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

- CCI releases Market Study Report on Pharmaceutical Sector in India

HEARD AT THE BAR

- CCI imposes Symbolic Penalty on 10 Parties Involved in Cartelisation in Paper Industry
- ACCC Alerts Public Agencies on Cartel Conduct Risk in Public Sector Tenders

BETWEEN THE LINES

- Suspicion of Anti-Competitive Conduct by Google, Canadian Competition Authority Proceeds with Investigation
- CMA orders Facebook to Sell Giphy

CCI releases Market Study Report on Pharmaceutical Sector in India

On 18.11.21, the Competition Commission of India ('CCI'/'Commission') released its report titled "*Market Study on the Pharmaceutical Sector in India: Key Findings and Observations*" ('Market Study'/'Study'). The Market Study, initiated in October 2020, focused primarily on the following points: (a) prevalence of branded generics for competition and pharmaceutical prices in India (b) drug distribution and competition.

This market study on pharmaceutical sector, being a regulated sector, was done with a view to ascertain the Commission's advocacy priorities, as per Section 49 of the Competition Act, 2002 ('Act'), for exploring the areas of interface between competition and regulation.

This market study led the Commission to the following inferences :

(a) **Generic Competition:** Generic drugs play an important role in bringing down drug prices, thereby reducing healthcare costs and improving access. In the generic drugs space, competition should be based on price, as generics are homogeneous and interchangeable to the originator product, conversely, the findings of the study confirmed, brand competition overriding price competition in the domestic market, where generic formulations are marketed with distinct brand names. Therefore, currently, the brands enjoying market leadership position are found to charge high prices, and lower-selling brands are priced low.

(b) **Brand differentiation and quality:** In generic drugs the brand differentiation, which dilutes the price-lowering effects of generic competition, is premised on the purported heterogeneous quality of drugs in India. Qualities of drugs, distinguished through the marketing done by brands, in reality are intrinsically unobservable. These further cement the Commission's stand that the marketing efforts and promotional measures of drug makers can steer the demand to higher-priced alternatives. Further, to improve the competition in market by focusing on price based competition, the Commission suggested specific measures; a few of these measures are mentioned below:

- i. *Uniform and effective implementation of existing quality standards:* Difference in quality standards in different states, in spite of the same rules being applicable to all states, indicates no uniformity across states. A harmonized system of quality standard enforcement is needed to ensure uniform and consistent application of quality standards throughout India.
- ii. *Better Transparency:* A central online portal, consisting of all information regarding grant of licenses, inspections, prosecutions for non-compliance, etc., could be helpful in attaining transparency at every stage of drug regulation.
- iii. *Periodic, systematic and scientific testing of drugs:* Simultaneous increase in drug testing capacity, both in central and state drug testing labs and accredited private labs, will lead to raise confidence in the system and improve quality expectations.
- iv. *National digital drugs databank:* A comprehensive, online, centralized drug databank consolidating real-time data on active pharmaceutical manufacturing companies in the country will lead to creation of a database addressing any information asymmetry and will help in preparation of regulatory needs in different states.
- v. *Standard compliance marks for unbranded generic drugs:* An institutional quality signaling mechanism may be put in place, through the printing of standard compliance marks on unbranded drugs, which meet the quality standards. This will lead to increase in confidence, of both physician community & consumer, in unbranded generic drugs.

(c) **Trade margin:** The market study found that, particularly in trade generics, one of the key ways in which pharmaceutical manufacturers compete to have their products stocked and sold by pharmacies, is by offering them high margins. While these high margins are incentives for chemists/retailers and helps the manufacturer to increase his market share but it never translates into lower prices for customers. Thus, even if there is competition on trade margins, in absence of effective competition at retail level, manufacturers will have no incentive to compete. Therefore, effective competition between retailers is required as it will lead to consumer benefit through price discounts being offered to them.

(d) **Trade Association Practices:** The Commission shall create awareness and prevent violation of the provisions of the Act with pro-active engagement with trade associations across India. This shall be done so that the association or any other member of the association will not indulge in any anti-competitive conduct, which will harm competition in the market.

