this policy, and its anti-competitive nature with respect to data sharing, have been set out in detail in the impugned order and are summarised below:

a. Privacy is a non-price factor in competition assessment: Privacy is an important non-price element of competition, as has been held by competition authorities the world over - WhatsApp's increased data collection and broader data sharing can thus be considered a reduction in the overall quality of service. This has two effects it impacts consumer welfare and competition, and it entrenches WhatsApp's dominance by creating insurmountable entry barriers for potential competitors. [Para 182.6-182.8 @ pg. 108 of Impugned Order]

b. Expanded data collection under 2021 Policy: WhatsApp may share users' account registration information, transaction data, information on how users interact with businesses when using WhatsApp's services, mobile device information, IP addresses, and certain other data they define in the "Information We Collect section" with other Meta companies. [Para 175 @ pg. 103 of Impugned Order]

c. WhatsApp user data not restricted to improving WhatsApp functionality: User data, instead of being restricted to WhatsApp's internal functions, may be shared across Meta's ecosystem to promote & improve other Meta products, recommend content, or tailor advertising, enhance integration across Meta products, etc. Such practices contradict users' reasonable expectations regarding data usage, as they extend beyond the limited context of service provision. [Para 182.10 @ pg. 109 of Impugned Order]

d. Expanded data collection goes beyond what is necessary: Sharing of data within Meta group goes beyond what is necessary to provide core WhatsApp services, indicating that user data is being leveraged for commercial purpose unrelated to the primary functionality of the platform. The

aggregation of data from multiple sources provides Meta with insights that smaller competitors cannot replicate, potentially blocking new entrants and closing the market in favour of established firms. [Para 182.3 @pg. 107 of Impugned Order]

e. 2021 Policy enables WhatsApp to share collected user data at any time: Even if WhatsApp currently claims to share only limited data with Meta, the 2021 Policy effectively grants it the unilateral right to expand data sharing at any point, without giving any choice to users. This creates a precarious situation where WhatsApp can begin sharing more data with Meta whenever it chooses, making the policy not only a matter of anti-competitive conduct but also raising concerns over user autonomy and transparency. [Para 182.5 @pg. 107 of Impugned Order]

f. User expectation is that their data will not be shared with third parties: Users do not typically anticipate or desire that their personal data will be shared with third parties beyond what is necessary for the service that they are using. However, the 2021 Policy goes far beyond this and explicitly states that user data will be utilised not only to improve WhatsApp but "all Meta company products), as also, personalising these other products to target the user better as per their preferences. Such a practice contradicts a user's reasonable expectation regarding data usage and extends beyond the permissible limits of service provision. [Para 182.9-182.10 @ pgs. 109 of Impugned Order]

g. Lack of valid user consent: Sharing of user's data by WhatsApp with Meta as per the 2021 Policy can be also considered an imposition on users due to the absence of choice. The 2021 Policy compels users to either accept broad

and ambiguous data sharing terms or risk losing access to essential features and functionalities of the platform (at least till 07.05.2021). This coercive approach leverages WhatsApp's dominance to impose data-sharing conditions that primarily benefit Meta's business. This combination of coercive imposition and unfair reduction in service quality (as outlined in preceding paragraphs) underscores the exploitative nature of WhatsApp's conduct which harms both consumer welfare and market competition. [Para 182.11 @pgs. 109-110 of Impugned Order]

h. Users still being prompted frequently to accept the 2021 Policy: The 2021 Policy introduced by WhatsApp has not been revoked and continues to be the operative privacy policy for users. As of 28.03.2024, more than 84% of users have accepted it despite Meta saying it will no longer delete accounts for not accepting it in no small part because users are still being prompted to accept the 2021 update. Therefore, the update continues to influence user behaviour and data sharing practices on the platform. [Para 182.4@pg. 107 of Impugned Order]

202. Appellants have sought to argue that the extent and scope of collection of user data is in line with the industry standard. The Commission. On the other hand, has argued this contention is also in the teeth of established law. In [43]**Belaire Owners' Association v. DLF Limited, HUDA & Ors. Case No. 19 of 2010** (Para 12.20), the CCI held that the same sort of conduct may be abusive for a dominant firm, but not be abusive for a non-dominant firm. The defence that the conduct, for which the dominant entity is under scrutiny, is in conformity with the industry practice and is being followed by other entities was rejected by the Commission holding that *"in terms of the section 4, the*

responsibility of the dominant player has been made more onerous and if such practices are also adopted by a non-dominant player it may not fall within the ambit of section 4".

203. The above view taken by the Commission was upheld by the Hon'ble Competition Appellate Tribunal ("COMPAT") in [47]**DLF Limited & Ors. v Competition Commission of India & Ors. 2014 SCC OnLine Comp AT 17** (Para 124). In its decision dt. 19.05.2014, the Hon'ble COMPAT in Para 124 had made the following observations:

> "124... We cannot expect a leading player like DLF to go on in this fashion. After all, as a dominant player in the market, it has a special duty to be within the four corners of law. It was argued that the CCI has given no reasons, why it was inflicting the heavy penalty of Rs. 630 crores which is 7% of the average total turnover. In our opinion, when we look at the order of the CCI, according to us there are enough reasons given for the same. It was also urged that since we have found the approach of the CCI in relying on the clauses of the ABA and dealing with the same incorrectly, therefore, we should lessen the penalty. We do not agree. An abuse of dominance whether it is on one count or on many remains an abuse and therefore it must be dealt with iron hands."

204. In its Rejoinder submissions on **expanded data obligations for users** Appellant claims that the 2021 Update does not expand data obligations for users. It also claims that the 2001 Update did not expand WhatsApp's ability to collect and share data with Meta. The 2016 Update already provided for this sharing. WhatsApp has also affirmed this in its affidavit before the Supreme Court in [48]**Karmanya Sangh Sareen v Union of India & Ors.. SLP(C) No. 804**

[47] DLF Limited & Ors. v Competition Commission of India & Ors. 2014 SCC OnLine Comp AT 17: Competition Appellate Tribunal ("COMPAT") in Para 124 held that as a dominant player in the market, it has a special duty to be within the four corners of law

[48] Karmanya Sangh Sareen v Union of India & Ors.. SLP(C) No. 804 of 2017

of 2017 (Refer Paras 58, 72 and 86). It is also claimed that the same categories of data mentioned in the 'usage and log information of the 2021 Update were present in the 2016 Update. The Commission wrongly inferred the additional textual detail in the 2021 Update to mean additional data collection rights. The purpose of the 2021 Update was merely to re-organize and provide users with (1) additional information about how WhatsApp collects, uses, and shares data, (il) additional information about how optional business messaging features work when they become available to users, and (iii) greater detail about the categories of information that may be shared with other Meta companies and more up-to-date examples of how WhatsApp partners with Meta to offer integrations across Meta's family of apps and products

205. In the Rejoinder, Appellant claims that there is no evidence that WhatsApp collected or shared user data that was not necessary to provide services/features that it offers. Data collected is not disproportionate or arbitrary as claimed by the Appellants: The user data which may be collected by WhatsApp under the 2021 Update and shared with Meta is neither disproportionate nor arbitrary. WhatsApp offers numerous useful features for both users and businesses. The collection of certain categories of user data is necessary to provide these specific functionalities. For example, the collection of device and connection information is necessary for account management communication, customer support, and product performance and analysis. About information enables account management. The collection of usage and log information is essential to prevent misuse of the WhatsApp service. Appellant-WhatsApp claims that User data shared from WhatsApp to Meta is

limited to what is necessary to provide services: The specific user data that WhatsApp may share with Meta depends on the development and availability of new products and features and how users decide to use them. WhatsApp limits the information it may share with other Meta companies in important ways. WhatsApp does not share certain information with other Meta companies, including (1) personal messages with friends, family and coworkers, including users shared location, which are end-to-end encrypted, (ii) logs of who everyone is messaging or calling; and (iii) users' contacts.

206. Appellant also contends that the specific types of user data that WhatsApp may share with other Meta companies are described in its privacy policy and publicly available Help Centre Articles. In fact, sharing user data within a family of companies is commonplace in the industry. In any event, the expansion of a "privacy policy" is a matter of privacy and data protection law and thus beyond the Commission's remit.

207. Appellant also contends the 2021 Update is not vague or ambiguous. The Commission has contended that the 2021 Update is unfair because the 2021 Update is "vague" and "ambiguous". This submission is unsustainable for several reasons. First, the exercise to ascertain whether a privacy policy is vague, broad, or ambiguous must be carried out under the privacy and data protection framework ([12]Vinod Kumar Gupta). Second, the Impugned Order states that both the 2016 and 2021 Updates adopted a "similar approach" when describing the data collected and shared. If the alleged vagueness of the 2016 Update did not form the basis of a competition violation in Vinod Kumar Gupta, that vagueness in the 2021 Update which is more detailed than the 2016 Update

cannot be a basis for such a violation. Third, the Commission cites WhatsApp's terms and policies in the European Region being more transparent and concludes that the "*differences demonstrate the scope and feasibility for providing greater transparency and choice for users in India*". However, it does not explain how the differences between WhatsApp's policies in Europe (drafted to comply with the General Data Protection Regulation (GDPR)) and its policies in India and elsewhere amount to an abuse of dominance under Indian competition law. Europe follows a distinct data protection framework that requires a different level of disclosure. This cannot serve as the benchmark for what is "sufficient or fair under Indian competition law. The fact that the 2021 Update may be more detailed in Europe does not make its implementation in India abusive. Fourth, the Commission ignores that terms like "includes", "such as", and "for example are routinely used in privacy policies by several enterprises across jurisdictions. Notably, in jurisdictions with some of the largest WhatsApp user bases - including the United States, Indonesia, Mexico, Russia, and the Philippines data protection authorities did not take issue with WhatsApp's 2021 privacy policy update, allowing the new terms to be rolled out in those regions. Finally, the 2021 Update clearly sets forth. (i) the types of data WhatsApp collects: (ii) the types of information that WhatsApp may receive from third-parties; (iii) the types of data that WhatsApp may share with Meta; and (iv) how WhatsApp and Meta may use that information. Further, the 2021 Update does not simply list broad categories of information. Instead, it provides examples so that users can easily understand what information WhatsApp collects, receives, and shares, and how that information may be used. Indeed, the very purpose of the 2021 Update was to provide greater transparency.

Further, even the supposedly vague terms were cherry-picked by the Commission in the Impugned Order.

