



Monthly Newsletter

State of Antitrust

December 2020; Volume 7 Issue 12



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EC issues Statement of Objections to Amazon for breach of EU antitrust rules, for abuse of dominant position in online retail markets, and initiates a new antitrust probe on another issue: Brussels

After preliminary examination, which commenced on 17th July, 2019, the European Commission ('EC') has issued a Statement of Objections ('SsOB'), which is a formal step in investigation by EC, into suspected violations of EU antitrust rules, to the Amazon. It emanates from the fact that EC has formed a preliminary view that Amazon has breached antitrust rules by distorting competition in online retail markets. This preliminary view is based on the initial findings about Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace to the benefit of Amazon's own retail business, directly competing with those third-party sellers.

With the advent and gaining in prominence of digital marketing, it is quite frequent for similar such digital platforms having to tread a very slippery edge. This arises from the fact that, like those other digital platforms, Amazon has a dual role in as much as, firstly, it provides a market place to independent sellers who can sell products directly to the consumers. Secondly, it also sells products as a retailer on the same marketplace. As regards the first of these roles, which Amazon has to perform, it is in direct competition with those sellers to which it provides a marketplace. With this kind of a special relationship, as a market place service provider, Amazon has access to non-public business data of the third-party sellers because it is manning the platform and is having access to all the backend data configuration. This gives Amazon access to figures such as number of ordered and shipped units of products, the sellers' revenues on the marketplace, the number of visits to sellers' offers, data relating to shipment, to sellers' past performance and other consumer claims on product, including the activated guarantees.

In the preliminary findings, the Commission found that very large quantities of non-public seller data were available to the employees of Amazon's retail business and flow directly into the automated systems of that business which aggregate these data and use them to calibrate Amazon's retail offer and strategic business decisions to the detriment of other market place sellers. All this is only possible because of the role of a big brother being provided by Amazon on account of its ownership of the platform, which is used by independent sellers to market their wares. As an example, access to all the aforementioned data allows Amazon to focus on its own offers in the best selling products across product categories and to adjust its offers in view of its access to the non-public data of competing sellers. If confirmed, these SsOB may lead to a finding about infringement of Article 102 of Treaty on the Functioning of the European Union ('TFEU') which prohibits abuse of dominant position.

Beyond the above issue of SsOB, the EC has also opened a second antitrust investigation into Amazon's business practices that might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services. Of special interest in the second investigation, the Commission would investigate whether the criteria that Amazon sets to select the winner of the 'buy box' and to enable sellers to offer products to Prime users, under Amazon's Prime Loyalty Programme leads to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery practices.

The above mentioned 'buy box' is displayed prominently on Amazon's websites and allows customers to add items from a specific retailer directly into their shopping carts. Winning the 'buy box', or being chosen as the offer that features in this box, is crucial to market place sellers, as the 'buy box' prominently shows the offer of one single seller for a chosen product on Amazon's market places and generates the vast majority of all sales. The other aspect of the investigation focuses on the possibility of marketplace sellers to effectively reach Prime users. This is important as reaching these consumers is important to sellers because the number of Prime users is continuously growing, and because they tend to generate more sales on Amazon's marketplaces than Non-Prime users. If it goes to the logical conclusion, this also is likely to lead to a possible inference of an abuse of dominant position under Article 102 of TFEU.



Heard at the BAR

*Legal news from
India and the world*

New Consumer Agenda launched by European Commission ('EC')

EC launched a New Consumer Agenda on 13th November, 2020 to empower European consumers for playing an active role in the green and digital transitions. It also addresses issues of increasing consumer protection and resilience during and after the COVID-19 pandemic, which already brought significant challenges affecting the consumer's daily lives. Priorities and key action points to be taken in next five years together with the member states at European and national levels is the main focus of the agenda. It includes a new legal proposal aiming to provide better information on sustainability to consumers, adopting existing legislation to the digital transformation as well as an action plan on product safety with China.

The new agenda introduces measures that will promote a fair digital and green society, taking into account that consumer behaviour goes beyond the borders of individual member States.

COVID-19 pandemic has substantially affected a large area of lives of consumers' at large including cancelled travel arrangements, being stuck up at various places or online scams. The EC intends to continue to tackle consumer scams in cooperation with the Consumer Protection Cooperation Network and in dialogue with the platforms and all relevant actors. The EC will also continue to ensure the protection of travellers and passengers in case of cancelled trips. For finding a trend for future policy initiatives, the EC is to analyse the longer-term impact of COVID-19 on the consumption patterns of Europeans.

