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Monthly Newsletter

State of Antitrust

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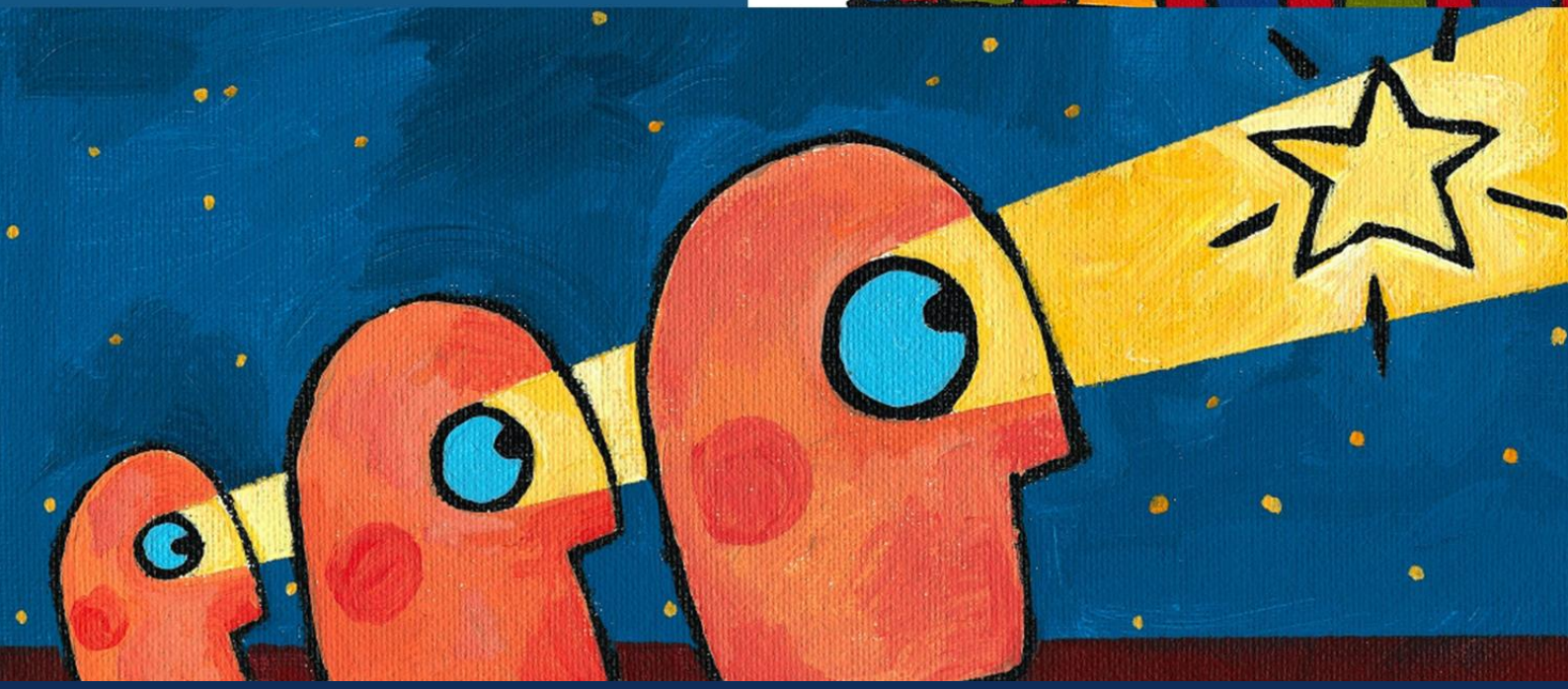

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

The Court of Justice of the European Union upholds the principle of 'economic continuity' to attribute responsibility on the acquirer company in private enforcement cases

Between 1994 and 2002, a cartel in the asphalt market was set up in Finland which agreed on dividing up contracts, prices and tender for contracts and operated in the whole of Finland. Seven companies were ultimately fined for their participation in the cartel. Out of these, three companies were dissolved, under voluntary liquidation procedure, by their parent companies which took over control of the capital and continued their commercial activities. Subsequently, Vantaa, a city in Finland, wanted to claim damages from the companies involved in cartel. The municipality of Vantaa wanted to claim damages from parent companies, which argued that they should not be held liable for the actions of their erstwhile autonomous subsidiaries. While deciding the dispute, the Finnish Supreme Court was uncertain as to whether (i) it should apply Article 101(1) of Treaty on the Functioning of the European Union ('TFEU') directly to private enforcement and (ii) if the principle of economic continuity would apply to this case and thus, referred for a preliminary ruling.