208. In its Rejoinder submissions on Abuse of Dominance the Appellants contends that mere roll-out of the 2021 Update on take-it-or-leave-it basis does not constitute a per-se violation of Section 4(2)(a)(i) of the Competition Act. A “rollout" of revised terms, by itself, cannot be abusive conduct. Every digital service periodically updates its terms globally. Treating the act of rollout as abusive would effectively make routine contractual updates illegal, which is not contemplated under the Competition Act.

209. Appellant also contends this Tribunal has also recognized that standard acceptance-for-use contracts by WhatsApp was a legitimate business practice (Refer. Paras 9(1) and 9(w), **Vinod Kumar Gupta**[12]). The Commission's arguments are in the teeth of this binding precedent. Further this approach conflates imposition and unfairness. If a dominant enterprise is prohibited from issuing standard acceptance-for-use contracts simply because they are dominant, this would effectively be punishing dominance with no evidence of either unfair or discriminatory conduct under Section 4(2) of the Competition Act or anti-competitive effect. Appellant also contends that WhatsApp has advanced detailed submissions on the process it followed to issue the 2021 Update, and the several extensions it provided to users to accept the 2021 Update and the Commission does not respond to these submissions, except to say that the mere fact that many users had accepted the 2021 Update by 7 May demonstrates abuse and effect. This is claimed to be flawed, for several reasons. Firstly, the Commission's submission is entirely without evidence. The

Commission admits that no users were contacted to determine their rationale for accepting the terms before 7 May 2021. Secondly, the evidence that exists is to the contrary. Only 241,917 132 users that existed as of 4 January 2021 (or 40-45% (43.3%)) accepted the 2021 Update. between 4 January 2021 and 7 May 2021. Almost as many users (40-45% (41%)) accepted the 2021 Update after 7 May 2021 (when there was admittedly no "take it or leave it condition), while approximately 15% had still not accepted the 2021 Update as of 28 March 2023. This belies any argument that the 2021 Update was "imposed" or that users were 'coerced to accept the 2021 Update due to any "urgency" or that users were coerced to accept the 2021 Update due to any "urgency".

210. Appellant claims that if nearly 60% of users did not feel compelled to accept the 2021 Update, the Commission cannot assume compulsion for the 40-46% (43.3%) who chose to accept the 2021 Update before 7 May 2021.

211. For better appreciation, we reproduce Section 4(2)(a)(i) - the section relating to abuse of dominance:

> **"Section 4. Abuse of dominant position.**
> [1][(1) No enterprise or group shall abuse its dominant position.]
> (2) There shall be an abuse of dominant position [2][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 [3][condition or price] which may be adopted to meet the competition; or"

212. The above section clearly brings out that *"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."* We note that Section 4(2)(a)(i) of the Competition Act prohibits a dominant enterprise from imposing unfair conditions or prices. We note that the 2021 WhatsApp policy presents a case of both imposition and unfairness. We find that the 2021 WhatsApp policy is impositional as users are compelled to accept expanded data-sharing terms with Meta without any opt-out option, leaving them no genuine choice but to consent or stop using the service. It is unfair because it arbitrarily alters prior user expectations regarding data use, undermines user autonomy, and introduces one-sided terms. The mandatory data sharing reduces user privacy — a key non-price parameter of competition — thereby harming consumer welfare. It also strengthens Meta's market power by giving it access to vast user data, disadvantaging competitors in the digital advertising market. We also observe that WhatsApp's 2021 policy update imposed "take-it-or-leave-it" terms requiring users to accept all data-sharing provisions to continue using the service. Unlike earlier policies (2016, 2019), it removed the 30-day opt-out option, leaving users with no real choice. The policy mandates sharing user data with other Meta companies and offers greater privacy rights to EU users than to Indian users, indicating discriminatory treatment. We also observe that due to user dependence on WhatsApp and limited ability to negotiate or understand the complex terms, users effectively had no alternative but to accept the update. Although Meta has suspended full implementation of the 2021 policy pending India's data protection law, users must still accept it to interact with business accounts. Therefore, basis the

materials placed on record and submissions of both sides, we are inclined to agree with the arguments of the Commission that WhatsApp's 2021 Privacy Policy amounted to an abuse of dominance under Section 4(2)(a)(i) of the Competition Act because it imposed unfair and coercive conditions on users. We also find force in the arguments that WhatsApp compelled users to accept the policy on a "take-it-or-leave-it" basis by threatening loss of service access, thereby vitiating free consent. We also find that unlike the 2016 policy which allowed users to opt out of data sharing, the 2021 update mandated extensive and vague data collection and sharing with Meta and its subsidiaries for non-WhatsApp purposes, going beyond what was necessary for the app's functioning. We also note that WhatsApp's dominant position, network effects, and lack of interoperability left users with no real alternatives, making their acceptance involuntary. This degradation of privacy amounted to a reduction in service quality, harming both users and competition. Hence, the 2021 policy's mandatory and expansive data-sharing terms were found to be unfair conditions imposed by a dominant enterprise and we cannot find any infirmity in the findings of the Commission.

213. We are therefore inclined to agree with the conclusions of CCI regarding the 2021 Policy that data privacy is a non-price factor in competition analysis as reduced privacy degrades service quality and creates competitive disadvantage for competitors. User consent is not free or voluntary due to lack of choice – a "take-it-or-leave-it" imposition harms both consumers and competition. Despite assurances to the contrary, more than 84% of users had accepted the update by 28.03.2024 due to frequent prompts for acceptance.

Purpose of expanded collection and sharing of user data with other Meta companies is not limited to improving WhatsApp's internal services / functioning, goes beyond what is necessary and gives Appellants insights which smaller competitors cannot replicate. Users expect data not to be shared unnecessarily for not WhatsApp purposes and the 2021 Policy breaches that reasonable expectation. WhatsApp has retained flexibility to unilaterally expand data sharing at its discretion, creating the potential for exploitation without user recourse Resultantly, collection and sharing of user data for non-WhatsApp purposes fulfil the second element of Section 4(2)(a)(i), i.e. imposition of unfair terms.

O. Violation of Sections 4(2)(c) and 4(2)(e) ||Denial of market access and leveraging dominance in Market 1 to enter and protect position in Market 2

214. Before proceeding further, we reproduce the section relating to abuse of dominance for sake of convenience.

> **"Section 4. Abuse of dominant position.**
> [1][(1) …
> (2) There shall be an abuse of dominant position [2][under sub-section (1), if an enterprise or a group],--
>
> (a) …
>
> (c) indulges in practice or practices resulting in denial of market access [4][*in any manner];* or
>
> (d) … or
>
> (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market."

215. Appellant-Meta also claims that the impugned order fails to correctly establish denial of market access under Section 4(2)(c) of the Competition Act. To establish denial of market access under Section 4(2)(c), the Commission must establish that (i) Meta is dominant in the relevant market; (ii) Meta is

engaged in particular conduct; and (iii) that conduct resulted in denial of market access. None of these conditions have been satisfied here. First, the Commission did not find Meta dominant in the market where the denial of access allegedly occurred - i.e., the alleged market for online display advertising in India. Instead, the Commission claims that a Section 4(2)(c) violation can be based on dominance in another market. [Paragraph 233, Impugned Order]. That is incorrect as a matter of law. It would render Section 4(2)(e) meaningless, as Section 4(2)(e) addresses the use of dominance in one market to protect the enterprise in another market. Second, the Commission mischaracterised Meta's alleged conduct that resulted in the denial of access. It claimed that Meta integrated extensive WhatsApp user data into Meta's advertising ecosystem [Paragraph 223.6, Impugned Order]. However, this is incorrect for several reasons, including that (i) this conclusion is based on WhatsApp's potential user data sharing with Meta, but Section 4(2)(c) requires actual conduct; and (ii) the Commission misrepresents WhatsApp's user data sharing with Meta for the WhatsApp Business App, WhatsApp Business API, and Cloud API. Third, the Commission failed to correctly establish that there was an actual denial of market access as it failed to conduct an effects analysis identifying actual anti-competitive effects. Indeed, it ought to have but fails to identify a single company that was denied access to the market due to Meta's conduct. There is also extensive evidence that (i) competitors and advertisers continue to have access to very broad sets of data; (ii) data is non-rivalrous, non-exclusive, and not scarce; (iii) the market has seen explosive entry and sustained growth of players; and (iv) Meta continues to face fierce competition in the market.

216. Furthermore, Appellant-Meta also claims that the impugned order fails to correctly establish a violation of leveraging under Section 4(2)(e) of the Competition Act. To establish a violation for leveraging under Section 4(2)(e), the Commission must establish that (i) there are two distinct relevant markets; (ii) Meta is dominant in one relevant market; (iii) Meta used its dominance in the first market; and (iv) the use of dominance protected Meta's position in the second market. The Commission fails to satisfy these conditions. First, the Commission claims that Meta used its alleged dominance in the first market, i.e., for OTT messaging apps through smartphones in India, to protect its position in the second market, i.e., online display advertising in India. However, Meta is not dominant in the first market. The Commission impermissibly imputes WhatsApp's alleged dominance in this market to Meta. Second, while the Commission does not clearly identify Meta's use of its alleged dominance in the first market, it seems to suggest that Meta did so by integrating extensive WhatsApp user data with Meta for advertising purposes. [Paragraph 223.6, Impugned Order, enclosed at Annexure-1] However, this assertion is without merit, as (i) the Commission improperly imputes WhatsApp's alleged conduct to Meta, as Meta does not provide the WhatsApp service; and (ii) Meta does not integrate extensive user data from WhatsApp users for advertising purposes. Third, the Commission cannot demonstrate that the alleged conduct has resulted in any actual anti-competitive effects in the second market, i.e., the alleged online display advertising market, for the same reasons it failed to correctly establish a violation for denial of market access.

217. Meta has claimed that it only shares user data for ad purposes on two accounts:

217.1 Click to WhatsApp Ads (CTWA): These are ads shown on Facebook or Instagram that include a "Click to WhatsApp" button. When a user taps the ad, they are redirected to a WhatsApp chat with the business advertiser.

217.2 Cross-Posting WhatsApp status to Facebook stories: WhatsApp users often share their status updates (photos, videos, or text) directly as stories on Facebook, this is cross-posting across platforms.

