



FinnRebus Quarterly

[A Peer-Reviewed Journal of Law, Economy & Development]

www.finnrebus.com : Email: Support@finnrebus.com

THE NEED TO DISCERN CONCEPTUAL ECHOES OF PHYSICAL MARKET FROM VIRTUAL MARKET: ANALYSIS OF COMPETITION LAW IN FINTECH SECTOR VIA HARSHITA CHAWLA CASE

Nikita Sharma* & Yugank Goel**

Abstract

If there is anything that resembles a jungle in our modern urban and civilised world, it is cyber-space. Our understanding of cyberspace is highly dependent on the human construct that surpasses the subjectivist interpretation of physical space. So, is that it? Is understanding cyberspace beyond us and so its regulation? The question then is: Can we suppose the traditional legal system be applied to the virtual environment; the first is determined by boundaries and later has no regard for them. On the contrary, it is suggested that we are not to start with a world to regulate, we must build it. The context of this last statement will become clear from the rest of this paper.

The study at hand is intended to target at the doctrines of competition law and whether those doctrines which have worked well in the physical environment are sure to fulfil their purpose by analogy in cyber-world i.e. whether we need to build by analogy or build anew. The recent developments in jurisprudence which we see evolving in the Fintech sector only strengthen the above question and this paper aims to provide an answer.

Keywords: Cyberspace, Cyber law, Information Technology, Competition law etc.

Citation: Sharma, Nikita & Goel, Yugank. "The Need to Discern Conceptual Echoes of Physical Market from Virtual Market: Analysis of Competition Law in Fintech Sector via Harshita Chawla Case". *FinnRebus Quarterly* 1.1. (2022): 33-37

INTRODUCTION

If there is anything that resembles a jungle in our modern urban and civilised world, it is cyber-space. Kant says our perception of the universe is not a feature of reality but a function of a priori scheme which we project into reality or interpret it. When applied to cyberspace, it would mean that our understanding of cyberspace is highly dependent on the human construct that surpasses subjectivist interpretation of physical space. So, is that it? Is understanding cyberspace beyond us and so its regulation? Rebecca Bryant says that there is no essential difference between the physical and cyberspace, but only our perception of its constituent elements. For us humans, understanding any alien element involves colonization of it by drawing analogies.

The question then is: Can we suppose the traditional legal system be applied to the virtual environment; the first is determined by boundaries and later has no regard for them. On the contraire, it is¹ suggested that we are not to start with a world to regulate, we must build it. The context of this last statement will become clear from the rest of this paper.

The study at hand is intended to target at the doctrines of competition law and whether those doctrines which have worked well in the physical environment are sure to fulfil their purpose by analogy in cyber-world i.e. whether we need to build by analogy or build anew. The recent developments in jurisprudence which we see evolving in the Fintech sector only strengthens the above question and this paper aims to provide an answer. Furthermore, an early recognition will not only provide us with a first mover advantage but also provide for a regulatory regime for a sector which involves an increasingly large number of people and huge amounts of money.

HARSHITA CHAWLA VS. WHATSAPP & FACEBOOK

WhatsApp Pay (hereinafter "WPay"), by way of third-party application mechanism, was to be launched as a UPI based service as an in-chat payment system with WhatsApp.² This means that it is automatically installed with WhatsApp, a situation which preemptively led to the present complaint.

With the beginning of March 2018, the parent company started facing a number of issues with NPCI as also Ministry of Electronics and Information Technology. This struggle has also been witnessed in Brazil whereby its Central Bank suspended the payment service on the premise that it was necessary for preserving “an adequate competitive environment”.³

The thrust of present analysis, which forms the grounds of this paper:

- a. Contention of the informant that there are two different markets in question and so as a necessary corollary, the two products should be released independently for in any other case, it would amount to tying under Section 4 (2) (e) of the Competition Act, 2002, which was followed by the allegation that there is an element of coercion present. It was contended that by means of pre-installation of WPay in WhatsApp, the latter violated Section 4 (2) (e), as it is was taking undue advantage of its dominance in the first market, with a view create a stronghold in the latter relevant market. This pre-installation was alleged to impose an unfair term on the user by the dominant entity.
- b. Contention of WPay that for “tying”, there must be a coercion and that for coercion it has to be established that WPay was forced on the consumers. Even though it was pre-installed, it was contended that it is only an additional feature and the consumers will have voluntary say in deciding to activate it as they will have to enter into a separate contract. Despite its assurances, WPay has been pre-installed.

