

## MOOT PROPOSITION

1. WhatsApp is a cross-platform centralized instant messaging and voice-over-IP service owned by French company Beta Platforms.
2. WhatsApp Inc. ('WhatsApp') has updated its privacy policy and terms of service for WhatsApp users. It was inter alia reported that the new policy makes it mandatory for the users to accept the terms and conditions in order to retain their WhatsApp account information and provides as to how it will share personalized user information with Facelook Inc. ('Facelook') and its subsidiaries.
3. Since early January 2022, WhatsApp users started receiving notification from WhatsApp informing them about the new changes in WhatsApp terms of service and privacy policies. The text of such notification, as reported in media is as follows:
  - WhatsApp is updating its terms and privacy policy.
  - Key updates include more information about:
    - WhatsApp's service and how we process your data.
    - How businesses can use Facelook hosted services to store and manage their WhatsApp chats.
    - How we partner with Facelook to offer integrations across the Facelook Company Products.
4. By tapping AGREE, you accept the new terms and privacy policy, which take effect on March 28, 2022. After this date, the users will need to accept these updates to continue using WhatsApp. Users can also visit the Help Center if they would prefer to delete the account and would like more information. As a result, users will have to mandatorily accept the new terms and policy in their entirety including the terms with respect to sharing of their data across all the information categories with other Facelook Companies.
5. As per previous privacy policy of WhatsApp, existing users had an option to choose whether they wanted to share their WhatsApp data with Facelook.
6. The antitrust watchdog in its order, Competition Commission of Myria essentially identified two interconnected grounds that raised several anti-trust concerns. The first is that under the updated policy, WhatsApp would share individualized user data with other Facebook companies. The second is that all current WhatsApp users were required to formally accept the Updated policy by a certain date in order to keep using WhatsApp's services.

In light of the WhatsApp's dominant market position and market dominance, Competition Commission of Myria believes that the "take-it-or-leave-it" nature of its privacy policy, terms of services, and information-sharing requirements demand a thorough review.

7. Having considered the media reports and the potential impact of the Policy and Terms for WhatsApp users and market, the Competition Commission of Myria (CCM), in its ordinary meeting held on 19 April 2022, decided to take suo moto cognizance of the matter.

8. In the said meeting, the Commission deemed it appropriate to seek response from both WhatsApp and Facelook on certain queries, as specified in the order dated 19 April, 2022.

9. Pursuant to the said directions, WhatsApp filed a confidential version of its response on 8, May 2022. The Commission in its meeting held on 11 May 2022 considered the same and observed that the same is not in accord with Regulation 35 of the Competition Commission of Myria (General) Regulations, 2009 (the, 'General Regulations') whereby and where under a party seeking confidentiality has to make an application setting out cogent reasons for seeking such treatment along with confidential and non-confidential versions of the information provided and documents sought to be filed. The Commission further observed that the response filed by WhatsApp is also not in compliance with Regulation 11 of General Regulations as the same is not signed in terms of the provisions contained therein. In view of the above, WhatsApp was directed to submit its response in compliance with the observations made in this order latest by 25 June 2022. The Commission further observed that despite clear directions in the order dated 19 April, 2022 passed by the Commission, Facelook neither responded to the queries raised by the Commission nor moved any application seeking extension of time to comply with the requisitions made by the Commission.

10. In these circumstances, the Commission directed Facelook to submit its response to the queries mentioned in the order dated 19 April 2022 without any delay and in any event latest by 30 May, 2022.

11. WhatsApp and Facelook responded to the said directions of the Commission vide separate e-mails dated 24 May 2022.

Facelook has inter alia submitted that "...While Facelook is the parent company of WhatsApp, Facelook and WhatsApp are separate and distinct legal entities. It is WhatsApp (not Facelook) that offers and operates. WhatsApp's instant messaging

service that is the subject of the Hon'ble Commission's Order. Specifically, the 2022 Update is in relation to the Terms of Service and Privacy Policy of the messaging service offered by WhatsApp. In light of the above, Facelook humbly submitted that it should not be arrayed as a party to these proceedings, and WhatsApp is the appropriate entity to provide the Hon'ble Commission with the information sought....". 11. WhatsApp had stated that the primary aim of the 2021 update was twofold: (a) to provide users with further transparency about how WhatsApp collects, uses and shares data.

(b) to inform users about how optional business messaging features work when certain business messaging features become available to them.

12. Since Facelook would be a beneficiary of the data sharing arrangement. Accordingly, it was held to be a necessary party since the data was to be shared with it and the Competition Commission of Myria decided against the step taken by Facelook in its order dated 30 June, 2022. The decision emphasised on excessive data collection and stalking of consumers for targeted advertising, an alleged abuse of dominant position. It found abuse of WhatsApp's dominant market status through "exploitative and exclusionary conduct". CCM held that there is abuse of dominant use on the part of WhatsApp and Facelook.

13. Aggrieved by the decision of CCM, WhatsApp and Facelook approached the Hon'ble High Court on 5 July, 2022.

- WhatsApp contends that there is no violation of constitutional rights. WhatsApp contended that there is no contravention of provisions of the Competition Act.
- Facelook submitted that it ought not to be made party to these proceedings since they are separate legal entities. While Facelook is the parent company of WhatsApp, the two are separate and distinct legal entities. It is WhatsApp (not Facelook) that offers and operates WhatsApp's instant messaging service that is the subject involved.

14. Constitutional validity of the updated privacy policy of WhatsApp was challenged as violative of Article 21 and Article 19 of Constitution of Myria.

15. Both the petitions were clubbed and would be heard together on 5<sup>th</sup> November, 2022.

16. The issues raised before the High Court are :

(a) Whether the CCM has jurisdiction to deal with data-related matters and Privacy concerns of WhatsApp and Facebook?

(b) Whether the updated Privacy Policy of WhatsApp is a *prima facie* a case of abuse of dominance under the Competition Act of Myria ?

(c) Whether the privacy policy and terms of service are violation of the fundamental right to privacy as well as provisions of the Information Technology Act of Myria?

Note: The Laws of Myria are to be presumed *pari-materia* to the laws of India.

**Disclaimer:**

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