218. The Commission refutes and contends that essentially, Meta argues that it only shares user WhatsApp data under the WhatsApp Policy if the users subsequently consents to the same. However, this submission is misplaced because the 2021 Policy does not contain any such clause that makes sharing of user data collected under the policy conditional upon subsequent user consent. Without prejudice to the foregoing, the issue under examination presently is with respect to the aggregation of user data by WhatsApp with Meta under the 2021 Policy and the resultant competitive edge arising from the same for Meta in the display advertising market. Optionality of features is immaterial for determination. [Para 214 pgs. 129-130 of Impugned Order]

219. Finally, Appellant-Meta claims that the Commission not only failed to consider the pro-competitive effects but also illegally introduced a new threshold for assessing pro-competitive effects. The Commission's finding that Meta violated Section 4 is particularly unwarranted because the Commission failed to consider the pro-competitive effects of Meta's conduct, including that (i)

personalised advertisements align with users' preferences and interests, and personalisation is valued by advertisers; and (ii) Meta's capabilities allow it to offer personalised solutions for businesses of all sizes. Further, Meta demonstrated that any improvement in its services would result in competitors competing more fiercely and improving their offerings rather than competing less or discontinuing their services. The Commission improperly rejects Meta's submission on pro-competitive effects by claiming that it must satisfy a new, unexplained, and mysterious standard of a very high threshold [Paragraph 225, Impugned Order] which has no basis in the Competition Act. In effect, the Commission sanctioned Meta for seeking to develop innovative solutions and improve its service quality. The Commission (i) faults Meta for trying to offer superior targeted advertising [Paragraph 229, Impugned Order]; and (ii) ignores that attracting consumers to a service provides an incentive to innovate for all players in the market, which ultimately benefits advertising businesses and consumers. If offering a better service is anti-competitive and can be sanctioned, then the remedy would be to deteriorate the quality of the services provided by the preferred players. This would of course hamper competition in the market and harm consumers, and is antithetical to the objective of the Competition Act, which is to promote and sustain competition in markets and protect the interests of consumers.

220. The Commission has also brought to our notice, which is noted herein earlier that Appellants' gather extensive user data from WhatsApp through the 2021 Policy. This data is then shared with other Meta companies for non-WhatsApp purposes, including digital advertisements on Meta's various

platforms. The Commission has thus argued that the Appellants (Meta through WhatsApp) have denied market access and leveraged dominance in Market 1[49] to enter and protect position in Market 2[50] and thus have violated Sections 4(2)(c) and 4(2)(e). The Commission has also emphasized that CCI conducted an extensive qualitative effects analysis of the competitive harm caused to advertisers due to the sharing of WhatsApp user data by Appellants with various Meta companies/platforms. In this regard, statements of several Meta's competitors and digital advertising companies have also been considered. These have been noted by us in detail in herein earlier in effects analysis.

221. The Commission has also brought to our notice Appellants' data collection practices qua WhatsApp business users. It brings to our notice that for an ordinary user to interact with a business user over WhatsApp, it remains mandatory to consent to the 2021 Policy. Therefore, CCI has also examined the framework nature of data collection from WhatsApp's small and large business users. Small businesses who generally use the WhatsApp Business App are contractually obligated to abide by the WhatsApp Business Terms of Service (and all policies, terms and guidelines incorporated by reference therein) while larger businesses using WhatsApp Business API are contractually obligated to abide by the Facebook Terms for WhatsApp Business (and all policies, terms and guidelines incorporated by reference therein). Business users are not permitted to opt-out of the mandatory data sharing envisaged under either

[49] **Market 1**: Market for OTT messaging apps through smartphones in India;
[50] **Market 2:** Market for Online Display Advertising in India

Terms of Service. Broadly stated, both categories of business users are required under their respective terms of service to share data in the following manner:

221.1 WhatsApp Business API: Collects or requires business users to share crucial identifiers such as business profile; display name; category; and business phone number, along with certain other optional identifiers such as: email address; business description; address; and websites. [Paras 209-210 @ pg. 128 of Impugned Order]

221.2 WhatsApp Business App: Collects or requires users to share information from their business account and registration; usage, log, and functional information generated from their use of our business services; performance, diagnostics, and analytics information; information related to their technical or other support requests; and (e) information about them from other sources such as other WhatsApp users, businesses, third-party companies, and the other Facebook Companies.

221.3 Businesses using Meta Cloud API: Meta continues to require ordinary users to mandatorily consent to the 2021 Policy if they interact with business users who avail of Meta's Cloud API services. In this regard, CCI has noted that out of 21,083 Business API users, 3082 businesses (14.14%) are using Meta's cloud hosting services. [Paras 211-212 @ pgs. 128-129 of Impugned Order]

222. The Commission has also brought to our notice that extensive data collection and sharing practices of Meta led to a situation where Meta has an unassailable lead in the market of online display advertising. [Paras 61-62 and 216-222 @pgs. 36 and 130-133 of Impugned Order]

223. The Commission has also brought to our notice about the importance of data in the digital advertising market. CCI claims that Appellants' ability to gather and utilise extensive user data through WhatsApp for digital advertising enables advertisers to create detailed profiles of potential customers and deliver targeted advertisements that align with users' preferences and interests. With access to detailed user profiles and data from multiple platforms, the Appellant (Meta) can promise advertisers the best returns in terms of clicks, engagement, and conversions per dollar spent. This advantage makes Appellant the preferred advertising partner for sellers, thereby leveraging its dominance in the OTT app market to reinforce its leading position in digital advertising market. It is informative to note the following observations of the CCI:

223.1 Data is the cornerstone of effective online display advertising, as it allows advertisers to target specific audience segments precisely, ensuring that their marketing spend is directed towards users with the highest likelihood of conversion. Every advertiser aims to maximize the return on investment within their advertising budgets. Without access to detailed user data, this level of precise targeting becomes impossible. The ability to analyse parameters such as user behaviour, preferences, and demographics ensures that advertising spend is optimized, avoiding wasted resources on uninterested audiences.

223.2 The responses of third-party advertisers indicate that WhatsApp's 2021 Privacy Policy update will provide Meta with a significant competitive advantage over its rivals. It is clear to CCI that removal of the right to opt out from the 2021 Update coupled with an expanded scope of data collection furthers the ability of Meta to benefit from a wider reach and a deeper understanding of user

behaviour. This cross-platform integration of data positioned Meta as a more attractive partner for advertisers.

223.3 Entering the online display advertising market requires substantial investment in technology and user acquisition. A new entrant must develop a product that is engaging enough to capture users' attention and encourage them to spend significant time on the platform. It is exceedingly difficult for any new player to replicate a similar level of engagement and data collection to Meta. The need to build a robust platform and collect relevant data to compete with Meta creates a prohibitive barrier of entry for new entrants.

223.4 With the increasing adoption of WhatsApp Business by small and mid-sized businesses, Meta can capitalize on this user base and the associated business interactions. By integrating WhatsApp's user data with its advanced advertising technology, Meta can build even more detailed audience profiles, enhancing its ability to deliver highly targeted ads. This capability not only strengthens Meta's advertising revenue potential but also enables it to offer tailored solutions for businesses of all sizes, making it a versatile and dominant player in the advertising ecosystem.

223.5 The extensive user data allows Meta to offer superior advertising solutions, which attract more advertisers and drive more revenue, which in turn enables Meta to invest further in improving its platforms and expanding its data capabilities, creating a self-reinforcing cycle that consolidates its market power.6. The 2021 policy update has enabled Meta to target a broader range of audiences and gain expanded access to user parameters allowing Meta to

provide more precise and accurate targeting to advertisers, giving it a distinct competitive advantage in the market. The ability to offer better-defined target audiences enables Meta to capture a larger market share and attract more advertisers seeking to optimize their advertising spend.

223.6 The increase in numbers of such advertisers from 376,732 in 2015 to 2,207,459 in 2021 evidence the attractiveness of Meta ecosystem for the advertisers. The increase in number of advertisers also indicates strong indirect network effects with an increasing number of users on the WhatsApp platform.

223.7 Advertisers prefer platforms that can display ads to users who are most likely to be interested and willing to engage with the content and the product being advertised. The effectiveness of targeted advertising depends on the scope, size, and diversity of the data set held by the media provider. Meta has gained an advantage by collecting extensive first-party data directly from its users which is shared across services, as well as additional third-party data through various tools, giving it a comprehensive data set. This vast data pool is a key factor behind Meta's unassailable position in the online display advertising market and acts as a barrier to entry for new competitors, as they are unable to match the scale of data Meta possesses. [Paras 223.1-223.10 @ pgs. of 133-137 Impugned Order)

224. The number of Advertisement Impressions sold is an important criterion to assess the position of players in the market. Extracts of para 216 of the impugned order are instructive for knowing this scenario:

No. of Impressions sold in India (in billion)

Company	2016	2017	2018	2019	2020	2021
Facebook (A)	429.8	705.62	967.24	1120.99	1303.33	1607.34
Instagram (B)	13.06	53.76	192.41	404.03	796.60	1405.68
Meta (Total A+B)	442.86	759.36	1159.65	1525.02	2099.93	3013.02
LinkedIn	3	2.4	1.46	2.11	5.27	-
Twitter	0.02	0.02	0.04	0.04	0.06	0.08
ASSPL	-	11.98	16.26	22.64	35.37	25.06
Snap	-	0.13	2.12	7.37	14.24	10.41
InMobi	-	-	42.5	18.7	23.4	18.7
OpenX	-	-	-	-	3.03	2.68
Magnite	2.34	7.37	14.87	22.14	12.69	14.31
Tyroo	-	-	1.2	5.5	4.1	10.7
Affle	0.03	0.04	0.05	0.07	0.11	0.31

225. Furthermore, the advertisement revenue of Meta and its competitors is highlighted as follows - extracts of para 219 of the impugned order:

Advertisement Revenue of players in the online display advertisement market in India

(in million USD)

Company	2016	2017	2018	2019	2020	2021 (Upto Q2)
Meta	365.45	532.77	779.47	1008.36	1068.55	1887.43
Google	-	-	234.45	297.81	331.82	264.36
Snap	-	0.30	6.29	4.76	6.31	4.47
*ASSPL	10.59	23.65	32.84	49.70	66.37	16.70
LinkedIn	10.4	12.9	18.2	25.7	38.1	19.2
*InMobi	10.41	16.11	20.95	23.82	25.93	13.67
Twitter	13.56	10.53	15.5	14.36	15.07	13.08
*#Collectcent	6.24	5.17	7.79	10.12	0.6	2.29
*#Xapads	4.45	4.50	3.08	4.90	8.86	4.93
*#Ally	-	0.10	0.09	0.04	0.03	0.01
*Affle	7.89	11.85	15.72	23.16	32.79	10.17

Source: Investigation Report data collected from the respective parties

*INR figures converted into USD using average conversion rates for 1 INR = 0.0149 USD (2016), 0.0154 USD (2017), 0.0146 USD (2018), 0.0142 USD (2019), 0.0135 USD (2020), and 0.0135 USD (2021).