Now, this paper focuses on another aspect and how we missed to gather an opportunity to establish suitable rules of violation in Virtual Markets instead of applying the tests good for physical market to the virtual space.

CCI on Dominance

The two markets identified by CCI, were:

- a. “Market for internet-based messaging application through smartphones; and
- b. Market for UPI enabled digital payment applications”

It cannot be denied that WhatsApp enjoys a dominant position (from general understanding and proxy data accepted by CCI) in first relevant market. However, a mere possession of dominance is not and cannot be prohibited as there could be a number of positive reasons for the achievement of the said dominance like. It was also highlighted by CCI that even though WhatsApp has a strong base, it cannot be said that it is necessarily true for its payment arm.

Unfair Competitive Edge

A third-party application (hereinafter ‘TPA’) has to strive and struggle hard to gain its consumer base, retain it and expand at the same time. The cost of consumer acquisition is high and there is constantly a need to expand its consumer base. The success or failure of a TPA is highly dependent upon its scale of operations. The simple reason being that there is a very low margin available for TPAs, which implies it has to depend on expansion and retention of as many customers as it can. This again culls out the importance of consumer base for a company operating in this area.

Now, due to pre-installation of WPay in WhatsApp, the customers will have a ready availability which would prima facie mean that the reach of WhatsApp will be readily available to WPay as opposed to other players who have struggled hard to gain consumers and have to still work hard to retain them in contrast to WPay. In other words, a new entrant will have to undergo considerable amount of struggle in terms of money, effort and most importantly time, which has very conveniently been by-passed by WPay.

It must be noted that such an act, if found, is not only detrimental to other players but also the consumers by being placed at a very intimate position with one product, which other products in the relevant market cannot and have not achieved and the market by changing its competitive dynamics.

Need for reform in Interpretation of Coercion in Virtual Market

No act constitutes ‘tying in’ if it lacks the element of coercion. The approach must be studied in contradistinction to the brick-and-mortar entities. The following are now well established, tests:

- a. The tying and tied products are two separate products
- b. The entity concerned is dominant in the market for tying products;
- c. The consumer has no choice to buy one of the products: tying or tied;
- d. The tying is capable of restricting/foreclosing in the market.

Failure to Consider the Dynamics of a Virtual Market

Whether mere existence of an App can be taken to be abuse must be objectively examined since in cyberspace it may well act as a catalyst and at the same time hide from the eyes of CCI. The abuse as we have known till now is necessarily to be differentiated in the physical world and the cyberspace environment. In the digital environment the abuse can take place different forms, this is exactly why we face moral or ethical constraints while enforcing click-wrap or browse-wrap

agreements which are in the nature of being coercive but cannot yet be called unconscionable.

Here in this case, it was noted that there was no explicit coercion whereby the user was to be meant to use WPay exclusively. It was also considered that there has been no influencing activity whereby the consumer choice was impaired. In fact, in analysing the fourth condition, the CCI observed after noting the competition in the relevant market that “in such a market, to perceive that WhatsApp Pay will automatically get a considerable market share only on the basis of its pre-installation seems implausible.” This is in the Airtel-Reliance case,⁴ it was held that “expansion into new markets should not always be looked critically”. The CCI in this case found no basis for allegation of abuse of dominance because “a mere existence of an App on the smartphone does not necessarily convert into transaction/usage.” It was also added that “incorporating the payment option in the messaging app does not seem to influence a consumer’s choice when it comes to exercising their preference in terms of app usage”.

The CCI does not work as an adversarial authority but rather as inquisitorial one. It is thus, naturally expected out of it to inquire and expand the interpretation of competition law as and when required. This expectation is only aggravated by the dynamic changes we see in the virtual markets today. The CCI is an over-reaching market regulator, however it is, hat in hand, humbly submitted that there was not enough discussion on consumer behaviour and point of sale in virtual market which resulted indirectly in the app getting a leeway.

It is submitted that tying in digital environment has to be viewed differently on account of its nature and scope. It is here, that we need to consider various other factors that come into picture in the virtual space which have to be given their due in the interpretation of coercion in cyber-market.