Preliminary ruling of the European Court of Justice

The Court of Justice ('ECJ') ruled that the full effectiveness of Article 101(1) of TFEU requires that it be open to individuals claiming damages for damage caused by anti-competitive behaviour so that liability may not be avoided by fraudulent corporate re-structuring. ECJ was of the opinion that *'when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical*'. As such, the ECJ held that national courts may rely directly on EU law in private enforcement cases regarding attribution of liability between undertakings taking part in a cartel. Further, the ECJ asserted that the meaning of an undertaking must be interpreted similarly both in the scope of penalty imposed by the Commission and private actions for damages. The ruling establishes that the principle of economic continuity applies both to public and private enforcements as long as the infringing undertaking in reality continues to function under a new operator. *(Judgment of Case C-724/17dated 14.03.2019)*

European Commission makes commitments offered by Disney, NBC Universal, Sony Pictures, Warner Bros. and Sky legally binding under EU antitrust rules

The efforts of the European Commission ('EC') to turn Digital Single Market into reality were achieved by its recent decision decided upon its investigation conducted concerning the cross-border provision of pay-TV services. In July 2015, the EC sent a Statement of Objections to Sky UK, a broadcaster, and six major US film studios: Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros ('Committing studios'). During the investigation, started in July 2014, the EC identified clauses in license agreement between the six film studios and Sky UK which, firstly, require Sky UK to block access to films through its online pay-TV services or through its satellite pay-TV services to consumers outside its licensed territory (the United Kingdom and Ireland) ('Broadcaster Obligation') and secondly, requiring the film studios to ensure that the broadcasters other than Sky UK are prevented from making their pay-TV services available in the UK and Ireland ('Studio Obligation'). This situation affects consumers who want to watch the pay-TV channels of their choice, regardless of where they live or travel in the European Union.

The EC was of the view that the clauses constitute infringements of Article 101 of TFEU and Article 53 of Agreement on the European Economic Area ('EEA Agreement') by each of the committing studios because: (i) the object of these clauses was to restrict competition within the meaning of Article 101(1) of TFEU and Article 53(1) of the EEA Agreement; (ii) no satisfactory economic and legal justification was given; and (iii) these clauses do not satisfy the conditions for an exemption under Article 101(3) of TFEU and Article 53(3) of EEA Agreement. In order to remove the EC's competition concerns, the parties offered commitments pursuant to Article 9 of Regulation No. 1/2003. It was Paramount, the first among the studios which offered commitments, which was accepted and was made legally binding in July 2016. Thereafter, Disney, in November 2018, proposed comparable commitments. Finally, in December 2018, NBC Universal, Sony Pictures, Warner Bros and Sky offered commitments. The commitments offered are: the parties should not enter into, renew or extend a license agreement by reintroducing Broadcaster Obligation and/or Studio Obligation; the parties should not act upon or enforce any Broadcaster Obligation and/ or Studio Obligation in any existing licensing agreement; and the parties would not seek to bring any action before a court or tribunal for the violation of any Broadcaster Obligation and/ or Studio Obligation. The commitments would apply for a period of five years and cover services provided by the committing studios in standard pay-TV and subscription video-on-demand either through satellite broadcast or online. The non-compliance of commitments would attract fine up to 10% of the company's turnover. *(Press Release 07.03.2019)*

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Legal news from India and the world

UK Competition & Markets Authority issues first order reversing Pre-Closing Integration

The United Kingdom's Competition & Markets Authority ('CMA') issued its first order requiring parties to a completed merger to reverse pre-closing integration that the CMA believes prejudiced its ability to assess the deal's impact on competition in the UK.

In October 2018, Tobii acquired Smartbox Assistive Technology ('Smartbox'). The parties design and supply technology to enable people with complex speech and language needs to communicate. In August 2018, the parties entered into mutual reseller agreements to assist the integration process by enabling each party to sell combined product portfolio to customers prior to the merger completion, where Smartbox sells the combined portfolio in the UK and Ireland and Tobii sells outside the UK.

CMA opened a post-completion review and, as is usual, imposed initial enforcement orders to stop further integration pending its decision. CMA, in January 2019, found that the merger may give rise to serious competition concerns and referred the deal to an in-depth Phase-II investigation in February 2019.

CMA issued an unwinding order in accordance with section 81(2A) of the Enterprise Act on 28.02.2019 reversing pre-closing acts. The CMA order requires that the parties do not accept any new UK product orders under their reseller agreement; the parties terminate their reseller agreement once they fulfil open orders; Smartbox accept orders for its discontinued products and reinstate its development projects. Further, the parties to amend the terms of the appointment of the monitoring trustee ('MT'), to enable the MT to take any steps which the CMA considers reasonable and necessary for the purpose of ensuring the Parties' compliance with the Unwinding Order.

(Press Release 22.03.2019)

European Commission fines Google €1.49 billion for abusive practices in online advertising

Google has abused its market dominance in the 'online search advertising intermediation market' by imposing a number of restrictive clauses in contracts with third-party websites which prevented rivals from placing their search adverts on these websites. It was found that Google first imposed an 'exclusive supply obligation', which prevented competitors from placing any search adverts on third-party websites. Then, Google introduced what it called its 'relaxed exclusivity' strategy aimed at reserving for its own search adverts the most valuable positions and at controlling competing adverts' performance.

Through Google's AdSense for Search, Google provided search adverts to third-party websites working as an intermediary between advertisers and website owners that want to profit from the space around their search results pages. The EC noted that in 2016, Google held market share above 75% in most of the national markets for online search advertising.