Revenue figures for 2016 denotes advertising revenue for financial year 2016-17, 2017 denotes 2017-18, and so on.

** Data for the financial year 2021-2022

226. Basis data collected by the Commission and as noted above we find that the Commission has clearly brought out that Meta leads in advertisement impressions and advertisement revenue in India in online display advertisement market and is way ahead of others:

> "222. A cumulative assessment of the available data on advertisement impressions and advertisement revenue clearly demonstrates that Meta is significantly ahead of its competitors in both categories. These comprehensive figures indicate that Meta not only generates far higher advertisement revenue compared to its competitors but also serves an overwhelming number of advertisement impressions in the Indian display advertisement market. Even the closest competitors, such as Google and Amazon, have a considerably lower share of both advertisement impressions served, and revenue generated. Smaller players, such as LinkedIn, InMobi, Affle, and Twitter, hold an even more negligible share, making it clear that Meta's scale and reach are unmatched in this segment. The stark disparity in both revenue and advertisements impressions served highlights Meta's superior ability to attract advertisers, optimize advertisement placements, and leverage its extensive user data, which collectively reinforces its competitive advantage in the display advertising market."

227. We note that a detailed analysis has been provided by the Commission as to how Meta without being dominant through its conduct has resulted in a situation of dominance and denial in market 2, which is extracted as below:

> "231. Dominant platforms must exercise caution when integrating data sets from their various services, as their actions can result in the exclusion of rivals. The ability of multiple product ecosystem operators (viz. Meta) to combine vast amounts of user data across different platforms can lead to insurmountable barriers for competitors, as they may not have access to comparable data sets. This practice will result in distortion of competition by providing the dominant firm with an unfair advantage, amplifying its market power. In contrast, similar data integration practices by non-dominant firms may not have the same exclusionary effects. Non-dominant firms may integrate data sets to enhance competitiveness and

innovation without causing market-wide harm, as they lack the scale and scope to impact multiple markets. Under the Act, dominant firms, are vested with a special responsibility to ensure that their conduct does not harm competition or gives them an unfair advantage.

232. To conclude, Meta's practices of data sharing across platforms (in this matter, from WhatsApp to Meta) lead to both the denial of market access to advertisers in the display advertising market and amounts to leveraging of its dominance in the OTT messaging market to protect and consolidate its position in the display advertising market.

233. In relation to finding of denial of market access under Section 4(2)(c) of the Act, Meta has submitted that establishing denial of market access under Section 4(2)(c) of the Act requires that the enterprise should be dominant in a relevant market. However, the Investigation Report does not find that Meta enjoys a dominant position in the alleged relevant market for online display advertising in India. In this regard, the Commission is of the view that there is no statutory or technical requirement that an enterprise must hold dominance in the market where the denial of market access is alleged. This is particularly relevant in multi-product platform markets that operate as ecosystems, where a dominant firm's conduct in one market can have exclusionary effects in another, related market. In multi-product ecosystems like Meta's, services are closely integrated in terms of functionality, data, and target groups. As already elaborated, Meta's dominance in the OTT messaging market (through WhatsApp) allows it to collect vast amounts of user data. This data is shared across its ecosystem, including its display advertisement services (Facebook, Instagram). By combining and using this data, Meta can offer highly targeted ads, which competitors in the display advertising market cannot easily match due to their lack of access to similar data. As a result, this creates a denial of market access for these rivals, who cannot compete effectively for advertisers.

234. In the instant case, denial of market access stems from Meta's dominant position in the OTT messaging space. By leveraging user data from WhatsApp, Meta consolidates its position in other markets, creating entry barriers and reducing competition in markets like display advertising. This integration of services and data sharing in platform ecosystems is particularly problematic as market power in one domain can spill over and adversely affect competition in related or neighbouring markets. Therefore, in ecosystem-driven markets, dominance in one

product market (such as OTT messaging) can lead to anticompetitive outcomes in other related markets (such as online display ads), where the dominant firm leverages its data and functional advantages across its entire platform and denies market access to players in other markets. In this regard the Commission finds the observations of the Hon'ble Supreme Court in **Competition Commission of India Vs**. **M/s Fast Way Transmission Pvt. Ltd. & Ors.** (Civil Appeal No.7215 of 2014) in judgement dated 24.01.2028 relevant wherein the Hon'ble Court stated that the term denial of market access *"in any manner"* is of wide import and must be given its natural meaning.

235. Based on the foregoing, the Commission concludes that (a) sharing of WhatsApp users' data between Meta companies for purposes other than providing WhatsApp Service creates an entry barrier for the rivals of Meta and thus, results in denial of market access in the display advertisement market, in contravention of the provisions of Section 4(2)(c) of the Act; and (b) Meta has engaged in leveraging its dominant position in the OTT messaging apps through smartphones to protect its position in the online display advertising market and the same is in contravention of Section 4(2)(e) of the Act."

228. As noted in the impugned order we find that the Commission gets full support of the above judgement [**Competition Commission of India Vs**. **M/s Fast Way Transmission Pvt. Ltd. & Ors.** (Civil Appeal No.7215 of 2014) in judgement dated 24.01.2018] while making out a case for denial of market access in the market of online display advertising wherein the Hon'ble Court stated that the term denial of market access *"in any manner"* is of wide import and must be given its natural meaning. Furthermore, the Commission argues that there is no statutory or technical requirement that an enterprise must hold dominance in the market where the denial of market access is alleged and we find that as per Section 4(2)(c) "there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group,-- (c) indulges in practice or practices resulting in denial of market access in any manner." The above

provision is very significant as Meta is a parent company and WhatsApp and Meta belong to the same group. Moreover, there is no provision that an enterprise or group has to be dominant for establishing denial of market access as per Section 4(2)(c) of the Act. Therefore, we find that the conclusions of the Commission to be not having infirmity regarding denial of market access by the conduct of the Meta group.

229. Bases above submissions of both sides and after perusal of materials placed on record, we find that Appellants' ability to gather and utilise extensive user data through WhatsApp for digital advertising enables advertisers to create detailed profiles of potential customers and deliver targeted advertisements that align with users' preferences and interests. With access to detailed user profiles and data from multiple platforms, the Appellant (Meta) can promise advertisers the best returns in terms of clicks, engagement, and conversions per dollar spent. This advantage makes Meta the preferred advertising partner for sellers, thereby leveraging its dominance in the OTT app market to reinforce its leading position in digital advertising market. We don't find any infirmity in the above analysis for advertising and marketing strategy and we find it be convincing.

230. We also need to note that Meta and WhatsApp are separate legal entities. It is WhatsApp and not Meta which offers and operates the WhatsApp service and the subject of the investigation is the WhatsApp 2021 Policy, which relates to the WhatsApp service. The allegations relate to sharing of user data by WhatsApp with Meta. We also note that Meta is not dominant in the online display advertisement market even though it a leading player. Therefore, there cannot be a question of abuse of its dominance in this market. But the above-

mentioned conduct has resulted in a situation of denial of market access and which is covered under Section4(2)(c). We also need to note that even though Meta and WhatsApp are separate legal entities, yet due 100% control of Meta over WhatsApp. WhatsApp acts more like an agent of the parent company. All policies and activities of the WhatsApp are being controlled by common executives. We also need to note that WhatsApp doesn't have separate financial statements. These are special circumstances in this case requiring attention to decide the case.

231. The Appellants-WhatsApp has claimed that the Commission made several factually incorrect submissions before this Tribunal during oral arguments, without filing any affidavit in support of that or without filing any rejoinder. In any case we have taken note of the factual inaccuracies pointed out to us while referring to the written submissions from both sides.

P. Conclusions on Abuse

232. Bases above submissions and materials placed on record, we find that WhatsApp's 2021 policy constituted abuse of dominance by WhatsApp under Section 4 of the Competition Act as briefly described below:

232.1 **Section 4(2)(a)(i)**: Imposition of unfair or discriminatory conditions on users, through a "take it or leave it" policy WhatsAp forced users into accepting expansive data sharing as a condition to using WhatsApp, without offering an effective opt-out. We find that mandatory acceptance of broad and vague data sharing terms amounted to coercion and unfair condition on users. We thus find

violation of Section 4(2)(i) by WhatsApp by the introduction of WhatsApp Policy 2021 and its subsequent conduct.

232.2 **Section 4(2)(c)**: Practices that limit or restrict market access of competitors - we find that cross-platform data sharing (between WhatsApp and Meta) enhanced Meta's advantage in the display advertising market, creating an entry barrier for rival firms in digital advertising that did not have equivalent access to WhatsApp data. We note that Meta is not dominant in [50]Market 2 but a leading business entity (As seen by advertisement impressions and also advertisement revenue of meta as noted by separately) and by its conduct has created a situation of market denial and thus Meta has violated Section 4(2)(c). It needs to be noted that section 4(2)(c) gets attracted herein due to special circumstances existing in this case. We have a case in which Commission has concluded that *"Meta has engaged in leveraging its dominant position in the OTT messaging apps through smartphones to protect its position in the online display advertising market and the same is in contravention of Section 4(2)(e) of the Act"*. We note that Section 4(2)(e) cannot be applied on Meta for only legal impediment that Meta and WhatsApp are two distinct legal entities. We need to note the special circumstances existing in this case that even though WhatsApp is a separate legal entity, yet it is fully controlled by Meta for the reasons that it does not have separate financial statements and also it has common executives with Meta and the parent company is in 100% control of WhatsApp. Even though we are not able to establish the

leveraging by Meta from market 1 to denial in market 2, we find that because of special circumstances existing in this case, denial of market 2 is happening irrespective of our conclusion that leveraging is happening or not. We also need to note that Section 4(2)(c) can be attracted independently of Section 4(2)(e). We note that Section 4(2)(c) provides that *"there shall be an abuse of dominant position if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner"*.