Switching Cost & Consumer Behaviour Undermined

The amount of experience with a particular platform in preference over a competitor is mediated by the consumer’s perceived ease of use.⁵ This leads to what is widely referred to as switching costs, which are defined as the time, money, and mostly the psychological and effort that would be required to ensure compatibility between a new purchase/use and an earlier one, for a consumer. With apps like WhatsApp, this cost of switching away, more than any other platform outweighs the benefit of using an alternative product, for most people.⁶ This cost is affected by factors like value characteristics of the service and service provider, the technical expertise of the user and the past investment of the user at this service.⁷ Further, this repeated consumption results in a (cognitive) switching cost that increases the probability of a

consumer to continue with that platform over the alternatives, especially when an additional dynamic service is offered in the same platform, opposite to which the alternatives offer a complex course. This cognitive switching cost is a factor of customer inertia, that is impacted by switching avoidance, a personalized state characterized by resistance to change, satisfied with the goods/services.⁸ Such customer loyalty is a complex aspect of consumer behaviour, of emotional commitment to simple habits and argues that switching costs can provide a source of differentiation for otherwise homogeneous products and can lead to customer lock-in.⁹

Test of Realistic Choice

The OECD Report on Abuse of Dominance suggested that “in digital markets, coercion should not be construed in its traditional sense. It states that the effect of even a nudge (such as pre-installation) can be equally conceptualised as an equivalent of coercion”.¹⁰

It is of extreme importance, thus, that the nature of market is considered before applying the rigid tests. One may refer to *Microsoft v Commission*,¹¹ whereby the test of realistic choice was examined by the Court of First Instance of European Union. The factual matrix of that case and the present case is quite similar. In that case the two products under consideration were: Windows Media Player which was alleged to be integrated with the Windows Operating System and on this basis, it was held that the case is of tying in of products which is violative of Article 102 TFEU, which is quite similar to Section 4 of the Indian Competition Act, 2002. It considered coercion at the time of sale and not only the effect on consumer behaviour after the purchase had been made. It was held that in cases of tying in digital markets “coercion exists when a dominant undertaking deprives its customers of the realistic choice of buying the tying product without the tied product”.

CCI did undertake that aspect to the extent that it noted that above will not have any effect on consumer behaviour as there “seems to be a strong likelihood of a status quo bias operating in favour of the incumbents, at present”. The approach of the CCI has to be appreciated here to attempt to take into consideration consumer behaviour. An added analysis of this behaviour specific to virtual environment may have done wonders in the development of jurisprudence of competition law in the country, whatever the decision might have been.

Networks Effect & Unethical Competitive Advantage Ignored

The nature of digital market is where winner-take-all markets. Meaning thereby it that a single dominant entity may have the potential to take over all

its competitors. If a company has significant market dominance over even one of its products, there is a serious risk of harm to competition and consumers. Considerations of network effects, which imply that a platform's dominance in one market may offer it the ability to leverage its network effects and so take advantage of economies of scope for entering a new market, only add to the potential harm.¹² Network effect ensures that customers do not switch to other platforms easily unless there is a new competitor entering the market with an altogether disruptive technology. In no scenario can it be said that in this case WhatsApp does not have the benefits of network effect.

The latter part of last decade has seen an unprecedented hike in the number of Fintechs which has led to alarming propositions. This includes, firstly, the overt exploitation of their core data reservoirs, gathered, collected and obtained using their non-financial activities, even in the financial market. Secondly, their inherent capacity to directly absorb competition altogether.¹³ This enables such giants in realising, direct and indirect network effects, that is increase in their service value with the increase in the number of consumers.¹⁴ It must be noted that WhatsApp has a vast existing database, 500 million users alone in India, added to the fact that Facebook is well known for its predatory tactics.

Rigid Necessity for Real & Actual Harm

CCI, in its conclusion, taking a “pragmatic approach” noted that the allegations of the informant here are only unwarranted and implausible

apprehensions that WhatsApp may use its dominant position to push its product in the second relevant market, since WhatsApp’s actual conduct is yet to manifest. However, we see now that informant was right as WPay is today installed automatically in the app.

