CCLP
Centre for Competition Law and Policy

NATIONAL

SC refuses to interfere with Karnataka HC order against Amazon and Flipkart

The Supreme Court dismissed Flipkart's appeal against the Karnataka High Court's order concerning the dismissal of an antitrust probe by the Competition Commission of India ('**CCI'**). The court commented that Amazon and Flipkart are expected to cooperate and submit themselves to investigation voluntarily.

However, on Flipkart's request, the court extended the deadline to join the probe by four weeks and instructed the party that no further extension shall be granted after the lapse of this period. Last month, a division bench of the Karnataka High Court had dismissed the appeals of Flipkart and Amazon against a single-judge bench ruling upholding the validity of CCI's order directing the Director General to conduct an investigation.

The investigation pertains to the allegations of deep discounts on online sales of smartphones, selective distribution, and predatory pricing against the two e-commerce giants. These allegations were levelled by Delhi Vyapar Mahasangh, an affiliate of the trade body Confederation of All India Traders. The legal experts perceive the Supreme Court's decision as a greater challenge for Amazon and Flipkart in the long run. However, the informants hailed it as a big milestone towards checking antitrust violations by the e-commerce giants.

Source: Supreme Court order 09-08-2021

CCI accuses Grasim Industries Limited for abusing its dominant position

The three Informants filed the instant matter against Grasim Industries Limited ('**GIL**') under section 19(1)(a) of the Competition Act, 2002 ('**Act**') alleging contravention of sections 3(4) and 4 of the Act. The Informants alleged that GIL didn't disclose its discount policies, treated customers differentially, and abused its dominance by refusing supply of Viscose Staple Fibre ('**VSF**').

The CCI directed the Director General ('**DG**') to investigate this matter under Section 26(1) of the Act. The DG identified the relevant market of GIL as the market for the supply of VSF to spinners in India. Further, the DG observed that GIL is the sole producer of VSF in India and noted its market share in the domestic supply of VSF to be above 85%. Based upon these considerations, the DG investigated the issue of abuse of dominance.

The DG found that GIL's practice of imposing supplementary obligations on VSF supply violated Section 4(2)(d) read with Section 4(1) of the Act. The DG also noted that the GIL's refusal to supply VSF to Informant No. 2 violated Section 4(2)(d) read with Section 4(1) of the Act.

Further, the DG noted that GIL's conduct of charging unfair and discriminatory prices contravened Section 4(2)(a)(ii) read with Section 4(1) of the Act.

Therefore, the CCI held that GIL has abused its dominant position in the relevant market for the supply of VSF by charging discriminatory prices, denying market access and imposing supplementary obligations on the customers. Moreover, since a penalty of ₹301.61 crore was already imposed against GIL in a similar case involving substantially similar conduct, the CCI deemed it appropriate not to impose any further penalty on GIL.

Source: Case Nos. 51, 54 & 56 of 2017

CCI imposed a fine of ₹200 crores on Maruti Suzuki for its Discount Policy

The CCI received an email from an anonymous Maruti Suzuki India Limited ('**MSIL'**) dealer alleging that MSIL's sales policy is against the customers' interest and the provisions of the Act. Further, it was alleged that MSIL's dealers in the West-2 Region (Maharashtra state, except Mumbai and Goa) were not permitted to give discounts to their customers beyond a prescribed limit. If any dealer gave extra discounts, MSIL would penalize them as per its Discount Control Policy ('**DPC'**).

The CCI issued a notice to MSIL upon consideration of the e-mail. Based upon the complaint and MSIL's response, the CCI held that MSIL has *prima facie* contravened the provisions of Section 3(4)(e) of the Act dealing with Resale Price Maintenance ('**RPM'**). The CCI directed the DG to investigate the matter and submit a report.

The DG noted that MSIL is a manufacturer operating in the upstream market of manufacturing passenger vehicles and the dealers are the distributors in the downstream market. The DG concluded that such practice by MSL caused an appreciable adverse effect on competition and was in contravention of Section 3(4)(e) of the Act. Therefore, the CCI imposed a penalty of ₹200 crores upon MSL by exercising its powers under the provisions of Section 27(b) of the Act. Further, the CCI ordered MSL to cease and desist from indulging in RPM.

Source: *Suo Motu* Case No. 01 of 2019

CCI dismisses allegations of abuse of dominance against Siemens Group

The informants, Star Imaging and Path Lab Pvt. Ltd. as well as Janta X-Ray Clinic Pvt. Ltd ('IPs') alleged that the IPs bought CT and MRI Machines from Siemens Group ('OPs') which were protected by encryption codes. Due to password-protection, the IPs had no other option but to oblige with the mandates of the OPs thereby resulting in 'refusal to deal'.