232.3 **Section 4(2)(e)**: Leveraging dominance in one market (OTT messaging) to protect or extend dominance in another (online display advertising) – We find that WhatsApp's Policy 2021, facilitated Meta's access to WhatsApp user data for advertising purposes. Meta is not dominant but just leading in Market 2 and way ahead both in terms of advertisement impressions and revenue. Even though, as noted by us earlier, that it cannot be concluded that it has leveraged its dominance in one market (OTT messaging) to protect or extend dominance in another (online display advertising) which was mainly for the reason that WhatsApp and Meta are distinct legal entities. But due to peculiar eco-system of digital market and also Meta exercising 100% control on WhatsApp and also the, conduct of Meta group has resulted in a situation of denial of market access and which is covered under Section4(2)(c). It may not be violative of section4(2)(e) But we bring the special circumstances existing in the case on record which has also been noted in detail in the impugned order. Even though the impugned

order does not recognize Meta and WhatsApp as separate legal entities due to reasons which we have discussed earlier, however, we reject this argument of the Commission. Even then we find denial of market 2 is happening that too is through the conduct of Meta and is thus violative of section4(2)(c).

233. In the above background we conclude that there is a violation Sections 4(2)(a)(i), 4(2)(c) but not Section 4(2)(e) and by WhatsApp as an enterprise and Meta as a group.

Q. <u>Remedies by the CCI</u>

234. In this Section we delve into remedial directions issued by the Commission with respect to abusive conduct of the Appellants contravening various sections of the Competition Act.

235. Before proceeding further, it will be instructive to note the remedies issued by the Commission:

> "247.1 WhatsApp will <u>not share</u> user data collected on its platform with other Meta Companies or Meta Company Products for advertising purposes, for a period of <u>5 (five) years</u> from the date of receipt of this order. After expiry of the said period, the directions at para 247.2 (except para 247.2.1) will apply mutatis mutandis in respect of such sharing of data for advertising purposes.
>
> 247.2 With respect to sharing of WhatsApp user data for purposes other than advertising:
>
> > 247.2.1 WhatsApp's policy should include a detailed explanation of the user data shared with other Meta Companies or Meta Company Products. This explanation should specify the purpose of data sharing, linking each type of data to its corresponding purpose.
> >
> > 247.2.2 Sharing of user data collected on WhatsApp with other Meta Companies or Meta Company Products for purposes other than for providing WhatsApp services shall not be made a condition for users to access WhatsApp Service in India

247.2.3 In respect of sharing of WhatsApp user data for purposes other than for providing WhatsApp Services, all users in India (including users who have accepted 2021 update) will be provided with:

a) the choice to manage such data sharing by way of an opt-out option prominently through an in-app notification; and

b) the option to review and modify their choice with respect to such sharing of data through a prominent tab in settings of WhatsApp application.

247.2.4 All future policy updates shall also comply with these requirements.

247.3 The OPs are directed to make necessary changes to comply with above directions within a period of 3 (three) months from the date of receipt of this order and submit a compliance report to the Commission in this regard."

236. We note that the Commission has relied on Sections 27 and 28 of the Competition Act to argue that neither the Digital Personal Data Protection Act 2023 (DPDP Act) nor any other legislation in India confers powers equivalent to those granted to the Commission. But the Appellant's once again question that it still does not allow the Commission to adjudicate privacy and data protection matters and also raise the concern that the Commission cannot make determinations in domains governed by other specialised laws like consumer protection, telecom, or financial regulation due to its wide powers.

237. Apart from grounds raised in his Appeal, the Appellants have in his rejoinder questioned the necessity and proportionality of the remedies imposed by the Commission. They contend that the remedies set out under para 247.2, Impugned Order (as noted above), deal with optionality and transparency, which squarely fall within the realm of privacy and data protection law. They claim that as an example five-year ban on sharing user data with Meta for advertising purposes, (Remedy 1) [Para 247.1 above]. The Commission itself admitted that this remedy is contestable. Appellant relies on **Mohinder Singh Gill v. Chief**

Election Commr. [Para 8, (1978) 1 SCC 405], that any direction of the Commission must take the form of a reasoned and speaking order. In the absence of cogent justification, the prescription of a five-year ban is manifestly arbitrary, disproportionate, and unsustainable. The only justification offered during oral arguments was a vague, unsupported assertion that such a period would revive competitive conditions. This statement, devoid of any evidentiary or analytical foundation, cannot meet the threshold required by law. The Commission does not explain further how it arrived at five years, why it would take that long to rectify any perceived harm, and why it cannot be done in a shorter timeline.

238. With respect to the remedy of the requirement to provide additional details on user data sharing with Meta in the WhatsApp privacy policy:(Remedy 2) [Para 247.2.1], Appellant claims that this prescribes the manner in which WhatsApp must provide information about the data it collects and shares. Such a direction squarely falls within the ambit of privacy and data protection issues.

239. On the remedies of prohibition on making the WhatsApp service conditional on user consent for data sharing for purposes other than providing the WhatsApp service (Remedy 3) [Refer: Para 247.2.2] and the requirement to create a prominent opt-out of, and option to review and modify user data sharing by WhatsApp with Meta for purposes other than providing the WhatsApp service (Remedy 4) and (Para 247.2.3), the Appellant claims that these remedies direct that WhatsApp may collect/share data only relevant to providing the WhatsApp service. This restricts WhatsApp's ability and freedom to choose its business model, adversely impacting its ability to offer new and

innovative products to their users in India. Such directions additionally also fall squarely within the realm of privacy and data protection law.

240. With respect to the requirement on Meta and WhatsApp to comply with the Remedies forever (Remedy 5) [Para 247.2.4. Impugned Order], the Commission has failed to explain how it can be required to comply with this remedy forever, even if it is not dominant. Section 4 does not apply if an entity does not enjoy a dominant position, which makes this remedy wholly disproportionate. Appellant claims that the Commission has itself argued that a finding of dominance or abuse is not one in perpetuity and may be revisited in future, while making arguments about the Vinod Kumar Gupta case. Yet, it has simultaneously imposed remedies on WhatsApp that are perpetual in nature. This internal inconsistency renders the remedy wholly disproportionate. Appellant also claims that the Commission's approach is contrary even to the ex-ante obligations set out in the Draft Digital Competition Bill, which allow the entity to approach the Commission in case it no longer meets the thresholds to be designated a gatekeeper.

241. It is useful to note how these remedies will alleviate specific competition harm. Each one is being discussed hereinafter.

241.1 **Remedy at Para 247.2.1 of Impugned Order:**

"WhatsApp's policy should include a detailed explanation of the user data shared with other Meta Companies or Meta Company Products. This explanation should specify the purpose of data sharing, linking each type of data to its corresponding purpose."

We were informed by the Commission that the above remedy tackles opaque and unfair contractual terms. The same promotes informed user choice and ensures fair conduct on part of a dominant enterprise. Instead of broad description of intended usage, the direction requires the Appellant to keep the user informed of the intended data usage. The same puts an obligation on the Appellant to compete on privacy standards, a critical non-price parameter of competition in digital markets.

Bases the materials placed on record and submissions of both sides and our analysis on the issue of privacy and data protection law, we find that the arguments of the Commission to be convincing and we cannot accept the contentions of the Appellant that the impugned order imposes remedies on WhatsApp / Meta which are unnecessary, disproportionate, and squarely fall within the realm of privacy and data protection law. We thus confirm this remedy.

241.2 **Remedy at Para 247.2.2:**

"Sharing of user data collected on WhatsApp with other Meta Companies Meta Products for purposes other than for providing or Company services WhatsApp shall not be made a condition for users to access WhatsApp Service in India."

We were informed by the Commission that the above remedy addresses unfair conditions imposed on the users and preserves choice. It gives user gives opportunity to the user to choose sharing of data with free will and not under coercion.

We need to note that the core principle is to remove exploitation by restoring user choice. Users must retain the right to decide what data is collected, for which purposes, and for how long. Any non-essential collection or cross-use (like advertising etc.) can occur only with the concerned user's express and revocable consent. The Appellant cannot assert unilateral or open-ended rights over user data. This takes care of the abuse found in 2021 Policy i.e., coercive, take-it-or-leave-it consent by re-establishing opt-in/opt-out which will be with desired transparency, and purpose limitation, while still allowing lawful, user-approved uses. We have already found herein earlier that the Commission is well within its right when dealing with issues overlapping privacy and competition. We cannot find any infirmity on this argument of the Commission and basis the analysis in this order we cannot agree with the arguments of the Appellants that this deals with optionality and transparency, which squarely fall within the realm of privacy and data protection law. We therefore uphold this remedy.

241.3 **Remedy at Para 247.2.3:**

"247.2.3 In respect of sharing of WhatsApp user data for purposes other than for providing WhatsApp Services, all users in India (including users who have accepted 2021 update) will be provided with:

a) the choice to manage such data sharing by way of an opt-out option prominently through an in-app notification; and

b) the option to review and modify their choice with respect to such sharing of data through a prominent tab in settings of WhatsApp application."

The Commission brought to our notice that the above remedy restores user autonomy through opt-out controls, which enhances competition on privacy by enabling users to compare platforms and make active choices. Further, it's a corollary to the rights granted to the users so that they have an option to change their decision of not sharing or for that matter 'sharing' their data with Meta for various purposes. We cannot find quarrel with the above arguments. And the contentions of the Appellants that this restricts WhatsApp's ability and freedom to choose its business model, adversely impacting its ability to offer new and innovative products to their users in India and such directions also fall within the realm of privacy and data protection law are not very strong compared to what has been presented by the Commission. We need to note that the core principle is to remove exploitation by restoring user choice. Users must retain the right to decide what data is collected, for which purposes, and for how long. Any non-essential collection or cross-use (like advertising etc) can occur only with the concerned user's express and revocable consent. The Appellant cannot assert unilateral or open-ended rights over user data. This takes care of the abuse found in 2021 Policy i.e., coercive, take-it-or-leave-it consent by re-establishing opt-in/opt-out which will be with desired transparency, and purpose limitation, while still allowing lawful, user-approved uses. Thus, we uphold this remedy also.

241.4. **Remedy at Para 247.1:**

"247.1 WhatsApp will not share user data collected on its platform with other Meta Companies or Meta Company Products for advertising purposes, for a period of 5 (five) years from the date of receipt of this order. After expiry of the said period, the directions at para 247.2 (except para 247.2.1) will apply mutatis

mutandis in respect of such sharing of data for advertising purposes."

We were informed by the Commission that the above remedy prevents leveraging of dominance in market of OTT messaging apps to reinforce Meta's position in online display advertising market. This also creates a competitive level playing field for other digital advertisers and OTT messaging apps that do not enjoy such vast, integrated user datasets. Further, it protects the market from data-driven foreclosure and gives potential competitors room to innovate and grow without getting overwhelmed by Meta's cross-market advantages.

