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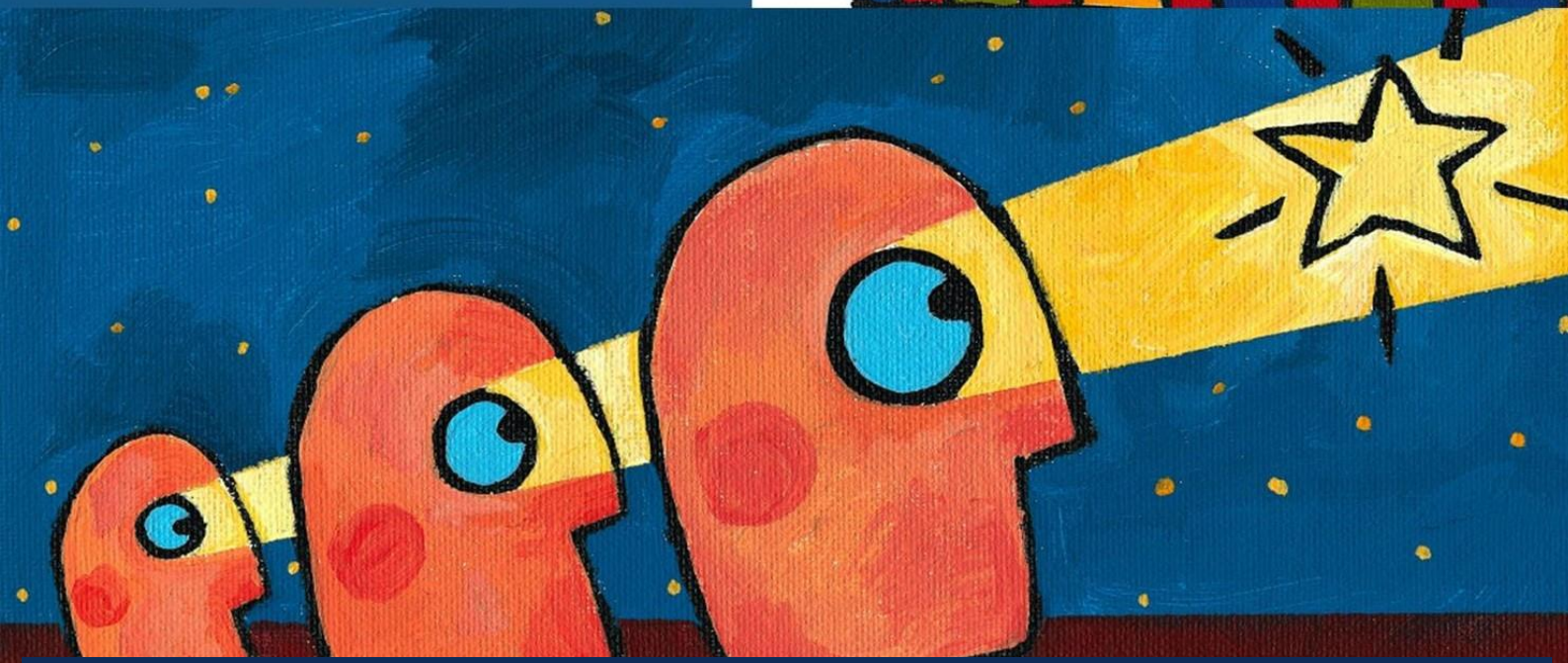

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The CCI disposes of the allegations of competition law violations by MERU against UBER

The Competition Commission of India **('CCI'/ 'the Commission')**, in its order dated 14.07.2021, disposed of the matter arising from the information filed by Meru Travel Sol. **('Meru')** alleging contravention of provisions of the Competition Act, 2002 **('the Act')** by Uber India Systems Pvt. Ltd. & Ors. **('Uber')** in the *market of radio/taxi services in Delhi-NCR.* Meru, a radio taxi provider, had filed information before the CCI on 09.10.2015 alleging anti-competitive conduct by Uber. However, CCI did not found a *prima facie* case to order an investigation and, through its order dated 10.02.2016, closed the case under section 26(2) of the Act. Meru appealed before the erstwhile Competition Appellate Tribunal **('COMPAT')** against the order of the CCI which resulted in the order of CCI being set aside by COMPAT and the Director General **('DG')** being directed to conduct an investigation and submit the report to the CCI. Aggrieved with the decision of COMPAT, Uber approached the Supreme Court of India **('SC')** by way of an appeal. The SC upheld the order by COMPAT and directed the DG to complete an investigation within six months and submit its report to the CCI. In compliance with the direction of SC, the DG submitted its report on 28.02.2020. Through its investigation, the DG concluded that Uber is not in a position of strength to behave independent of market forces and cause an Appreciable Adverse Effect on Competition **('AAEC')**. Therefore, the DG did not find Uber to be in contravention of the provisions of the Act.