Further, the IPs alleged that the OPs were charging differential prices from their customers. The CCI observed that there was no requirement of defining the relevant markets in the present case. The CCI noted that the CT and MRI machines were apparently substitutable with the other machines of similar types offered by other manufacturers in the market.

Additionally, the CCI noted that big players like Philips, GE, and TATA Group had a strong presence in the primary market. Therefore, the OPs were held not to be dominant in the market. On the allegation of abuse of dominance, the CCI noted that the password protection of machines may not have existed as OPs could have shared the passwords with the IPs for a price. Since the IPs did not establish whether any hurdle was created post the payment of such fees, the CCI dismissed

the IPs' allegation of refusal to deal under Section 3(4) of the Act. Therefore, the CCI held that there existed no *prima facie* case under Section 3(4) and Section 4 of the Act. Hence, it closed the case under Section 26(2) of the Act.

Source: Case No. 06 of 2020

Japan's FTC enters into a memorandum of cooperation with India's CCI

Japan Fair Trade Commission ('**JFTC**') entered into a Memorandum of Cooperation ('**MoC**') with the Competition Commission of India ('**CCI**'). The primary objective of the MoC is to foster a cooperative relationship for operating the markets efficiently and promote the economic welfare of the citizens of Japan and India respectively.

The MoC entails that each of these competition authorities will notify the other authority of its enforcement activities which the notifying authority considers important for the interests of the other authority. Further, the authorities can exchange information with the other to the extent it is consistent with the laws and regulations of each country and important interests of each authority.

Moreover, these authorities agreed to work together in matters of technical cooperation and to coordinate their enforcement activities while investigating matters which are related to each other. Both the authorities agreed on conducting periodic working meetings.

The MoC will continue for an indefinite period unless any authority terminates the same by giving a 90-day written notice to the other authority. The MoC was signed between Mr. Kazuyuki Furuya (Chairman, JFTC) and Mr. Ashok Kumar Gupta (Chairman, CCI) on 6th August, 2021.

Source: JFTC Press Release

Predatory Pricing

The expression 'predatory price' has been defined under Explanation (b) of Section 4 of the Competition Act, 2002 as a price, determined by the regulations, which is below the cost of goods and services to reduce competition or eliminate the competitors. The CCI has noted the following elements to be pre-requisites in proving the existence of a predatory pricing:

1. The existence of a dominant position of the enterprise in the relevant market
2. The relevant product is priced at below its cost in the relevant market by the dominant enterprise
3. Such pricing intends to reduce competition or the competitors ('Predatory Intent Test')

The noteworthy aspect of predatory pricing is that not all enterprises can indulge in predatory pricing, rather the enterprises, enjoying a dominant position in the market, can indulge in the same. The reason behind this distinction is only the dominant enterprises enjoy such a market position that they can exclude their competitors through predatory pricing.

This aspect could be understood through the case of *Bharti Airtel Ltd. v. Reliance Industries Ltd., CCI Case No. 03/2017* where the CCI investigated the alleged abuse of dominance by RIL on providing free Jio telecom services with an intent to eliminate the competition. The CCI noted that since RIL was a new entrant to the relevant market of providing telecommunications services, it could not be held to enjoy a dominant position in the market. Therefore, the question of predatory pricing does not arise in the first place.

INTERNATIONAL

Lawsuit against Google Play Store in UK over excessive and unlawful charges

Liz Coll, a renowned consumer advocate, instituted a lawsuit against Google and its parent company, Alphabet in the Competition Appeal Tribunal, London. Coll alleged that Google's conduct of over-charging 19.5 million UK Android users violates section 18 of the UK Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union.

The present suit alleges that Google has bundled its Play Store with other Google products and services and also requires its pre-installation and prominent placement, apart from subjecting users to other contractual and technical restrictions. This conduct was alleged to be ultimately posing risk to existing competitors in the Android app marketplace.

Further, it claimed that Google steers the customers to its payment processing system via the app store and produces escalating amounts of profit by charging a 30% surcharge on every digital transaction. The damages have been estimated at about 920 million pounds ($1.3 billion) since 2015.

Google has responded to the allegations by stating that it competes fairly for the interests of developers and consumers. It claimed that 97% of its developers on the app store don't pay any service fees, and therefore its apps are free for the users. Further, only 0.1% of developers pay a 30% service fee because they earn above $1 million. This suit marks yet another episode when the company has been at loggerheads with an antitrust regulator.

Source: Coll v. Google Press Release

UK's CMA accuses pharmaceutical companies for illegal pricing

The Competition and Markets Authority ('**CMA**') has found Pfizer and Flynn liable for overcharging the essential anti-epilepsy drugs in a new re-investigation. In 2015, the CMA had accused Pfizer and Flynn for charging unfairly high prices to the UK's National Health Service ('**NHS**').