The author is bound to submit, however, that even if this new development is ignored, this determination of market foreclosure is problematic and in fact, dangerous, especially in the ever-dynamic and uncertain digital media, since it presupposes it on real and actual harm. CCI in this case considered that it is only when a significant and real harm is caused to the competitor must market foreclosure be examined. This clearly needs revision. The European Union Court of Justice has affirmed that a total foreclosure is not necessary; it would be enough if competitors are “disadvantaged, which is deemed to occur when demand for their products is reduced”.¹⁵

CONCLUSION

The paper contends that, whether mere existence of an App can be taken to be abuse, must be objectively examined since in the digital world it may well act as a catalyst. This analysis submits that tying in digital environment has to be viewed differently on account of its nature and scope. We live in the dynamics of the digital world and our jurisprudence must catch up with it. The inquisitorial nature of CCI mandates it to inquire into the ever-growing possibilities. It has to be accepted that the competition law in the country is still developing and evolution of new jurisprudence should not be feared.

End Note

* Nikita Sharma, B.B.A. LL.B. (Batch 2017-18), HPNLU, Shimla.

** Yugank Goel, B.B.A. LL.B. (Batch 2017-18), HPNLU, Shimla.

¹ Lawrence Lessig, *The Path of Cyberlaw*, 104 *Yale Law Jour.* 1743 (1995)

² *WhatsApp Payments*, WhatsApp, <https://www.whatsapp.com/payments/in> (last visited Feb. 13, 2021).

³ Mario Sergio Lima & Kurt Wagner, *Brazilian Authorities Suspend WhatsApp Payments*, BLOOMBERG, (Jun. 24, 2020), <https://www.bloomberg.com/news/articles/2020-06-23/brazil-s-central-bank-suspends-whatsapp-payments>; see also *Dibya Behera et al.*, *No Abuse Of Dominance By WhatsApp And Facebook: A Shot In The Arm For WhatsApp Pay?*, NITISH DESAI ASSOCIATES, (Sep. 1, 2020), https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/no-abuse-of-dominance-by-whatsapp-and-facebook-a-shot-in-the-arm-for-whatsapp-pay.html?no_cache=1&cHash=e8a8e3642161742b5724e186de8bf274.

⁴ *Bharti Airtel Limited v. Reliance Industries Limited & Ors.*, [2017] 142 SCL 294 (CCI); see also *In Re: C. Shanmugam & Anr. v. Reliance Jio Infocomm Limited & Ors.*, 2017 SCC OnLine CCI 27.

⁵ Kyle B. Murray & Gerald Häubl, *Explaining Cognitive Lock-In: The Role of Skill-Based Habits of Use in Consumer Choice*, 34 *J. Con. Res.* 77-88 (2007).

⁶ P. Klempere, *Competition when consumers have switching costs: An overview with applications to industrial organization, macroeconomics, and international trade*, 62(4) *Rev. Eco. Stud.* 515-539 (1995).

⁷ Soumya Ray et al., *Research Note: Online Users' Switching Costs: Their Nature and Formation*, 23(1) *Info Sys Res* 197-213 (2012).

⁸ José Marcos Carvalho de Mesquita & André Torres Urdan, *Determinants of Customer Inertia – An Investigation of Mobile Phone Services*, 21(2) *Rev. Bras. Gest. Neg. São Paulo* 234-253 (2019).

⁹ Gal Zauberaman, *The Intertemporal Dynamics of Consumer Lock-In*, 30(3) *J Con Res* 405-419 (2003).

¹⁰ OECD (2020), *Abuse of Dominance In Digital Markets*, <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>.

¹¹ *Microsoft Corp. v. Commission*, [2007] 5 C.M.L.R. 11.

¹² Rajarshi Singh & Abhishek Abhi, 'The Problematic Stance of CCI in Whatsapp Pay Tying Case: An Opportunity Missed?', KLUWER COMPETITION LAW BLOG, (Jan. 11 2021),

<http://competitionlawblog.kluwercompetitionlaw.com/2021/01/11/the-problematic-stance-of-cci-in-whatsapp-pay-tying-case-an-opportunity-missed/>.

¹³ Dirk Zetzsche et al., *From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance*, 14(2) NYU JL&B 393-446 (2018).

¹⁴ Nicola Bilotta & Simone Romano, *Tech Giants in Banking the Implications of a New Market Power*, Istituto Affari Internazionali (IAI) 20 (2019).

¹⁵ *Microsoft Corp. v. Commission*, [2007] 5 C.M.L.R. 11.