We note that this remedy is contestable as the rationale for the duration of 5 years ban was missing altogether in the Impugned Order. The justification that such a period would "revive competitive conditions" cannot meet the threshold required by law as claimed by the Appellants. CCI has categorized the remedies into two categories – one for sharing data for advertisement purposes for which 5 years ban has been imposed and other remedy for sharing of data for other than advertising. We find that once users have been given option to freely decide to opt in or opt out, as in other reliefs, this direction becomes redundant. We need to note that the core principle is to remove exploitation by restoring user choice. Users must retain the right to decide what data is collected, for which purposes, and for how long. Any non-essential collection or cross-use (like advertising etc) can occur only with the concerned user's express and revocable consent. The Appellant cannot assert unilateral or open-ended rights over user data. This takes care of the abuse found in 2021 Policy i.e., coercive, take-it-or-leave-it consent by re-establishing opt-in/opt-out which will be with desired

transparency, and purpose limitation, while still allowing lawful, user-approved uses. Then there is no requirement of these exclusive directions.

241.5. **Remedy at Para 247.2.4:**

"247.2.4 All future policy updates shall also comply with these requirements."

The Appellant claims that the Commission has failed to explain how it can be required to comply with this remedy forever, even if it is not dominant. Section 4 does not apply if an entity does not enjoy a dominant position, which makes this remedy wholly disproportionate. We find that the language of the direction says that "*all future policy updates shall also comply with these requirements"* and have to be seen in the context of present situation created by WhatsApp 2021 policy from 4th Jan 2021 to 7th May 2021/ Also we don't see any firm commitment exists by WhatsApp for users to provide for opt-out option for the terms and conditions of WhatsApp Policy. In such a situation we don't find any infirmity in this requirement in the direction issued by the commission.

R. Penalty imposed by CCI

242. After a detailed examination the Commission had imposed a penalty and the relevant paragraph is extracted as below:

"263. Consequently, the Commission imposes a penalty of Rs. 213.14 crore only (Rs. Two hundred Thirteen Crores and Fourteen Lakhs only), upon Meta for violating Section 4 of the Act. Meta is directed to deposit the penalty amount within 60 days of the receipt of this order."

243. The Appellant contends that imposition of penalty on Meta cannot be justified. Only WhatsApp has been found dominant, and WhatsApp has

allegedly abused its dominant position by forcing users to share data with Meta under the 2021 Update. Meta has vehemently opposed imposition of penalty on several grounds noted herein after. Meta claims that the Impugned Order fails to identify the relevant entity and, consequently, the relevant turnover for imposition of penalty. The Relevant Entity for Consideration Is WhatsApp and Not Meta. The primary purpose of imposing fines for competition law violations is deterrence. The fine must be proportional, and relevant turnover is routinely used to determine a proportional amount for the fine [**Excel Crop Care v. CCI, Paragraph 92**]. Further, the penalty must be based on the relevant turnover of the entity that committed the competition violation. Here, however, the Commission imposes a penalty based on the relevant turnover of both Meta and WhatsApp [Paragraph 257, Impugned Order]. The Impugned Order does not attribute an independent violation of the Competition Act to Meta; and the WhatsApp service (and the 2021 Update to which it applies) is provided by WhatsApp and not Meta. Accordingly, the Commission should not have imposed a penalty based on Meta's turnover at all. Instead, any penalty should have been based on WhatsApp's relevant turnover in India. The impugned order wrongfully imposes a penalty on Meta for an alleged conduct by its subsidiary. In the past, the Commission has refrained from imposing a penalty on a parent company for a contravention of the Competition Act by its subsidiary. For example:

(a) The Commission penalised Ultratech Cement Ltd. and not its parent group, the Aditya Birla Group [Paragraph 301, **Builders Association of India v. Cement Manufacturers, Case No. 29 of 2010**];

(b) The Commission penalised CEAT Limited but not its parent group, RPG Group [Paragraph 176, **Ministry of Corporate**

Affairs v. CEAT Limited and Ors., Ref Case No. 8 of 2013]; and

(c) The Commission penalised only Schott Glass India even though it noted that the resources available to Schott Glass India were from its parent group [Paragraph 9.95 and Paragraphs 10.2-10.3, **Schott Glass CCI**].

244. This is consistent with the approach in jurisdictions like the United States of America, where courts have held that, absent any anti-competitive conduct by the parent entity, there is no basis for holding a parent liable for the antitrust violation of its subsidiary [**Arnold Chevrolet LLC v. Tribune Co., 418 F. Supp 2d 172, 178**].

245. Thus, any penalty must have been calculated based on WhatsApp's relevant turnover because:

(a) Although Meta is WhatsApp's parent company, Meta and WhatsApp are distinct legal entities with separate operations;

(b) WhatsApp, and not Meta, offers and operates the WhatsApp service (along with the 2021 Update), which is the subject matter of the investigation;

(c) The Impugned Order's findings on alleged mandatory consent and excessive data collection relate to WhatsApp's conduct pertaining to the 2021 Update; and

(d) Even the findings against Meta in relation to leveraging and denial of market access are predicated on WhatsApp's user data-sharing practices under the 2021 Update, rather than an independent violation of the Competition Act by Meta.

246. The Commission imposes a penalty based on the relevant turnover of both Meta and WhatsApp because Meta allegedly enjoys full control over the activities and operations of WhatsApp. The law is clear that this alter ego theory must

satisfy a heightened threshold and be supported by evidence that the parent company dominates the subsidiary so fully that they are essentially the same company. Such a determination requires: (i) fraudulent intention; and (ii) complete domination of the affairs of the subsidiary by the parent [Paragraph 94, **Cox & Kings Ltd. v. SAP India Private Limited**, (2024) 4 SCC 1; Paragraphs 70-74, **Balwant Rai Saluja v. Air India Limited**, (2014) 9 SCC 407; Paragraph 90, **LIC v Escorts Ltd**. (1986) 1 SCC 264]. None of these factors have been established here.

247. It is claimed by Meta that the Commission's basis for asserting that WhatsApp is "fully controlled" by Meta for penalty purposes is equally unavailing:

(a) **Absence of standalone financial statements**: The Impugned Order claims that the absence of standalone financial statements for WhatsApp demonstrates that it is 'fully controlled' by Meta for fining purposes [Paragraph 257, Impugned Order]. WhatsApp is not an Indian entity and therefore does not maintain its financials in accordance with Indian regulatory standards, as this is not a statutory requirement for it. WhatsApp operates consistent with the accounting standards applicable to it, and its adherence to those standards may not be construed as Meta having full control over WhatsApp's activities and operations for fining purposes; and

(b) **Common executives**: The Impugned Order emphasises that WhatsApp and Meta have common executives [Paragraph 257, Impugned Order]. However, overlaps in the executive pool and management of group companies are commonplace and in the ordinary course of business.

> Such cross-staffing enables the companies to achieve broad alignment with their legal obligations and financial goals, and this does not undermine the established "separate legal entity" doctrine in corporate laws. To the contrary, courts have held that "mere similarity of shareholding patterns or commonality of management would not be by itself sufficient to lift the corporate veil. Law does not prohibit creation of various companies and corporations for different and specific purposes under common management. Each company, however, retains its independent legal entity and character" [Paragraph 19, **Board of Trustees of Port Kandla v. Jaisu Shipping Co. Pvt. Ltd**., Special Civil Application No. 23329 of 2017]. Indeed, this Hon'ble Tribunal itself has followed these principles in the past, observing that "[m]ere ownership, parental control, management of a subsidiary by the holding company [] does not constitute sufficient and adequate ground to justify piercing the status of their relationship" [Paragraph 16, **Vishal Sethi v. Collage Group Infrastructure Pvt. Ltd**., (2024) SCC OnLine NCLAT 396].

248. Therefore, Meta claims that the Commission has failed to demonstrate that WhatsApp and Meta are not separate legal entities. As a result, the Commission may not impose a penalty based on Meta's turnover, and the penalty should be set aside. We find strength in the arguments presented regarding Meta and WhatsApp being separate legal entity.

249. Furthermore, Meta claims that any penalty imposed on Meta is unjustified as the impugned order fails to establish any anti-competitive effects attributable to Meta's conduct. The Commission states that it is committed to

ensuring that penalties are 'proportionate' and 'reflective of the impact of the violations' [Paragraph 253, Impugned Order]. In the absence of any established effects in the market, the impact of any (hypothetical) violation cannot be determined, and any penalty imposed is inherently disproportionate. The principle of proportionality while imposing penalties has been recognised by several courts. For instance, the Hon'ble Delhi High Court set aside a penalty imposed by the Commission for non-compliance with its order, observing that the order was passed by the Commission without any application of mind and that the penalty was "shockingly disproportionate" [Paragraphs 22 and 33, **Rajkumar Dyeing & Printing Works Private Limited & Anr. v. Competition Commission of India**, (2014) SCC OnLine Del 6450]. Appellant contends that the Impugned Order fails to demonstrate that Meta's conduct has caused any anti-competitive effects in the alleged market for "online display advertising in India". Indeed, it fails to demonstrate any barrier to entry or growth by Meta's competitors, many of whom are thriving in the advertising sector. Nor has the Commission established any incremental benefit to Meta's advertising presence as a result of the limited user data sharing by WhatsApp. The Commission also fails to establish that consumers are harmed by Meta's conduct. Accordingly, in the absence of any anti-competitive effects, the penalty is clearly disproportionate to any 'harm' caused. To the contrary, the Commission, in fact, admits that advertisers value platforms that deliver relevant advertisements to users which align with the users' preferences and interests [Paragraph 207, Impugned Order]. Accordingly, the penalties imposed in the Impugned Order should be set aside as they have been issued in the absence of anti-competitive effects.