The CMA observed that the companies had de-branded Epanutin as the unbranded drugs were not subject to price control like the branded drugs. Further, since these two companies were the dominant suppliers of *phenytoin sodium capsules*, the NHS had no other option but to pay the prices demanded by the two companies.

The CMA noted that these companies exploited a loophole and therefore held them liable for abusing their dominant position. Resultantly, the CMA imposed £90 million on the companies. In 2018, the Competition Appeal Tribunal ('**CAT**') concurred with the CMA's dominance part but overturned its judgement where it held that the pricing of companies amounted to an illegal abuse of dominance. The case was referred back to the CMA for an additional review.

In 2020, Flynn appealed to the Court of Appeal against the CMA's decision. The court dismissed Flynn's entire appeal and upheld certain parts of CMA's appeals. After this, the CMA decided to re-investigate the matter.

However, the current CMA findings are provisional. Pfizer and Flynn could reply to the preliminary conclusions in the objections' statement and the CMA will carefully evaluate their arguments before assessing whether they had violated the law.

Source: CMA Press Release dated 05-08-2021

European Commission investigates the ongoing Illumina-GRAIL acquisition

The European Commission ('**EC**') has opened an investigation into the proposed acquisition of GRAIL by Illumina for breach of a 'standstill obligation' under Article 7 of the Merger Regulation. The EC noted that under this obligation, the companies have to wait for the outcome of the EC's approval before finalizing the deal.

Illumina was held liable for breaching this provision because the outcome of the earlier investigation was still pending. The EC's concern was that the proposed acquisition may reduce the innovation and competition in the market for the development of cancer detection tests based on sequencing technologies. This previous investigation will continue separately from the EC's current in-depth investigation.

Illumina filed a statement and called this investigation 'unprecedented' since both of the companies are based in the US. It stated that the acquisition of GRAIL will accelerate the availability of the GRAIL test in the European Economic Area (EEA) and globally. The company also challenged the previous investigation in court, contending that the EC doesn't have jurisdiction over the deal because GRAIL doesn't operate its business in the EEA.

Source: EC Press Release dated 20-08-2021

EC clears new synthetic securitisation product under EU Guarantee Fund

The European Commission ('**EC**') approved the introduction of a new product in the form of guarantees on synthetic securitisation tranches under the European Guarantee Fund ('**EGF'**) to support companies affected by the pandemic in the 22 participating Member States.

The EGF is managed by the European Investment Bank Group, which consists of the European Investment Bank ('**EIB**') and the European Investment Fund ('**EIF**'). In April 2020, the European Council proposed the establishment of EGF under the management of the EIB Group, as part of the EU's response to the pandemic.

Presently, the EIB and EIF have approved a total of €17.8 billion worth of projects under EGF. The purpose of EGF is to encourage new, riskier lending by financial intermediaries to Small and Medium Enterprises. The EC concluded that the EGF will mitigate the economic impact of pandemic and remedy the serious disturbance in the economy.

The EGF is assessed by the EC in line with Article 107(3)(b) of the Treaty on the Functioning of the European Union. This enables the EC to approve state aid measures to remedy a serious disturbance in the economy of a member state. Therefore, the EC approved the EGF upon notification by the 22 member states under the EU state aid rules.

Source: EC Press Release dated 16-08-2020

EC investigates the proposed Facebook-Kustomer acquisition

The European Commission ('**EC**') has opened an investigation on acquisition of Kustomer by Facebook under the EU Merger Regulation. Commission's concern is that this acquisition will reduce competition in market for Customer Relationship Management ('**CRM**') software's supply and would also strengthen Facebook's Position in the online display advertising market by increasing the amount of data available to Facebook for personalization of ads it displays. Kustomer is a CRM software supplier that allows organizations to manage customer communications across several channels (phone,

email, SMS, WhatsApp, Messenger, and Instagram, for example) with a single tool. The Commission is worried that Facebook's acquisition of Kustomer could limit access to its business-to-consumer over-the-top (OTT) messaging channels. This could restrict market competition for both CRM software and customer service, resulting in higher pricing, lesser quality, and less innovation for corporate clients.

On the market for online display advertising services, the data that companies save in Kustomer's CRM software and can share with Facebook appears to provide Facebook a significant edge. It would be increasingly difficult for competitors to match Facebook's online advertising services if the company increased its data dominance. As a result, the deal would raise entry and expansion obstacles for Facebook's competitors in these services.

The proposed transaction was notified to the Commission on 25 June 2021. The Commission now has 90 working days, until 8 December, 2021, to take a decision and to assess the impact of the acquisition of Kustomer by Facebook within the territory of the Member States under the EU Merger Regulation.

Source: EC Press Release dated 02-08-2021