(e) **Online Pharmacies:** The brand-new segment in India, in pharmaceutical sector is online pharmacies. This segment is evolving and the pandemic had given boost to its evolution in the Indian market. However, the Commission has two key concerns regarding online pharmacy segment, they are:

- (i) discounts offered by these platforms, and
- (ii) concentration of personal health data with few platforms.

With regards to the discounts offered, the Commission is of the view that the same can be procompetitive. In absence of any data protection law in India, the Commission suggested online pharmacies for adoption of self-regulatory methods.

[\(Market Study on the Pharmaceutical Sector in India dated 18.11.2021\)](#)



CCI imposes Symbolic Penalty on 10 Parties Involved in Cartelisation in Paper Industry:

The Office of Director General ('DG') while investigating two other matters, *Case No. 30 of 2014 & Case No. 85 of 2015*, found certain material, gathered by way of e-mail dumps, which indicated that paper manufacturers might have indulged in price manipulation through concerted action, and, therefore, this was brought to the knowledge of the Commission informing the same. The Commission took cognizance of the note and, through its order, decided to register the instant case as *Suo Motu Case No. 05 of 2016* against twenty paper manufacturers and an association ('Opposite Parties'/'OPs') for indulging in anti-competitive activities.

The Commission, after having perused the material received, *prima facie* opined that there appeared to be a case of contravention of the provisions of Section 3(1) of the Act r/w Section 3(3)(a) of the Act. Therefore, the DG was directed to cause an investigation into the matter and submit a report.

During the pendency of the investigation before the DG, one of the OPs approached the Commission by filing an application under the provisions of Section 46 of the Act r/w the CCI (Lesser Penalty) Regulations, 2009 ('LPR').

The DG after investigating all the 21 OPs reached the conclusion that, 10 OPs have contravened the provisions of Section 3 (1) r/w Section 3 (3) (a) of the Act. With regards other remaining OPs, the DG did not record any specific finding of contravention of the provisions of the Act. Further, the DG in its report also determined the period of cartel to be September 2012- March 2013. After perusal of DG report and submissions of the OPs, the Commission reached the following conclusions: (a) From the e-mails, it is evident that meetings were held to discuss current prices and future increase in prices by paper manufacturers under the garb of Association and monitoring the level of implementation of the decisions taken

in the previous meetings, was also a practice. (b) The submission of price parallelism, by the OPs, are unnecessary and inconsequential as mere attendance in meetings where commercially sensitive information, like prices, are discussed, is a direct evidence as the same eliminates the ability of the competitor to decide the price as per market condition. (c) The submissions regarding the relevant product and geographic market were found to be thoroughly misplaced, as while examining anti-competitive conduct under Section 3 of the Act, the question of delineation of product and geographic market is beyond the statutory scheme. (d) The pleas of a few OPs regarding no Appreciable Adverse Effect on Competition ('AAEC') was said to be misdirected, as an agreement under Section 3(3) of the Act, if established, is supposed to be leading to a presumption of an AAEC within India. Therefore, in view of the above reasoning, the CCI concluded that the OPs had indulged in cartelisation in fixing prices of writing and printing paper, by participating in the meetings, discussing prices and monitoring the decisions taken in these meetings. The CCI found these 10 OPs to be in contravention of the provisions of Section 3(1) of the Act r/w Section 3(3)(a) of the Act. Furthermore, with regards to imposition of penalty, the Commission considered the impact of pandemic on paper business and therefore, imposed a symbolic penalty of Rs. 5 lakhs on each of the 10 OPs, for indulging in anti-competitive conduct, and a penalty of Rs. 2.5 lakhs on the Association, for actively providing its platform for anti-competitive activities.

