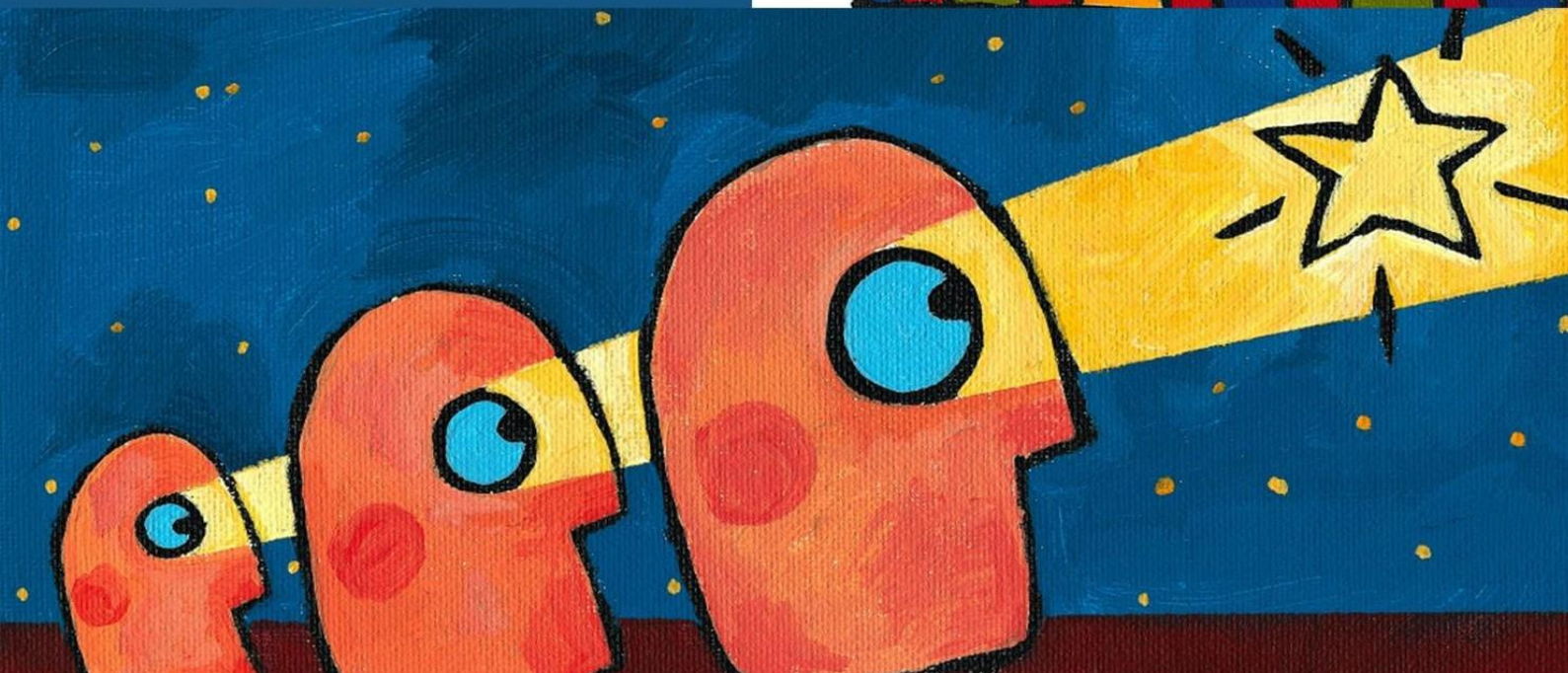




Monthly Newsletter

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Delhi High Court rules out CCI's jurisdiction over reasonable licensing of patents

The Delhi High Court ('DHC'), dealing with Competition Commission of India's ('CCI'/'Commission') jurisdiction over the abusive and anti-competitive terms in the licensing of Standard Essential Patents ('SEP'), has held that Competition Act, 2002 ('Competition Act') does not override the Patents Act, 1970 ('Patents Act').

The issue involved in the case before DHC was whether CCI has jurisdiction and power to investigate, under Section 26(1) of the Competition Act, conditions imposed by Patent Holder/Patentee for licensing SEP. The conflict was between CCI's jurisdiction pertaining to Patentee's rights under Section 3(5)(i)(b) of the Competition Act and Controller of Patent's jurisdiction over patents under Chapter XVI of the Patents Act.

