

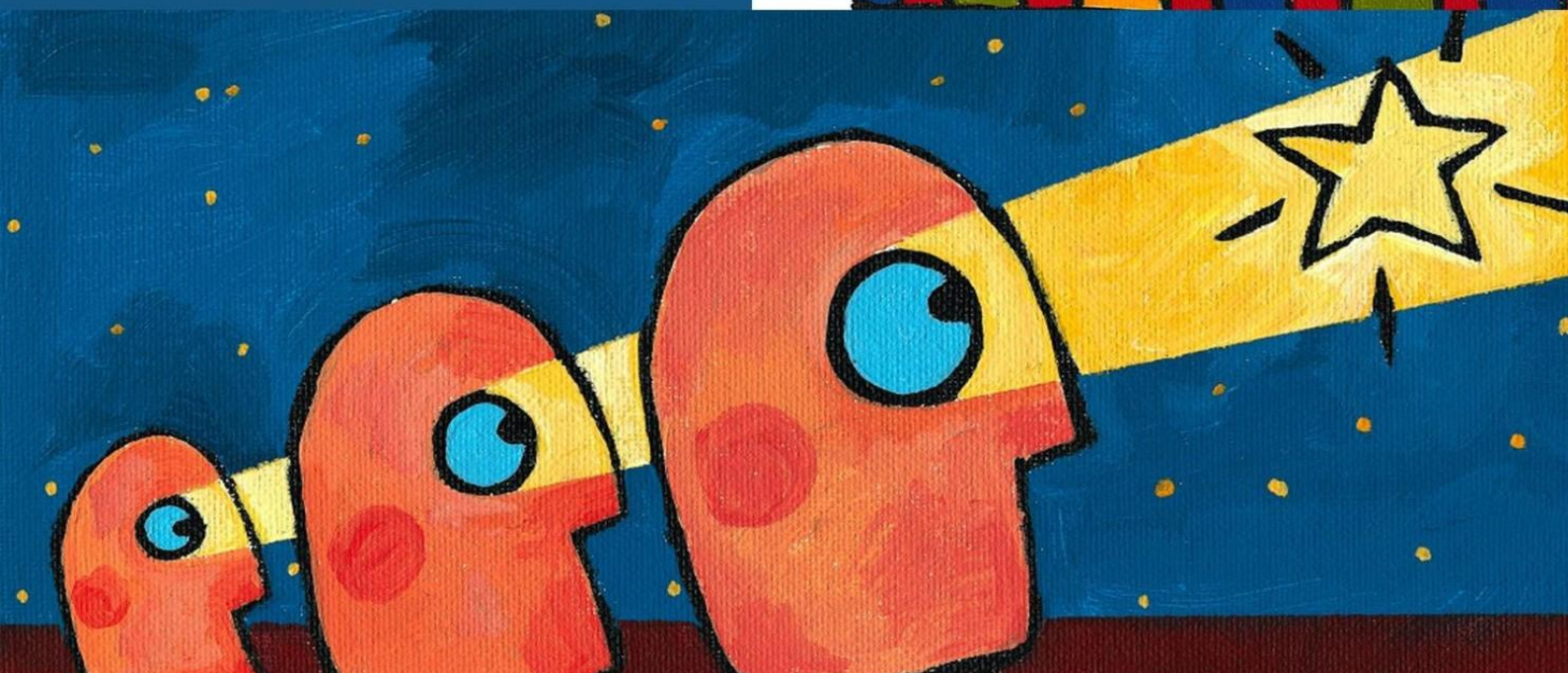


KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

February 2022; Volume 9 Issue 2



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

- CCI Orders Probe against Google

HEARD AT THE BAR

- Google Proposes Measures Addressing Competition Concerns raised by Bundeskartellamt
- FTC Announces Annual Adjustments to Merger-Reporting Thresholds

- EC gives Conditional Approval to the Acquisition of Kustomer by Meta

BETWEEN THE LINES

- CCI Penalises Maritime Transport Companies for Indulging in Cartelisation

CCI Orders Probe against Google

Digital News Publishers Association (**'Informant'**), consisting of its members (**'MOI'**), filed an Information before the Competition Commission of India (**'CCI'/'Commission'**) by under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) against Alphabet Inc., Google LLC, Google India Pvt. Ltd. and Google Ireland Ltd. (**collectively referred to as 'Google'/'OPs'**) alleging violation of Section 4 of the Act. The MOI are engaged in the business of News Media. The Informant submitted that the newspaper industry in India has sustained itself on a business model driven by advertising, which accounts for 2/3 of its total revenue, with only 1/3 of its total revenue coming from subscription by readers. Further, majority (more than 50%) of the traffic on news websites comes from online search engines, wherein Google is a dominant. Google, by way of its algorithms, determines which news website gets discovered via search.