250. Appellant also claims that the Commission incorrectly applies the Competition (Amendment) Act, 2023 for determination of penalty. The Commission determines the penalty applicable to the parties based on the amendments to Section 27(b) added by the Competition (Amendment) Act, 2023 (Amendment Act), which was only brought into force on 5 March 2024. The law in force at the time the alleged contravention took place (i.e., January 2021) and even when the DG Report was published (i.e., 14 July 2023) did not include these amendments. The Competition Commission of India (Determination of Turnover or Income) Regulations, 2024 (Turnover Regulations) and the Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 (Penalty Guidelines) were also introduced on 6 March 2024. There was no basis to retrospectively apply the Amendment Act, the Turnover Regulations, or the Penalty Guidelines to conduct that had already taken place. Unless otherwise specified, any amendment applies only to prospective conduct and cannot be applied retrospectively [Paragraph 26, M. Surender Reddy v. State of A.P., (2015) 8 SCC 410; Paragraphs 28-29, CIT v. Vatika Township Private Limited, (2015) 1 SCC 1; and Paragraph 26, ITC Limited v. Competition Commission of India, Competition Appeal (AT) No. 11 of 2018]. The Amendment Act, Turnover Regulations, and Penalty Guidelines do not specify that they have retrospective effect and, therefore, they should be considered prospective in nature. Furthermore, there is nothing in the legislative intent to even indicate that these provisions were intended to apply retrospectively. The 'Explanations' cannot be read as merely clarificatory. The Commission's rationale to retrospectively apply Explanation 2 of the amended Section 27(b) was that "the objective of explanation to a section is to clarify or elucidate the intent of the

legislation without expanding or narrowing its original scope. It serves to make the meaning clear and consistent, aiding interpretation without altering or restricting the substantive provision itself" [Paragraph 252, Impugned Order]. This rationale is clearly inapplicable to the Amendment Act. Explanation 2 clearly expands the original scope of Section 27(b) and does not merely make its meaning clear. It introduces a substantive shift in the legal standard from the one set by the Hon'ble Supreme Court [Paragraphs 91-94, Excel Crop v. CCI]. The impact of this shift is an increase in the maximum possible penalty that can be levied by changing the basis of the cap on penalties from "relevant" turnover to "global" turnover. Where an explanation is substantive, it cannot be merely read to be clarificatory [Paragraph 62(ii), **Fashion Design Council of India v. Government of NCT**, 2024 SCC OnLine Del 5457]. Further, it is also a settled principle of law that penalty provisions are substantive in nature [Paragraph 39, **M/s Khemka & Co (Agencies) Private Limited v. State of Maharashtra**, (1975) 2 SCC 22]. Accordingly, the Commission errs in law by applying the explanation introduced by way of the Amendment Act in such a case and should have applied the applicable law in force at the time (i.e., the standards set out in **Excel Crop v. CCI**).

251. Appellant also claims that the Commission fails to account for important mitigating factors. Even if a penalty was warranted (which it was not), the amount of the penalty is disproportionate because the Commission failed to effectively consider two important mitigating factors: (i) the novel facts and circumstances and unique theories of harm; and (ii) the nature of the industry in which Meta operates. The Hon'ble Supreme Court has held that penalties

should not be imposed for a default in cases where there are novel facts and circumstances and unique theories of harm unless the party acted in deliberate defiance of the law or in conscious disregard of its obligation [Paragraph 8, **Hindustan Steel Ltd vs. State of Orissa**, (1969) 2 SCC 627; Paragraph 110, **Excel Crop v. CCI**]. Similarly, the European Commission (then the Commission of the European Communities) has also considered the novelty of a case when deciding whether to impose penalties. It stated, "In the case in point, in view of the fact that the concept of collective dominant position is being used for the first time under Article 86, the Commission considers that no fines should be imposed under Article 86" [Paragraph 84(a), Re **Italian Flat Glass**, OJ L33/44]. There is no question that this present case is the first time in India that a privacy policy is being adjudicated on competition standards. This certainly involves novel facts and circumstances and unique theories of harm. Meta could not have foreseen that its conduct would be alleged to be in violation of the Competition Act, especially since its conduct was bona fide and aimed at providing new and innovative products and services to users in India and across the world. The Commission appears to claim that the issues in this case are not novel because competition authorities across jurisdictions have increasingly been addressing issues arising out of data, network effects, and leveraging in digital markets [Paragraph 248, Impugned Order]. However, the Commission fails to provide any examples where those other authorities addressed issues that were the same as the issues before the Commission in this case. To the contrary, the Commission concedes that "[o]f course, the exact nature and impact of issues vary on a case-to-case basis" [Paragraph 248, Impugned Order].

252. Appellant further argues that the Commission's argument is undercut by its own reasoning. Specifically, when defining the relevant market and considering issues involved in the digital market, the Commission limits the geographic market to India, citing India's "unique" regulatory environment as compared to other global regimes [See, e.g., Paragraph 48.12 and Paragraph 128, Impugned Order]. Under the Commission's own reasoning, the fact that issues involving the digital market have been addressed by other authorities does not mean those issues are not novel in India. Yet, the Commission is quick to dismiss India's "unique" regulatory environment and import the experience of other jurisdictions when deciding to impose penalties [Paragraph 248, Impugned Order].

253. Meta also claims that the Commission fails to effectively consider the nature of the industry as a mitigating factor. In previous decisions, the Commission has taken into account the nature of the industry and market dynamics while determining penalties [Paragraphs 105 and 123, **Fast Track Call Cab Pvt. Ltd. Vs. ANI Technologies Pvt. Ltd.** and **Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd**., Case Nos. 6 and 74 of 2015]. However, in this case, the Commission fails to effectively account for the nature of digital markets when imposing a penalty on Meta. The nature of the digital market is a mitigating factor that precludes the imposition of a penalty. Specifically, Meta operates in a highly dynamic industry, as digital markets are characterised by innovation, fast-moving trends, and changing tastes and preferences. The dynamic advertising landscape has benefited from industry-wide digitisation, and technological developments are improving the personalisation abilities of

offline channels, increasing the substitutability between online and offline channels. The dynamic nature of the online display advertising market is further exemplified by the explosion in entry and expansion of competitors between 2016 and 2022. Moreover, with the introduction of AI and new technologies, the industry is poised toward further disruption and innovation. The Impugned Order fails to account for the rapidly changing and dynamic nature of the industry, where there is a constant shift in users' content preferences, ongoing improvement and enhancement in the nature of services offered by digital players, and periodic shifts in content display and consumption, etc. Given that the market often self-evolves based on these shifting factors, imposing penalties in such a fast-paced industry is inappropriate.

254. The Appellant also claims that the Impugned Order also fails to provide any cogent methodology explaining how the Commission arrived at the percentage for penalty. The Impugned Order concludes that the penalty should be 4% (four per cent) of the average total relevant turnover for Meta and WhatsApp. It claims that it arrived at this percentage based on the nature and gravity of the contravention as well as the nature of the industry or sector affected by the contravention. It gauges the nature and gravity of the contravention from the "sheer number of WhatsApp users affected by the 2021 Update" [Paragraph 261, Impugned Order]. However, this reasoning is vague and flawed because:

(a) WhatsApp currently may share user data with Meta from optional features on the WhatsApp service for advertising

purposes in limited scenarios; that is, users are not obliged to use these features; and

(b) While the Commission claims that it considered the nature of the industry, there is no discussion of the same when calculating the penalty. There is no analysis of the nature of the online display advertising sector (which is relevant for Meta) or the sector for OTT messaging apps through smartphones, let alone why 4% is required to create a deterrent effect.

255. In short, Meta counters the imposition of penalty on Meta on the grounds that the impugned order is disproportionate and unfair. A penalty on Meta is issued without due consideration that Meta's conduct squarely involves issues of privacy and data protection laws. Meta has not violated any provision of the Competition Act. Meta operates in a highly competitive market that is significantly wider than the alleged relevant market for "online display advertising in India". Meta is not dominant in any alleged relevant market. Further Meta has not abused its dominant position either as a result of leveraging or through denial of market access. Further, Meta has not engaged in conduct that has resulted in any anti-competitive effects.

256. Rebutting the arguments of the Appellants the Commission contends that it has adequately and correctly dealt with various submissions of Appellants in relation to imposition of penalty including quantum of penalty in light of Appellants' defence of mitigating circumstances and imposition of penalty on Meta through WhatsApp. The same are provided in details in paragraphs 248 to 263 of the impugned Order.

257. The issue of imposition of penalties and its determination has been considered in detail in the impugned order which is extracted as below for better understanding:

> "…
> 248. The Commission has also considered the issue of imposition of monetary penalty upon OPs and has given it a thoughtful consideration. WhatsApp and Meta have averred that even if the Commission were to find that they have violated the Act, it should not impose any penalty or remedies on them for various reasons mentioned in their respective submissions. The Commission has perused the same and notes that these assertions have already been dealt in this order. For example, WhatsApp has claimed that it did not compel any user to accept the 2021 Update. However, as observed earlier in this order, by providing a limited window for accepting the update, a sense of urgency was created among the users coercing them to accede to the take-it or leave-it terms dictated by Meta (through WhatsApp) out of fear of losing access to the platform which enjoys dominance in the relevant market. It has also been claimed that the present matter involves novel facts and unique theories of harm. In this regard, the Commission notes that the competition issues emanating from data, network effects and leveraging in digital markets have assumed huge significance, particularly in the last decade, and the Competition Authorities across jurisdictions have been intervening to address the same. Of course, the exact nature and impact of issues vary on case-to-case basis. As per Section 4 of the Act, every dominant entity is vested with the responsibility that it does not indulge in abusive conduct prohibited therein, such as imposition of unfair conditions, denial of market access, leveraging. Further, Competition Act being an independent statute in India, the conduct of the entities needs to be examined as per the provisions of the same and the plea taken that they are in compliance with existing data protection and privacy legislation does not absolve them of the contraventions found under the Competition Act."

Perusal of the explanation reveals the justification to be without any infirmity.

258. With respect to amendment of Section 27(b) of the Act, it has been noted as follows in the impugned order:

"…

252. The Hon'ble Supreme Court in plethora of judgements has clarified the intent, purpose and legal effect of an Explanation. The Commission notes that the objective of explanation to a section is to clarify or elucidate the intent of the legislation without expanding or narrowing its original scope. It serves to make the meaning clear and consistent, aiding interpretation without altering or restricting the substantive provision itself. Thus, the contentions of the OPs are rejected."

We don't find any infirmity even in this line of reasoning.

259. Further it has been noted by the Commission that *"…… Be that as it may, the primary contention of the OPs is that penalty should not be based on their global turnover. As elaborated infra, the Commission has computed the penalty based on the turnover of the OPs in India and therefore, no prejudice has been caused to the OPs by application of amended Section 27(b) of the Act….."*

260. The Commission also notes Regulations and Guidelines with respect to computation of monetary penalty:

"…

254. Accordingly, the Commission is guided by the amended Section 27(b) as well as the Competition Commission of India (Determination of Turnover or Income) Regulations. 2024 (Turnover Regulations), and general methodology laid down in the Competition Commission of India (Determination of Monetary Penalty) Guidelines. 2024 (Penalty Guidelines) in relation to computation of monetary penalty."