The Patentees contended that the exercise of their rights under the Patents Act cannot be overridden by the CCI by imposing provisions of the Competition Act. On the other hand, CCI's contention was that Competition Act is a special legislation dealing with promotion of competition in the markets in India and that Section 62 of the Competition Act makes the CCI's exercise of powers in addition to, and not in derogation with, other laws operating in India.

The DHC in its judgment emphasized on provisions relating to compulsory licensing as envisaged in Chapter XVI of the Patents Act. The DHC, reconciling the Patents Act and Competition Act, observed that Chapter XVI of the Patents Act was inserted subsequent to enactment of Competition Act; thus, the legislative intent in relation to Patent licensing is clear and that Chapter XVI of the Patents Act is enacted especially for the field pertaining to patents, unreasonable conditions in agreements of licensing, abuse of status as a patentee, inquiry to be undertaken and relief that is to be granted. Unlike, the Competition Act dealing with anti-competitive agreements and abuse of dominance generally, the subsequent inclusion of Chapter XVI in the Patents Act makes it abundantly clear that reasonable conditions in licensing of patents is in the exclusive domain of the Patents Act and not under the Competition Act. Thus, the DHC was of the opinion that in relation to anti-competitive agreements and abuse of dominant position by a patentee in exercise of their rights Chapter XVI of the Patents Act is a complete code and, further, that the Patents Act in relation to subject of reasonable licensing conditions is a special statute. Therefore, the DHC held that Patents Act must necessarily prevail over that of the Competition Act for matters relating to reasonableness, fairness and non-discrimination in licensing of SEPs.

(Order dated 13.07.2023)

ACCC issues Statement of Issues to the Merger of two Pathology Services Companies

The Australian Competition & Consumer Commission ('ACCC') has issued 'Statement of Issues' to Australian Clinical Labs Limited ('ACL') and Healius Limited ('Healius') highlighting its concern over Healius's acquisition by ACL. According to ACCC, at this stage, the merger could lead to substantial lessening of competition in Australia.

ACL – Acquirer – operates as a provider of pathology services providing human pathology services, through its subsidiary Clinical Labs Pty. Ltd. to out-patients, in-patients (of public and private hospitals), and commercial and government customers. Further, through its Gribbles Veterinary brand, it also provides veterinary pathology services.

Healius – Target – also provides pathology services and additionally, provide diagnostic imaging services to out-patients and in-patients (of private and public hospitals), and commercial and government customers. It operates under various brand names such as Laverty Pathology, Dorevitch Pathology, QML Pathology etc. Similar to ACL, Healius also provides veterinary pathology services through its brand – Vetpath, Vetnostics, QML Vetnostics etc.

From the consumers' i.e., patients' perspective, competition may be less readily apparent as these companies operates on bulk billing and it is through operating on this model the pathology services provider companies compete with each other in Australia.

However, given the operating structure of both the merging parties, ACCC was of the opinion that, both, closely compete with each other under well-known brands which are familiar to customers. ACCC further, noted that only one company i.e., Sonic competes parallelly with ALC and Healius. Therefore, proposed acquisition creates strong concerns about its impact on community pathology services in Australia, and potentially, greater impacts in regional and remote areas of Australia. According to ACCC's preliminary view, if the acquisition is allowed to go through it will have a significant reduction in competition in the pathology services market in Australia; and further that the combined entity, may be able to increase prices or reduce service quality in bids for public hospital tenders particularly in the State of Victoria, Australia.

(Press release dated 20.07.2023)

CMA fines Leicester City FC 880,000 GBP for colluding with JD Sports

The Competition and Markets Authority ('CMA'), in the United Kingdom ('UK'), reached a settlement with Leicester City FC after it admitted to participating in an anti-competitive arrangement with JD Sports Fashion plc. ('JD Sports')

(Continued on next page)



Heard at the BAR

Legal news from India and the world

The EC was of preliminary view that by the proposed acquisition Amazon may have the ability and incentive: **i)** To foreclose iRobot's rivals by preventing them from selling RVCs on Amazon's marketplace & degrading their access to the marketplace by self-preferencing iRobot, by imposing discriminatory advertising terms or by raising their cost to advertise and sell their products on Amazon's marketplace; **ii)** To foreclose iRobot's rivals by degrading their access or outrightly preventing them from accessing the Application Programming Interface(s) of Amazon's Alexa software as well as the 'Works with Alexa' certification; **iii)** To gain a significant advantage in data-related markets by accessing and obtaining information collected from iRobot's RVCs and its users; and information iRobot collected from third parties.