[\(Order dated 17.11.21\)](#)

ACCC Alerts Public Agencies on Cartel Conduct Risk in Public Sector Tenders: Following a recent investigation in government tenders, the Australian Competition & Consumer Commission ('ACCC') had warned public agencies to be observant for anti-competitive conduct like collusion



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between bidders during procurement process. Public sector procurement is a multi-billion-dollar sector which makes a vital contribution to the Australian economy and the welfare of Australian citizens and residents. Therefore, any anti-competitive conduct in this segment of the market leads to deterioration of "value for money for taxpayers". Further, based on the recent experience of ACCC, an emphasis was placed on the lack of awareness amongst public servants and businesses of breaching cartel laws during the procurement process. While warning the public agencies, the ACCC Chair Rod Sims emphasized on the cartel conduct by business, in public sector procurement, to be just as illegal as it would have been in private sector tender. Further, he also said that, encouraging business to discuss their bids with one another, or decide the bid winner, will also amount to cartel-like conduct and, therefore, is in violation of the competition law.

The ACCC Chair stated that, "It is also important for prospective bidders to be aware of their obligations and comply with the law. We encourage public sector procurement professionals to proactively review their procurement processes and identify and remedy any potentially anti-competitive elements in any procurement procedures, policies or guidelines."

[\(Press release dated 01.11.21\)](#)

On Suspicion of Anti-Competitive Conduct by Google, Canadian Competition Authority Proceeds with Investigation

The Competition Bureau (**‘Bureau’**), Canadian competition regulator, obtained a court order from the Federal Court of Canada, which requires Google to produce records and written information that are relevant to the Bureau’s investigation into alleged anti-competitive conduct in its online advertising business.

The Bureau is investigating whether Google has engaged in certain anti-competitive practices that had harmful impact on competition in the online display advertising industry in Canada.

Online display advertising refers to advertising shown to users when they visit websites or use apps, including a variety of ad formats from pictures to videos. The advertisers and publishers use ad tech services to connect through digital marketplaces where ad space can be bought and sold in auctions.

Google is involved in selling of online ad space to advertisers in Canada, among other places, on YouTube. It also provides online advertising technology services to both advertisers and publishers in Canada who buy and sell online ad space. Therefore, the impact of any anti-competitive conduct of Google can cause severe harm to competition in the online display advertising industry in Canada.

As the investigation is continuing, the Bureau is focusing mainly on acquiring more information to examine these practices and to determine whether they are: (a) obstructing or impeding the success of competitors; and (b) resulting in higher prices, reducing choice and hindering innovation for advertising technology services, and harming advertisers, publishers and consumers.

[\(Press release dated 22.10.21\)](#)

CMA orders Facebook to Sell Giphy

The Competition and Markets Authority (**‘CMA’**) concluded its [investigation](#) as it found that Facebook’s (**‘FB’**) acquisition of Giphy would reduce competition between social media platforms. Furthermore, the CMA emphasised on the acquisition already having an anti-competitive impact on the market as it had already removed Giphy as a potential competitor in the display advertising market.

The independent CMA panel considered the following two factors: (a) denying or limiting other platforms’ access to Giphy GIFs and driving more traffic to FB owned sites; and (b) by changing terms of access, requiring other platforms like Snapchat, Twitter and TikTok to provide more user data in order to access Giphy GIFs. Therefore, after considering these factors, CMA concluded that the acquisition will lead to increase in market power of FB which is already significant in relation to other social media platforms in UK.

Additionally, while looking into the affects this deal can have on display advertising market, the CMA found that, prior to the merger, Giphy had launched innovative advertising services, which it was considering expanding to countries outside the US, including the UK. These services by Giphy allowed various companies to promote their brands through visual images and GIFs and they also had the potential to compete with FB’s own display advertising services, and therefore, would’ve encouraged innovation from other players present in the market. FB terminated these services at the time of merger, leading to removal of potential competition. This was particularly concerning for the CMA as FB controls nearly half of the £7 billion display advertising market in the UK.


The CMA consulted interested businesses and organisations and also assessed the “alternative solutions” submitted by FB and went on to conclude that its competition concerns can only be addressed by FB selling Giphy in its entirety to an approved buyer.

Stuart McIntosh, the Chair of the independent inquiry group carrying out the phase 2 investigation said, *“The tie-up between Facebook and Giphy has already removed a potential challenger in the display advertising market. Without action, it will also allow Facebook to increase its significant market power in social media even further, through controlling competitors’ access to Giphy GIFs.”*

[\(Press release dated 20.11.21\)](#)

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