In the proceedings before the CCI, there were three major allegations. Firstly, it was alleged that UBER is in a dominant position and, through its *below-cost pricing policies,* is abusing that dominant position. Secondly, there existed a *Duopoly* as Uber and Ola together held around 95% of the Market Share and they were indulging in similar anti-competitive practices. Thirdly, Uber, having an exclusive agreement with its drivers, compelled drivers to stay with Uber and the drivers did not have the choice of engaging with other cab aggregators or radio operators, therefore, creating a scarcity of drivers and eliminating competition. Meru emphasized that Uber offered various daily and weekly schemes. In addition to these schemes, the rating mechanism followed by Uber creates a threat of deactivation of an account of a driver-partner and, therefore, is exclusive in nature, thus leading to anti-competitive conduct.

On these three allegations, the CCI observed that Uber is not found to be in a dominant position as Ola exists as its competitor. The market share of Uber and Ola kept on changing because of competition in the market and, in a highly fluctuating market, Uber cannot be said to be in a dominant position. As Uber was not found to be in a dominant position, therefore, the claim of below-cost pricing to abuse its dominant position did not arise. However, for the sake of completeness, the CCI went on to clarify its stand on the allegations. It referred to the decision in the Ola Case *[Case No. 6 & 74 of 2015]* where it was observed, that the below-cost pricing was done to build a network and increase market share and it was a way of competing with existing players. It was further stated that these methods of gaining customer interest and building a network were also followed by Ola and Meru. The allegations regarding *duopoly* were disregarded stating that the CCI is present to promote competition and not to ensure that a certain number of player existed in the market. While quoting from its Ola case, the CCI observed that *"as long as there is competition in and for the market satisfying these outcomes, regulatory intervention is not warranted to either protect the existing players or to increase the number of players in the market"*. Finally, the allegations regarding the *"exclusivity clause with drivers"* were unable to meet the legal test of an exclusionary agreement that would cause AAEC, as despite the alleged practices, Ola has also grown in the market with Uber. Therefore, the CCI did not find merits in the arguments raised by Meru and held that Uber was not contravening to the provisions of the Act. ***(Case No. 96 of 2015 14/07/2021)***

Karnataka High Court dismisses the writs filed by Amazon and Flipkart against probe and agrees with the CCI

The E-commerce giants **[**Flipkart Internet Private Limited **('Flipkart')** and Amazon Seller Services Private Limited **('Amazon')]** approached the division bench of Karnataka High Court **('KHC')** seeking dismissal of the probe ordered by the CCI in ***Case No. 40 of 2019***. Prior to this, the Single Judge Bench of Justice P.S. Dinesh Kumar in KHC dismissed the petition of Amazon and Flipkart through an order dated 11.06.21. The case can be traced back to the time when Delhi Vyapar Mahasangh **('DVM')** filed information before the CCI for alleged contravention of sections 3 and 4 by Amazon and Flipkart. As per the information, both Amazon and Flipkart indulged in anti-competitive practices such as preferential listing, deep discounting, exclusive arrangements regarding the launch of mobile phone brands and preferred sellers. Furthermore, collective dominance of both the entities was claimed by the informant but it was rejected by the CCI as the Indian competition law does not recognize the concept of collective dominance. Concerning the alleged contravention of section 3, the CCI found a *prima facie* case and ordered the DG to carry out an investigation. The division bench of the KHC (Justice Satish Chandra Sharma and Justice Nataraj Rangaswamy) upheld the order dated 11.06.21 and observed that *"an expert body cannot be crippled or hamstrung in their efforts by application of technical rules of procedure."* Furthermore, the KHC stated that if the appellants are not in contravention of the Act, they should not shy from the inquiry and should entertain it. The E-commerce giants have appealed to SC against this order. ***[23.07.2021 Writ Appeal No. 562/2021 and Writ Appeal No. 563/2021 (GM-RES)]***