Thus, the EC opined that proposed acquisition needs an in-depth investigation as the transaction has the likelihood to raise barriers to entry and expansion for Amazon's competitors to the detriment of consumers.

[\(Press release dated 06.07.2023\)](#)

Spanish Competition Authority Fines Apple and Amazon for Restricting Competition on Amazon Marketplace

The competition authority of Spain, Comisión Nacional de los Mercados y la Competencia ('CNMC'), has fined Apple Inc. ('Apple')

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companies, resulting in higher bulk discounts on the postage payable by the business customers.

DPAG and its subsidiary companies dominates the mail/courier services market in Germany and this mail consolidation services allows other courier services providers to effectively use DPAG's delivery network, through a regulated access. Through its subsidiary, Deutsche Post InHaus, DPAG has a strong presence in this mail consolidation services market. Further, as Postcon and Compador belongs to the same corporate group, the mail consolidation services market seems concentrated. Postcon and Compador are the largest competitors in the market. Considering the abovementioned circumstances, the President of Bundeskartellamt commented that, they will examine *"...whether the existing agreements Deutsche Post InHaus Service has in place with its direct competitors restrict competition."*

[\(Press release dated 20.07.2023\)](#)

EC Opens In-Depth Investigation on Amazon-iRobot Acquisition

The EC has opened an in-depth investigation to assess Amazon.com Inc.'s ('Amazon') proposed acquisition of iRobot. In the opinion of EC, the proposed acquisition is likely to restrict competition in the market for Robot Vacuum Cleaners ('RVC') and will further, strengthen Amazon's position as an online marketplace provider.

The Acquirer, Amazon, a US-based multinational company, operates as an online marketplace in which retailers and sellers can advertise and sell their products (including the product under scrutiny in this assessment – RVC) to consumers. Further, through its own brand also Amazon sells various products on its online store. In addition to that, Amazon also offers voice assistant – Alexa which enables smart device operations through voice enabled assistance. The Target entity – iRobot is also a US-based company which manufacturer RVCs and sells it through various channels including on Amazon's online marketplace.

and agreed to pay a fine of 880,000 GBP under the CMA's settlement policy. JD Sports had reported the conduct infringing competition law by way of a leniency application and, therefore, no fine will be imposed on it if it continued its cooperation and comply with the conditions of the leniency policy.

Leicester City FC and JD Sports, through their agreement, had agreed that JD Sports would: **(i)** stop selling Leicester City-branded clothing online for 2018/19 season; **(ii)** not undercut Leicester City in online sales for 2019/20 season by applying delivery charges for orders of Leicester City—branded clothing despite its company-wide policy of free delivery over 70 GBP orders; and **(iii)** continue to apply the aforementioned delivery charges for 2020/21 season as well.

The Executive Director of Enforcement at the CMA commented, *"Football fans are well-known for their loyalty towards their teams. In this case we have provisionally found that Leicester City FC and JD Sports colluded to share out markets and fix prices - with the result that fans may have ended up paying more than they would otherwise have done. Both parties have now admitted their involvement, allowing us to bring the investigation to a swift conclusion."*

[\(Press release dated 05.07.2023\)](#)

Bundeskartellamt Opens Investigation into Practices Espoused by Mail Service Providers