The New Consumer Agenda presents a vision for EU consumer policy for the period 2020 to 2025 and it plans to focus on five key policy areas as under:

(i) Green Transition – It aims to ensure that sustainable products are available to consumers on the EU market and that consumers have better information to be able to make an informed choice. A proposal to equip consumers with better information on sustainability of products and to fight practices such as greenwashing or early obsolescence are the proposals to be presented next year.

(ii) Digital Transformation – Though digital transformation is radically changing the lives of consumers with new opportunities but it also brings forth new challenges. The online commercial practices, which disregard the right of consumer to make an informed choice shall also be targets of EC. It also intends to keep consumers interest in mind while setting rules governing the digital economy and requirements for artificial intelligence.

(iii) Effective Enforcement of Consumer Rights – In its coordinating and supporting role, the EC will assist member States in the timely implementation and enforcement of consumer law including through the Consumer Protection Cooperation Network. It also intends to support national authorities by deploying a toolbox of innovative e-tools for enhancing the capacity of national authorities.

(iv) Specific Needs of Certain Consumer Groups – To address the concerns of vulnerable groups such as children, older people, or those with disabilities, needing specific safeguards, shall be the other focus of the EC. The EC also intends to support initiatives providing local advice on how to access information- either online or offline.

(v) International Cooperation – In a world where online purchases transcend borders, the EC will

develop an action plan with China in 2021 to enhance the safety of products sold online as well as a regulatory support, technical assistance and capacity building for EU partner regions including in Africa.

Initiatives and also the agenda will be followed by wide ranging dialogue with interested parties on priorities and actions as well as cooperation methods to promote consumer protection together in the coming times.

CCI organises Virtual Workshop of BRICS Competition Agencies on Competition Issues in Automotive Sector: INDIA

The Competition Commission of India (CCI), organised a virtual workshop of BRICS Competition Agencies on "Competition Issues in Automotive Sector" during 5th-6th November, 2020. Along with Competition Commission of South Africa, CCI is the project co-lead of the Automotive Working Group (AWG).

In their representation, the representatives of BRICS Competition Agencies highlighted the key developments in the automotive sector in their respective jurisdictions. They also deliberated upon the Challenges arising out of new age digital economy.

The common issues generally faced by all BRICS nations also emerged during the Workshop. The representatives also debated upon the way forward to tackle

such issues including the importance of advocacy.

(Press release 7th November 2020)

Combination of Upjohn from Pfizer Inc. and Mylon N.V. approved by FTC with conditions

In an exercise in which the staff of Federal Trade Commission ('FTC') and the staff of competition agency of Australia, Canada, European Union and the New Zealand worked in a cooperative manner, FTC has set conditions for approving the proposed combination of Upjohn Inc. and Mylon N.V.. This arises from the charges of FTC that, otherwise, this proposed combination will harm current or future competition in ten generic markets.

In this conditional approval Pfizer will spin off its Upjohn division which includes Pfizer authorised generic business Greenstone and combine it with Mylon. The new entity, so created, will be called Viartis and Pfizer will receive \$12 billion from Viartis as partial consideration for spinning off Upjohn.

According to the FTC, the proposed combination would harm current US competition in seven product markets by reducing the number of existing suppliers of seven drugs ranging from a calcium channel blocker to treat hypertension, a diuretic for treating hypertension or congestive heart failure after heart attack, drug for preventing epileptic seizures, a drug for hypertension by relaxing the veins and arteries so that blood can more easily pass through, an eye drop for treating bacterial conjunctivitis, another diuretic to treat hypertension and an injectible solution for treating certain types of dysfunctional uterine bleeding.

The proposed combination has the potential to delay or eliminate a likely entrant for three products dealing with a drug for treating thyroid cancer, one for treating ulcers in the small intestines and a smoker cessation aid. For remedying competitive concerns in the ten generic pharma markets, the proposed settlement seeks the parties to divest Prasco, the rights and assets relating to Upjohn's medicines, this also requires prior approval of FTC before Upjohn, Mylon or Viartis may gain an interest in or exercise control over any third parties' rights to some of the drugs in question.

The FTC is to publish the consent package along with instruction of filing comments in the federal register shortly. Only after a 30-day public comment period, can the FTC decide whether to make the proposed consent order final.

(Press release 30th October 2020)

FAS-AEB mull over the concept of mortgage insurance and the prospects for development of competition in the banking insurance market; Russia.

The first meeting of Working Group on Mortgage Insurance, was held on November 10, 2020, between the Federal Antimonopoly Service of Russia (FAS) and the Association of European Business (AEB). The concept of mortgage insurance, as well as the prospects for development of competition in the banking insurance market was the core issue of discussion before the Working Group. In conclusion, the participants agreed in the near future to consider alternative solutions to the concept of mortgage insurance, analyze them and discuss them at the next meeting of the Working Group.

(Press release 10th November 2020)

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