The Informant alleges that the OPs are in contravention of the following provisions of the Act:

(a) *Section 4(2)(a)(i)*: Google imposes direct/indirect unfair conditions on the MOI, while allowing website links of the MOI on their search engine results. In addition to this, Google arbitrarily distributes only a small part of revenue generated from the advertisements on the websites/links, without disclosing the total revenue generated or the basis for calculation of such revenue. Google also uses snippets of the content, for which they do not compensate fairly. Furthermore, due to lack of bargaining power, the MOI have no option but to enter into an agreement for sharing the advertisement revenues, which is unilaterally and arbitrarily dictated by Google. (b) *Section 4(2)(b)(ii)*: Google, by depriving the MOI of the fair value of the content, discourages innovation and technical development of the services provided by the MOI and other media companies, to the detriment of consumers. (c) *Section 4(2)(c)*: Due to the unilateral, arbitrary and unfair decisions of Google, the MOI have to suffer a loss of advertising revenues and the inability to bargain a fair share in the value chain of news dissemination, despite working and generating credible news. Therefore, Google had used its dominant position in the relevant market(s) to deny market access to members of the Informant in the digital advertising space. (d) *Section 4(2)(e)*: Google have entered into the news aggregation genre by launching Google News, Google News Showcase, etc. The OPs do not produce any news of their own; however, they have steadily grown their influence in the news space by effectively using their dominance in the relevant markets. This has been enabled by Google's ability to dictate what a viewer sees first, thereafter using advanced algorithmic tools to cater tailor-made news as per the viewing history of each viewer.

The Informant further submitted that there has been a surge in zero-click searches from 50% in June 2019 to 65% between January and December 2020. Zero-click searches have been stated to mean that user queries have been resolved on the results page itself, without the user going on to the target website. As such, by displaying its own advertisements, Google is stated to extract value from zero-click searches, while publishers lose out on traffic.

Further, Google gives publishers no choice but to implement Accelerated Mobile Pages standard (**'AMP'**) or lose critical placement in mobile search, resulting in reduced traffic. The publishers are forced to build mirror-image websites using this format, with Google caching all articles in the AMP format and serving the content directly to mobile users. Furthermore, for AMP articles, Google restricts paywall options unless publishers rebuild their paywall options and their meters for AMP. The only alternate to the AMP system is for publishers to subscribe with Google, which benefits Google, to the detriment of the publishers.

Therefore, the CCI delineated the relevant markets as *'Market for Online General Web Search Services in India'* and *'Market for Online Search Advertising Services in India'*, wherein it found Google to be dominant.

While forming a *prima facie* opinion regarding the abuse of dominant position by Google, the CCI noted the following:

(a) The unilateral and non-transparent determination and sharing of ad revenues, appears to be an unfair condition imposed on publishers, which further affects the quality of their services and innovation, to consumer detriment. Thus, this conduct of Google is *prima facie* violation of Section 4(2)(a) of the Act. (b) The use of snippets by Google is a result of bargaining power imbalance between Google and news publishers. The Commission is of the view that it needs to be examined whether it affects the referral traffic to news publisher websites and, thus, their monetization abilities. Therefore, the alleged conduct of Google appears to be an imposition of unfair conditions and price which, *prima facie*, is a violation of Section 4(2)(a) of the Act. (c) The alleged issue of publishers being forced to build mirror-image websites using the AMP format, with Google caching all articles and serving the content directly to mobile users, can have revenue implications for the publishers. As alleged, Google restricts paywall options unless publishers rebuild their paywall options and their meters for AMP, which may amount to an unfair imposition on publishers.

The above-mentioned conduct of OPs also resulted in violation of the provisions of Section 4(2)(b)(ii) and 4(2)(c) of the Act. Further, the CCI also stated that, Google appears to be using its dominant position in the relevant markets to enter/protect its position in the market for news aggregation services, which is in violation of Section 4(2)(e) of the Act. Accordingly, the CCI directed the Director General (**'DG'**) to cause an investigation into the matter under the provisions of Section 26(1) of the Act.