Heard at the BAR

Legal news from India and the world

The Competition and Market Authority ('CMA') imposes hefty penalties on pharmaceutical enterprises

In two cases, the CMA had heavily fined parties involved in anti-competitive conduct in the pharmaceutical sector. The CMA had imposed a penalty of around £100 million and £260 million respectively as under:

a) *Advanz fined £100 million:* The 2016 investigation initiated by the CMA found that the pharmaceutical company Advanz charged excessive and unfair prices. Advanz was indulging in increasing the price of *20 mcg liothyronine* tablets by more than 6000% from 2009 to 2017. The cost of production remained almost stable for the concerned period and the price of the drug did not increase due to innovation etc. but only to exploit the market. The liothyronine tablets are used to treat thyroid hormone deficiency. This drug had an excessive demand. There was limited competition in the market of production of this drug and, thus, it was easier for Advanz to increase the price. The fine of exact £101,442,899 is to be paid by the parties. Advanz Pharma Corp and its three subsidiaries shall pay £40,942,899 and two private equity firms that were previously the owners of Advanz, HgCapital and Cinven shall pay £8.6 & £51.9 millions respectively.

b) *£260 million on Auden Mckenzie and Actavis UK* **('Accord-UK')**: The CMA found that the price of life-saving hydrocortisone rose by 10000% and Accord UK was also involved in paying its would-be rivals to stay out of the market, thus avoiding competition. Due to this anti-competitive conduct of involved Pharmaceutical companies, the National Health Service **('NHS')** had to pay high prices for the tablets. Accord UK has been fined £155 million for charging the NHS with excessive and high prices. Accord UK had also been fined £66 million for sharing the market and buying out its competitors. For their involvement in the anti-competitive collusion, the CMA has fined Advanz and its former parent Cinven – a total of £43 million and Waymade with £2.5 million.

(Press Release 16.07.2021 & 30.07.2021)

Five Car manufacturers, involved in cartel, fined with €875 million by the EC

The European Commission **('EC'/ 'Commission')** took a historic decision when it fined five car manufacturers with an amount of 875 Million Euros. The five-car manufacturers involved were Daimler, BMW, Audi, Porsche, and Volkswagen [the latter three being part of the Volkswagen Group **('VG')**]. The information regarding the cartel was provided by Daimler and, therefore, it received full immunity. This is the first time when the commission relied on *"cooperation on technical elements"* for determining a cartel-like behavior as opposed to traditional approaches such as price-fixing, market share, etc. These car manufacturers illegally colluded to restrict competition in the area of emission cleaning technology for diesel cars. The Car manufacturers were meeting regularly to discuss the development of selective catalytic reduction **('SCR')** technology. The SCR technology assists in the reduction of emission of Nitrogen Oxide **('NOx')** from diesel passenger cars. The cooperation allowed them to develop a technology through which they can inject liquid urea, called "AdBlue" to the exhaust steam, and then NOx turns into harmless water and nitrogen, thus leading to a reduction in harmful emission from vehicles but the car manufacturers delayed it by at least five years. In addition to this, commercially sensitive information regarding these elements was also shared amongst the car manufactures. This anti-competitive act of the car manufacturers led to restrictions on the innovation and removal of uncertainty from the future conduct of the market. The uncertainty of the future and innovation being two main planks for competition, any interference with either of the two is illegal. Limiting technical development is one of the forms of prohibited horizontal agreements. The EC emphasized on describing the importance of competition law enforcement in contribution to the Green Deal **('GD')**. It further stated that innovation is the key to meeting the ambitions of Europe in its GD objectives. Although the law has fixed a minimum cleaning standard, and all these manufacturers were meeting those standards, but that cannot be used as an argument to not use a technology that can benefit the market, consumers, and the environment. The European Union antitrust rules do not prohibit players in *pro competitive* cooperation regarding R&D and product development, but the same cannot be used as a shield to carry out anti-competitive activities. Through the full immunity received by Daimler, it had avoided an aggregate fine of €727 million. Additionally, VG also benefited from a reduction in a penalty (55%) under the 2006 Leniency notice, therefore, the penalty imposed was €502362000. VG had also helped the Commission to prove the existence of cartel by providing the necessary evidence. All the participants of the cartel received a 10% reduction in the penalty as they admitted being a participant in the cartel and thus saved time, effort, and resources of the Commission. The fine imposed on BMW was €372827000.