255. In terms of Penalty Guidelines issued by the Commission, the first step is determination of relevant turnover. Thereafter, the Commission would consider an amount up to thirty percent of the average relevant turnover of the enterprise for the purpose of determination of penalty to be imposed on an enterprise under Section 27(b) of the Act. The amount so determined would be adjusted for mitigating and aggravating factors applicable to a given case. Further, subject to legal maximum, the Commission may further increase the amount of penalty, if the amount of penalty so determined is not sufficient to create deterrence."

261. Basis the relevant turnover and relevant entity, penalty is concluded as follows in the impugned order:

> "....
> 256. The OPs have further asserted that penalty should be (a) based on relevant turnover and not total turnover of the entity concerned: and (b) imposed on relevant turnover of WhatsApp alone and not Meta. In this regard, the Penalty Guidelines issued by the Commission, itself prescribes that the starting point for computation of penalty is linked to the relevant turnover, therefore, the contention of the OPs in this regard stands appropriately accounted for. Further, clause 2(1)(h) of the Penalty Guidelines provides that relevant turnover means the turnover derived by an enterprise directly or indirectly from the sale of products and or provision of services, to which the contravention relates and determined for the purposes of imposition of penalty. Thus. the relevant turnover is to be determined with reference to the products or services directly or indirectly linked to violation of the Act.
>
> 257. In relation to second contention of the OPs i.e., the penalty should be imposed on relevant turnover of WhatsApp alone and not Meta, the Commission notes that, as discussed in detail in the order, the contravention of the provisions of the Act relates to both the OTT messaging services provided by WhatsApp as well as display advertising services provided by Meta. Therefore, relevant turnover derived from both of these services offered by the OP's must be considered for determining penalty. Additionally, the Commission notes that WhatsApp was wholly acquired by Meta in 2014 thereby assuming full control of WhatsApp. Further, WhatsApp and Meta vide their replies dated 05.07.2021 have submitted that the President of WhatsApp, who is responsible for the general management and control of the business and affairs of WhatsApp and the general supervision and direction of all its officers, employees, and agents, is also one of the Executives of Meta. Further, another executive at Meta is designated as Chief Product Officer and is responsible for leading Facebook products including both WhatsApp and Messenger services. It is further noted that WhatsApp does not maintain stand-alone financial statements and instead its assets/turnover are included in the financial statements of Meta. Thus, Meta enjoys full control over the activities and operations of WhatsApp. In view of the foregoing, the Commission is of the view that relevant turnover of both the entities

should be considered for computation of penalty and the averments of the OPs in this regard are rejected.

258. Coming to the determination of relevant turnover, it is noted from the submissions of WhatsApp that penalty should be based on its relevant turnover i.e, WhatsApp's turnover in India which is stated to be derived solely from WhatsApp Business API sales to business presumably as the OTT messaging services are provided to users at zero monetary cost). Further, it is noted from Meta's submissions that its revenues from online digital display advertising in India is the relevant turnover for computation of penalty. Meta has furnished details related to its revenues from online digital display advertising in India. Therefore, the Commission observes that relevant turnover in the present matter is the turnover derived by WhatsApp in India and turnover derived by Meta from display advertisement services in India.

259. Para 3 of the Penalty Guidelines also provides that for calculating average relevant turnover, the Commission, may consider the relevant turnover or income of three years of the enterprise preceding the year in which the DG's Investigation Report is received by the Commission. In the present matter, the DG's Investigation Report was received by the Commission on 12.01.2023 and accordingly, the Commission had considered relevant turnover of Calendar Years (CYs) 2020, 2021 and 2022 of the OPs.

260. The Commission vide its order dated 18.10.2024 sought turnover data from all the three OPs for the CYs 2020, 2021 and 2022 within 7 (seven) days of receipt of the said order. This data was furnished by the OPs on 14.11.2024 after seeking an extension of three weeks. Based on the said data, relevant turnover of WhatsApp and Meta as determined above for the CYs 2020. 2021 and 2022 is tabulated hereunder:

Year	**Relevant Turnover of WhatsApp (A)**	**Relevant Turnover of Meta (B)**	**Total Relevant Turnover WhatsApp (A+B)**
CY 2020	38.34	7.888.27	7,926.61
CY 2021	85.09	13,934.06	14,019.15
CY 2022	524.76	17,494.04	18,018.80
Total	648.19	39,316.37	39,964.56
Average of three years	216.06	13,105.46	13,321.52

261. The nature and gravity of the contravention can be gauged from the sheer number of WhatsApp users affected by the 2021 Update wherein an

unfair condition was imposed upon them by Meta in coercing them to accept the said update. As a result of such coercion, approximately 264.50 million users had accepted the policy by May 2021. Further, as of March 2023, 594.50 million WhatsApp users have accepted the 2021 Update ie., Meta has the unilateral ability to use data of these 594.50 million users for advertising purpose. As already elaborated in detail in this order, user data is crucial in offering targeted advertisements creating a lock-in for advertisers to prefer Meta over rivals. This is corroborated by the ever-increasing revenue numbers for Meta from display advertising. The anti-competitive effect has already been elaborated in this order and the same is not being repeated for brevity. Therefore, considering the nature and gravity of contravention as well as nature of the industry or sector affected by the contravention, the Commission concludes that an amount of 4% (four per cent) of the average total relevant turnover as stated above is the basis for determination of penalty to be imposed on the OPs under Section 27(b) of the Act. Accordingly, the amount so determined is Rs. 532.86 crore based on average total relevant turnover as computed above.

262. Coming to assessment of mitigating and aggravating factors, the OPs have submitted various mitigating factors viz. co-operation with the Commission and the DG throughout the investigation, first-time contravention of the Act by the OPs, benefits to consumers and advertisers, as well as pro-competitive effects, etc. The OPs have also averred that optional features that result in sharing of user data from WhatsApp to Meta for advertising purposes were introduced recently. The Commission has given a thoughtful consideration to these factors and notes that WhatsApp users started receiving notifications relating to mandatory acceptance of 2021 Update from 05.01.2021 and on 07.05.2021, WhatsApp announced that no user would have their account deleted or lose functionality due to non-acceptance of the 2021 Update. Meta has also asserted that user data is currently being shared by WhatsApp with Meta for advertising purposes in limited scenarios. In view of the same, the Commission decides to reduce the amount of penalty as determined in previous para by 60% (sixty per cent). The Commission do not find any aggravating factor in the present matter."

This determination of penalty is as per the methodology and Regulations and also accounts for mitigating factors and therefore we cannot find any infirmity in this conclusion of the Commission. It is to be noted that with the same

methodology even with slightly modified orders, we find that the amount of penalty will work out to be the same i.e. Rs. 213.14 crore only (Rs. Two hundred Thirteen Crores and Fourteen Lakhs only).

262. Meta is the parent company of WhatsApp. Apart from many other activities, Meta has been undertaking “online display advertising”. Commission has found it be leading in this segment. Commission notes that Appellants collect extensive user data from WhatsApp through the 2021 Policy, and thereafter, shares this data with other Meta companies for non-WhatsApp purposes, including digital advertisements on Meta's various platforms. This causes, and has further potential to cause, immense anti-competitive harm to Meta’s competitors in the online display advertising market. We have already concluded earlier that Meta is not dominant in the market for "online display advertising in India" but a leading player. But its conduct has caused anti-competitive effects in the market for "online display advertising in India" by denial in this market. We have determined earlier, it is the WhatsApp alone, which is dominant in relevant market of OTT messaging apps through smartphones in India and is also found to have abused its dominant position and violated Section 4(2)(a)(i) of the Act. Thus, imposition of penalty on WhatsApp is wholly justified. But in case of Meta group, we find that in online display advertisement market, they have violated section 4(2)(c) but not Section 4(2)(e). We also note that the violation of Section 4(2)(e) to be not sustainable as WhatsApp and Meta are separate legal entities, even though Meta is acquired WhatsApp and has full control company. Still there is a violation of Section 4(2)(a(i) and section 4(2)(c) - by WhatsApp and by Meta group respectively. We

also need to note that even though legally WhatsApp and Meta are separate legal entities, yet Meta is parent company of WhatsApp. We also note that Meta enjoys fall control over the activities and operations of WhatsApp. WhatsApp doesn't have standalone financial statements. Furthermore, WhatsApp and Meta have common executives. We need not pierce the corporate veil but Commission has established that due to excessive data sharing between WhatsApp and Meta, a situation of market denial has been created. Therefore, there is a justification in imposing penalty on both in a combined manner as has been worked out by the Commission.

263. We have gone through the methodology adopted by the Commission in calculating the penalty and we don't find any having any infirmity. We therefore do not find justification in ordering review of the penalty.

Conclusion

264. On the basis of aforesaid we arrive at following conclusions:

a) The Commission's order holding breach of Section 4(2)(a)(i) and 4(2)(c) are upheld.

b) The Commission's order holding breach of Section 4(2)(e) is not sustainable.

c) The directions issued by the Commission to cease and desist in paragraph 247.1, i.e. *"247.1 WhatsApp will not share user data collected on its platform with other Meta Companies or Meta Company Products for advertising purposes, for a period of 5 (five) years from the date of receipt of this order. After expiry of the said period, the directions at para 247.2 (except para 247.2.1) will apply mutatis*

mutandis in respect of such sharing of data for advertising purposes." is not sustainable and is set aside, the rest of directions i.e. 247.2.1, 247.2.2, 247.2.3 and 247.2.4 are upheld.

d) The penalty imposed of ₹213.14 crore only (Rupees Two Hundred Thirteen Crores and Fourteen Lakhs only) upon Meta is upheld.

Order

265. In result, both the Appeals are partly allowed only to the extent of:

(i) Setting aside the findings of the Commission in so far as it holds breach of Section 4(2)(e), and

(ii) Setting aside the directions in paragraph 247.1, i.e. *"247.1 WhatsApp will not share user data collected on its platform with other Meta Companies or Meta Company Products for advertising purposes, for a period of 5 (five) years from the date of receipt of this order. After expiry of the said period, the directions at para 247.2 (except para 247.2.1) will apply mutatis mutandis in respect of such sharing of data for advertising purposes."* The rest of the Impugned Order is upheld. The order dated 18 November 2024 is modified accordingly. The parties shall bear their own cost.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi.
November 4, 2025.

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