[\(Order dated 07.01.2022\)](#)

Google Proposes Measures Addressing Competition Concerns raised by Bundeskartellamt

As per the recently introduced provision under the German Competition Act [Section 19a of the German Competition Act (GWB)], the German competition authority, the Bundeskartellamt, has the ability to intervene earlier and more effectively against the practices of large digital companies which it considers to be of paramount significance.

On 30.12.2021, the Bundeskartellamt determined that Google is of paramount significance for competition across markets as it has an economic position of power which gives rise to a scope of action across markets that is insufficiently controlled by competition. On 04.01.2022, Google decided not to appeal the decision.

In 2021, the Bundeskartellamt initiated a proceeding against Google to examine 'Google News Showcase'. This was largely based on the authority's jurisdiction under the new rules for large digital companies. Therefore, after the decision of Bundeskartellamt dated 30.12.2021, Google is subject to special abuse control, which is relevant in this proceeding to examine 'Google News Showcase'. Google News Showcase is a news service offered by Google, giving publishing companies the opportunity to present their contents in prominent 'story panels'.

In this regard, the Bundeskartellamt is concerned with the following aspects:

(a) Self Preferencing: Google had originally announced to integrate and, accordingly, present the service in Google's general search function. The authority fears that this approach will result in Google self-preferencing its own services or impeding services offered by competing third parties.

(b) Enforcement of Copyright: The authority is examining whether the relevant contractual terms unreasonably disadvantage the participating publishers and, in particular, make it disproportionately difficult for them to enforce their general ancillary copyright when participating in Google News

Showcase.

(c) Non-discriminatory access: The authority is reviewing the conditions for access to Google's News Showcase service i.e. whether non-discriminatory access is ensured for publishers.

Google, while declaring its willingness to address any ambiguities and concerns, had already changed some of the practices under examination by modifying the Showcase contracts.

[\(Press release dated 12.01.2022\)](#)

FTC Announces Annual Adjustments to Merger-Reporting Thresholds

The US Federal Trade Commission ('FTC') had revised the size of transaction thresholds for premerger notification filings, and interlocking directorates, of the Hart-Scott-Rodino Antitrust Improvements Act, 1976 ('HSR Act').

The FTC, as mandated by the HSR Act, is required to revise its thresholds according to annual change in the gross national product of the US. As per the revised thresholds, the minimum size of transaction for reporting proposed merger and acquisitions under Section 7A of the Clayton Act, 1914 ('Clayton Act') had now been increased from \$92 million from \$101 million. Furthermore, the 2022 thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors are \$41,034,000 for Section 8(a)(1) and \$4,103,400 for Section 8(a)(2)(A).

Recently, the FTC also announced an adjustment to [maximum daily civil penalty](#) for HSR Act violations, which had been increased from \$43,792 to \$46,517. The maximum daily civil penalty, under Section 8 of the Clayton Act is adjusted for annual inflation, as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act, 2015.

The FTC Commissioner Rebecca Slaughter, while expressing dismay at the 'outdated fee schedule' and supporting a statutory increase in merger filing fees, stated that, "even as the largest mergers and merger



Heard at the BAR

Legal news from India and the world

investigations have increased in size and complexity, the per-transaction filing fees have remained stagnant."

[\(Press release dated 24.01.2022\)](#)

EC gives Conditional Approval to the Acquisition of Kustomer by Meta

After an in-depth investigation into the proposed acquisition of Kustomer by Meta (formerly Facebook), the European Commission ('EC') approved the deal. This approval is conditional on full compliance with commitments offered by Meta.

Following its market investigation, the EC had following concerns: **(a)** *In the market for the supply of customer relationship management ('CRM') software*, Meta would have the ability, as well as an economic incentive, to engage in foreclosure strategies vis-à-vis Kustomer's close rivals and new entrants, such as denying or degrading access to the application programming interfaces ('APIs') for Meta's messaging channels. **(b)** *Such foreclosure strategies could reduce competition in the market for the supply of CRM software and the market for the supply of customer service and support CRM software*, leading to higher prices, lower quality and less innovation for business customers, SMBs in particular, which may in turn be passed on to consumers.