The German Competition Authority ('Bundeskartellamt') has opened a cartel investigation against Deutsche Post InHaus Services GmbH ('Deutsche Post InHaus') a subsidiary of Deutsche Post AG, Postcon Konsolidierungs GmbH ('Postcon') and Compador Dienstleistungs GmbH ('Compador') for their alleged collusive practices in "mail consolidation services" offered to business customers. Mail consolidation services offered by these three courier companies include collection and sorting of letters and transport of the same to Deutsche Post AG's ('DPAG') mail centres. The process allows consolidation of mail volumes of several business customers of the courier

and Amazon 194 million Euros for restricting competition, in the online market & on the Amazon website in Spain, which affected third-party resellers of Apple products and competing Apple products. The two companies signed an agreement to update Amazon's terms as an Apple Authorised Reseller which included restrictive clauses that affected the internet (online) retail sale of electronic products in Spain. The contract included exclusion clauses, wherein, only those distributors which were designated by Apple itself, could sell Apple-branded products through the Amazon website in Spain. As a result: (i) more than 90% of the resellers, who had been using the Amazon's website in Spain to sell Apple products, were excluded from the main online market in Spain; (ii) sellers not authorised by Apple lost an important sales channel since most online purchases of electronic products in Spain occur on Amazon's website; (iii) competition was reduced between resellers of Apple products since the sales of Apple-based products in said online market were concentrated to Amazon itself; (iv) trade between Member States was limited; (v) price paid by consumers for Apple products in the online market increased.

Further, there were advertising and market limitation clauses, in the agreement, by which the brands competing with Apple were restricted from acquiring advertising space on Amazon's website in Spain when searches for Apple products were made. Moreover, Amazon was restricted from advertising campaigns aimed at customers who have purchased Apple products to encourage them to switch to a competitor's product from an Apple product. This reduced the competitive pressure on Apple by reducing the advertisement of the competition on Amazon's website in Spain. These restrictions also resulted in consumer harm by restricting consumers' ability to discover new/alternative products, increasing the search cost and reducing switching capacity of consumers.

The CNMC opined that the aforementioned clauses changed the sales dynamic of Apple products on Amazon's website in Spain by restricting intra-brand and inter-brand competition and violated Article 1 of the Law 15/2007 for the Defense of Competition and 101 of the Treaty on the Functioning of the European Union. As a result, Apple and Amazon were fined 143,640,000 Euros and 50,510,000 Euros respectively by the CNMC.

[\(Press release dated 18.07.2023\)](#)

EC Imposes Fine of 432 Million Euros on Illumina for Gun-Jumping

The European Commission ('EC') has imposed fines on Illumina, Inc. ('Illumina') and GRAIL, Inc. ('GRAIL') to the tune of 432 million Euros and 1000 Euros, respectively, for effectuating Illumina's proposed acquisition of GRAIL before obtaining approval from the EC, in breach of European Union Merger Control Rules ('EUMR').

The Acquirer i.e. Illumina is an unrivalled supplier of Next-Generation Sequencing ('NGS') systems for genetic and genomic analysis. On the other hand the Target i.e. GRAIL develops cancer detection tests using Illumina's NGS systems. These detection tests are crucial for fighting against cancer as the tests can detect different type of cancers in asymptomatic patients at an early stage.

The EC had opened an in-depth investigation into the transaction in July 2021; and just a month later in August, 2021 Illumina made a public announcement declaring that it has completed the acquisition of GRAIL. The EC after completing its in-depth investigation, in September 2022, opined that the proposed acquisition of GRAIL by Illumina would have significant anticompetitive effects, stifling innovation and reducing choice in the emerging market for blood-based early cancer detection tests. Thus, the EC blocked the transaction.

Now the EC has imposed fines on both the companies as the conduct of Illumina effectuating the transaction without obtaining prior approval of the EC is in clear violation of Article 7 of the EUMR. Article 7 of the EUMR puts an obligation on the merging parties to not effectuate the transaction prior to getting the approval from EC. The EC, while calculating the amount of fine to be imposed, considered Illumina's deliberate strategy of obtaining potential profits and risk of paying high break-up fee, which Illumina did weigh in while taking up the risk of gun-jumping. Regarding GRAIL's involvement in gun-jumping, the EC took note of the fact that GRAIL was fully aware of the standstill obligation and yet it played an active role in infringement. Thus, based on observation that both the parties, knowingly and intentionally, breached the standstill obligation, EC imposed fines on both the parties for effectuating the transaction without obtaining approval from EC.

[\(Press release dated 12.07.2023\)](#)

KK Sharma Law Offices

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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