(Press Release 08.07.2021)

The CCI looking into concealment of facts by Amazon in the 2019 deal with Future Group

The ongoing tussle between Future Retail Ltd & Ors **('Future Group')** and Amazon.com NV Investment Holdings LLC **('Amazon')** in front of the SC led to the disclosure of certain facts of Amazon's 2019 deal with Future Group **('deal')**. These disclosures have re-ignited interest of the CCI in the deal earlier approved by them.

As per the deal, in which an amount of Rs. 1431 Crore was paid to Future Coupons Pvt. Ltd. **('FCPL')** by Amazon, Future Retail Ltd. **('FRL')** was prohibited from encumbering/transferring/ selling/divesting/disposing of its retail assets to *"restricted persons"*, being prohibited entities, with whom FRL, FCPL, and the Future Group could not contract. It is evident, through various submissions, that Reliance Ltd. Group **('Reliance')** was also included in this list. For this reason, the news of the amalgamation of FRL with Reliance ($3.4 billion), giving Reliance access to all retail assets of FRL, did not bring cheers to Amazon. Therefore, Amazon initiated arbitration proceedings and the Singapore Emergency Arbitrator **('SEA')** passed an interim order in October 2020 in favour of Amazon. The order restrained the Future Group from taking any steps in furtherance of amalgamation with Reliance. In February 2021, Amazon approached the Delhi High Court **('DHC')** urging the enforcement of the SEA decision. The single judge bench put the deal on hold and attached the assets of Future Group barring it from dealing with them. This order was appealed before a larger DHC bench which stayed the order. Aggrieved with the decision, Amazon approached the SC seeking favorable remedy. The matter is currently in front of the SC and may reach a finality soon.

According to the information provided by Amazon to the CCI in 2019, it was going to acquire 49% of voting and non-voting equity shares of FCPL. The purpose of the combination, disclosed by Amazon, was to increase the existing portfolio in the payment landscape in India concerning the marketing and distribution of corporate gift cards. Based on these facts, the Commission had approved the acquisition of FCPL by Amazon in 2019. After comparisons between the submissions made by Amazon in 2019 to the Commission and those made before to other legal authorities (including the SC), the Commission came to the conclusion that Amazon concealed its actual *"strategic interest"* and misrepresented the facts. Therefore, through a letter dated 04.06.2021 the Commission had issued a show-cause notice to Amazon seeking clarifications regarding the discrepancies found in their stands. If Amazon is unable to satisfy the CCI, it could even lead to the imposition of a penalty. Amazon confirmed the receipt of the notice and ensured that they will address the concerns raised by the CCI. It was further stated that they are bound by confidentiality obligations and unable to comment at this stage of ongoing proceedings in front of SC. ***(22.07.2021)***

Bundeskartellamt examining whether Facebook's planned acquisition of Kustomer is subject to notification

The Bunderskartellamt has taken interest in the proposed Facebook/Kustomer merger and is examining whether the same is subject to notification under the German Merger Control. Kustomer is a New York, USA-based start-up providing a cloud-based customer management platform for business customers. It is expected that the acquisition of Kustomer by Facebook will lead to immense data collection by Facebook. Therefore, official requests have been sent to Facebook and Kustomer to obtain information regarding the merger and whether it reaches the set threshold limits.

Andreas Mundt, President of the Bundeskartellamt said: *"We are examining ex officio whether German merger control applies to Facebook's proposed acquisition of Kustomer. Should it turn out that the merger is subject to notification with us, we would request Facebook to submit the respective documents for examination immediately. Effective merger control is the most powerful instrument we have to prevent too much market power from falling into the hands of only a few companies We already see particularly strong market concentration in the digital economy. Stringent merger control is therefore indispensable."*

The proceedings aim to ascertain whether the merger project will have any domestic impact and if the target company is active in Germany to a significant extent. The Austrian Competition Authority has referred the proposed merger to the European Commission. The EC , in parallel proceedings , is currently examining the proposed merger. Germany has not yet joined the application for referral as the general practice in the Bundeskartellamt requires a merger to be subject to notification based on national competition law, which has not yet been clarified in the present case. It will be interesting to see how the Indian antitrust watchdog will look into the Facebook/Kustomer merger, as there are higher chances of this merger having a great domestic impact in India because of there being about 340 million users using Facebook in India. ***(Press Release 23.07.2021)***

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