Meta offered the following comprehensive access commitments with 10-year duration remedies to address the concerns raised by the EC:

(Continued from previous page)

(a) Public API access commitment: A guarantee of non-discriminatory access, without charge to its publicly available APIs for its messaging channels to competing customer service CRM software providers and new entrants. **(b) Core API access-parity commitment:** To the extent any features or functionalities of Messenger, Instagram messaging or WhatsApp, used by Kustomer's customers today, may be improved or updated, Meta gave commitment to also provide equivalent improvements to Kustomer's rivals and new entrants.

Therefore, the EC concluded that the proposed transaction, as modified by the above-mentioned commitments, would no longer raise competition concerns. [\(Press release dated 27.01.2022\)](#)

CCI Penalises Maritime Transport Companies for Indulging in Cartelisation

The CCI passed a final order against Nippon Yusen Kabushiki Kaisha (**'NYK Line'**), Kawasaki Kisen Kaisha Ltd. (**'K-Line'**), Mitsui O.S.K. Lines Ltd. (**'MOL'**) and Nissan Motor Car Carrier Company (**'NMCC'**) (collectively referred as **'Opposite Parties'**/ **'OPs'**) for indulging in cartelisation in supplying of maritime motor vehicle transport services to automobile Original Equipment Manufacturers (**'OEMs'**) for various trade routes.

The CCI took *suo motu* cognizance after receiving a lesser penalty application by NYK Line under Section 46 of the Act read with Regulation 5(1) of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (**'Lesser Penalty Regulations'**). Upon perusal of the documents/ evidence filed by NYK Line, the CCI noted that the OPs were exchanging commercially sensitive information to co-ordinate, inter alia, the price to be quoted in the matter of provision of maritime motor vehicle transport services on Pure Car Carrier vessels to automobile OEMs. In light of the same, the CCI, formed an opinion that there exists a *prima facie* case, of contravention of the provisions of Section 3(3)(a) and Section 3(3)(d) read with Section 3(1) of the Act, and passed an order Section 26(1) of the Act directing the DG to cause an investigation and submit a report.

During the pendency of the investigation before the DG, MOL and NMCC also approached the CCI as lesser penalty applicants, by filing a joint application under the provisions of Section 46 of the Act read with Regulation 5(1) of the Lesser Penalty Regulations. The CCI, however, rejected the said application on the ground that, two competing companies have filed a joint application. The CCI observed that under Lesser Penalty Regulations read with Sections 46 of the Act, there is no provision whereby two or more parties can jointly file an application. Furthermore, the CCI also noted that such joint application is in contrast to the spirit of the lesser penalty provisions. Therefore, in light of the same, MOL and NMCC later filed separate applications, which were accepted by the CCI.


The DG through its investigation found that all the four OPs had agreements/ arrangements/ tacit understanding with each other, through which they indulged in cartel-like behaviour leading to limiting competition in India, for the period of 2008-2012. Accordingly, the DG concluded that the above-mentioned actions of the OPs are in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act.

The CCI, as per the evaluation of available evidence revealed that there was an agreement between the OPs with the objective of enforcement of "*Respect Rule*", which implied avoiding competition with each other and protecting the business of incumbent carrier with the respective OEM. To achieve the said objective, the OPs resorted to multi-lateral as well as bilateral contacts/ meetings/ e-mails with each other to share commercially sensitive information, which also included freight rates. They also aimed to preserve their position in the market and maintain/increase prices, even after requests for price reduction from certain OEMs.

The CCI held that all the four OPs are guilty of contravention of the provisions of Section 3 of the Act. Further, under Section 48 of the Act, 14 individuals of NYK Line, 10 individuals of K-Line, 6 individuals of MOL, and 3 individuals of NMCC, were also held liable. As three enterprises were lesser penalty applicants, the CCI gave benefit of reduction in penalty by 100% to NYK Line and its individuals, 50% to MOL and its individuals, and 30% to NMCC and its individuals. Accordingly, the Commission, besides passing a cease-and-desist order, imposed a penalty of Rs. 28.69 crores on K-Line, MOL and NMCC. [\(Order dated 20.01.22\)](#)

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



4th Floor, Sishan House,
119, Shahpur Jat,
New Delhi – 110049
India

+91-11-41081137
+91-11-49053075

www.kkslawoffices.com
globalhq@kkslawoffices.com
operations@kkslawoffices.com
legal@kkslawoffices.com