The decision of EC requires Google to stop its illegal conduct and to refrain from any measure that has the same or equivalent object or effect. The fine imposed is 1.29% of Google's turnover in 2018 taking into account the duration and gravity of the infringement.

(Press Release 20.03.2019)

FTC announces annual update of Size of Transaction thresholds for Premerger Notification filings and Interlocking Directorates

Section 7A of the Clayton Act, as added by the Hart-Scott-Rodino Antitrust Improvements Act, requires all persons contemplating certain mergers or acquisitions to notify the Federal Trade Commission ('FTC') which meet the thresholds.

For the year 2019, the revised thresholds were delayed due to the recent federal government shutdown and the same are now brought into effect as follows:

Size of Transaction threshold

The Size of transaction threshold under Section 7A of the Clayton Act will be $90 million (from $84.4 million). This includes acquisitions that do not exceed $359.9 million in value (from $337.6 million) and must also meet the Size-of-Person threshold to require notification. This threshold requires that one of the parties to the transaction has total assets or annual net sales of $180 million (from $168.8 million) or more and the other party has total assets or annual net sales of $18 million (from $16.9 million) or more.

Interlocking Directorates threshold

Section 8 of the Clayton Act prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations if two thresholds are met. Competitor corporations are covered by Section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000. The new thresholds, which take effect immediately, are $36,564,000 for Section 8(a)(1), and $3,656,400 for Section 8(a)(2)(A).

(Press Release 15.03. 2019)

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Between The Lines...
Comments & Analysis

CCI raids Glencore in an inquiry into alleged collusion on the price of pulses

The Competition Commission of India ('CCI') raided at the Mumbai offices of Glencore, Export Trading Group and Edelweiss. The raids were part of an investigation into allegations of collusion in a conspiracy to raise prices of pulses in 2015 and 2016. The prices of staple pulses rose substantially in 2015 after a severe drought. To control the shortage, the Indian Government introduced duty-free imports. The CCI is investigating whether collusion between these companies kept market costs of pulses artificially high even after commodity prices stabilised. During the raids, the CCI collected evidence including documents and emails, and questioned officials. Incidentally, Glencore's activities in Nigeria, Venezuela and the Democratic Republic of Congo are also under scrutiny of US Department of Justice.

CCI's power to search and seizure

Under section 41(3) of the Competition Act ('the Act'), search and seizure powers are available to the Director General ('DG') acting upon the directions of the CCI. It is popularly called as 'dawn raids' due to its surprise element. A dawn raid pre-empts enterprises from destroying, concealing or altering information that it would provide to the CCI during its investigation through summons. Section 41 of the Act along with sections 240 and 240A of the Companies Act, 1956 (now sections 207 and 209 of the Companies Act, 2013, respectively) empower the DG to conduct search and search operations after obtaining a prior order/ warrant from the designated Magistrate.

The order of the Supreme Court of India ('SC'), passed on January 15, 2019 in Crl. Appeal No.76-77/2019, clarified the power of DG and the purpose to conduct dawn raids. While reading the provisions, the SC clarified that the power does not merely relate to an authorisation for a search but extend to the authorisation of a seizure as well. The case was related to authorisation given to the DG to investigate JCB Pvt Ltd. ('JCB') by the CCI under section 26(1) of the Act. Consequently, the DG filed for an application for a search warrant to Chief Metropolitan Magistrate ('CMM') to conduct search in the business premises of JCB. The DG executed it and conducted dawn raids and seized documents from the business premises of JCB. JCB challenged this by reasoning out that the DG was only authorised to conduct search but he cannot seize material due to lack of specific order to seize. The SC, on the contrary, found that a mere search by itself will not be sufficient for the purposes of investigation and seizure of relevant material is allowed. Any blanket restraint imposed on the CCI and the DG utilising the seized material for any purpose is 'unwarranted'. However, the SC left the question open for the lower courts to interpret whether and, if so, to what extent the seized material should be permitted to be made for the purposes of testing the issue of jurisdiction.

Other examples of dawn raids conducted in India were, in October 2018, at the premises of United Breweries, Carlsberg and Anheuser-Busch InBev to investigate into allegations of price-fixing. It has been reported that the search and seizure yielded significant evidences. Previously, in 2016, there were dawn raids at the premises of certain dry cell manufacturers, including Eveready Industries, while investigating allegations of cartelisation. In April 2018, as a result of evidence collected during the raid, the CCI imposed a penalty against Eveready and others.

In conclusion, dawn raids are an important tool to collect direct evidence and a part of the significant power granted to the CCI while investigating cartels or anti-competitive agreements otherwise the CCI has to depend on circumstantial evidence or the preponderance of probabilities. Not just the CCI but various law enforcement agencies in India are frequently using dawn raids to gather evidence to put a leash on financial and business crimes. Thus, companies in India must take note of this developing investigative technique and develop effective protection of their interest during a dawn raid without violating Indian laws.

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An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax

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