KK SHARMA
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Monthly Newsletter

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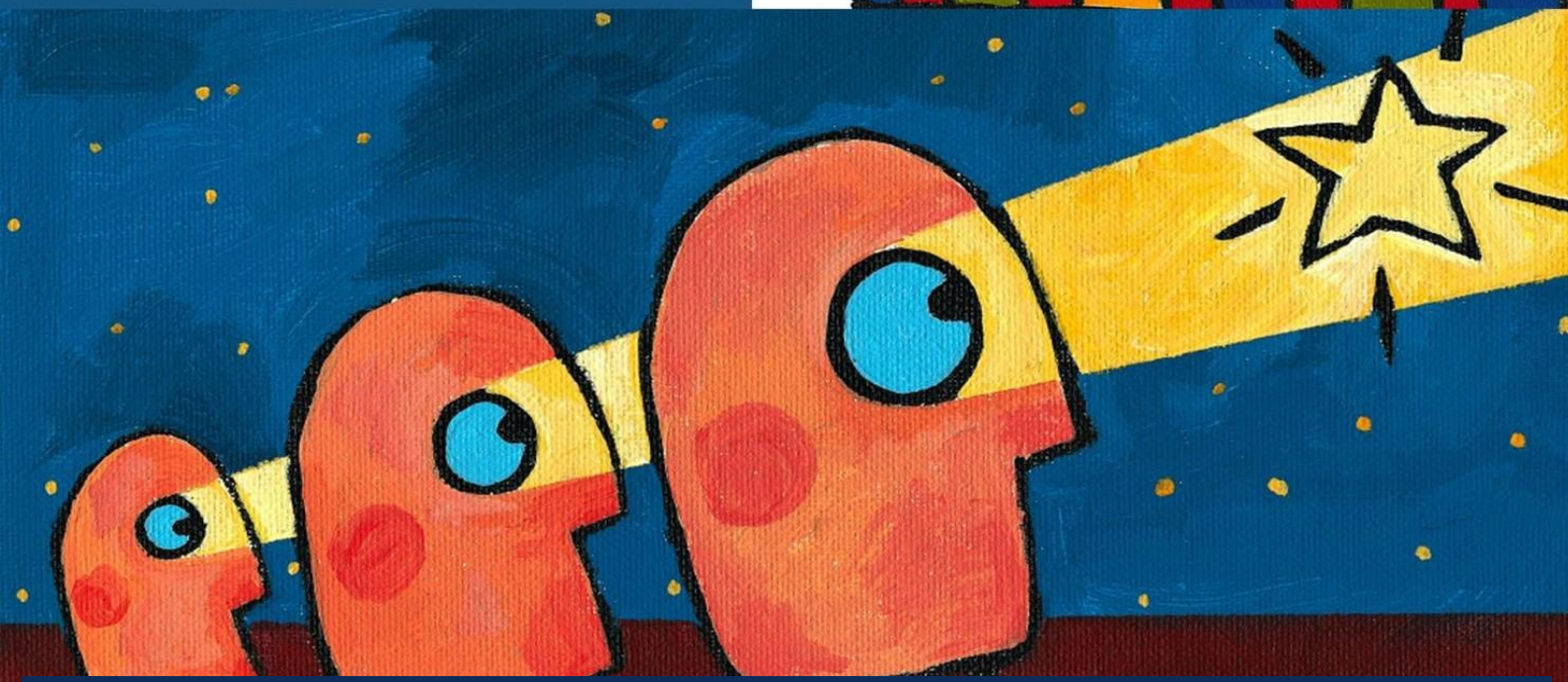

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

Historic Antitrust Lawsuit Filed Against Google for Monopolizing Digital Advertising Technologies

The Department of Justice **('DoJ')** in the United States **('US')**, along with several US States, filed a historic civil antitrust lawsuit against Google LLC **('Google')** alleging monopolization of multiple digital advertising technology products in contravention of section 1 and 2 of the Sherman Antitrust Act, 1890. The complaint, filed by the DoJ, alleges that Google monopolized key digital advertising technologies **(collectively, 'ad tech stack')**, on which the website publishers depend on to sell ads and advertisers depend on to buy ads to reach potential customers. Ad tech stack and tech tools help the website publishers to generate revenue that, in turn, supports the maintenance of open web, which provides unprecedented access to ideas, information, etc. to the public.

The digital advertising market process of Google: The sellers in the market, consisting of website publishers, use Google's Publisher Ad Server. The Publisher Ad Server sends bid requests of the seller to the Google AdExchange which sends the request to the buyers. The buyers are the advertisers who send their responses to the Google AdExchange which sends them back to the Publisher Ad Server. The buyer side has two subsets – Advertiser Ad Network and Demand Side Platform. Advertiser Ad Network is used by a diverse range of advertisers from small businesses to larger brands who are interested in the offerings of "Google Ads." Demand Side Platform is used by large global advertisers and their agencies who are interested in the offerings of "Display & Video 360," which is used to execute complex marketing campaigns.

It has been alleged, in the complaint filed by the DoJ, that Google is a long-standing monopoly in the digital advertising technologies and controls**: (i)** digital tools that the website publishers use to sell ads on their websites; **(ii)** advertiser tool that the millions of advertisers use to buy ad inventory and; **(iii)** AdExchange, the largest advertising exchange in the world, that matches the purchasers and sellers of online advertising through a technology running real-time auctions.

The alleged anti-competitive conduct of Google includes: **(i)** acquiring competitors, to gain control over ad tech stack, that website publishers use to sell advertising space; **(ii)** forcing the website publishers to use Google's tools by restricting its must-have advertiser demand to its own ad exchange and, further, making the access to its ad exchange conditional on the use of its publisher ad server for the website publishers; thereby, resulting in lock-in of website publishers; **(iii)** distorting auction competition by only allowing real-time bidding on its ad exchange to its Publisher Ad Server. If publishers did not use Google's Publisher Ad Server, they could only sell impressions to AdExchange at floor price based on historical price data rather than real-time prices. Google also impeded the ability of a rival ad exchange to compete on the same terms as Google's by altering its publisher ad server rules to ensure that more high-value transactions came through its own ad exchange, and; **(iv)** manipulating auction mechanism allowing Google's AdExchange the opportunity to buy publisher inventory before other ad exchanges and at lower prices. Google Ads is essentially a "black box" to advertisers where Google can set its own rules subject to the maximum price set by advertisers. This allows it to secure more high-value ad inventory and charge high fees on less competitive inventory through its monopoly and control over the publisher ad server. Google is alleged to have "*nearly full control over when, where, and how Google Ads bids for its advertiser customers*" which allows it to charge higher advertising prices from advertisers and increase pay-outs to publishers that use Google's platform, thereby, making its ad tech stack indispensable to publishers. Further, it has been alleged that Google has managed to gain more than 30% of all the *"advertising dollars"* flowing through its ad tech stack on average, suppress alternative technologies and reduce choice for publishers and advertisers by impeding rival's ability to compete. The DoJ, in its lawsuit against Google, seeks equitable relief for the public and treble damages (capped at three times of the actual loss suffered) for losses accrued to the Federal Government agencies for overpaying for web display advertising. The DoJ has sought damages in a civil antitrust violation for the first time in half a century.

(Press release 24.01.2023)

FTC Insists on Holding 'PHARMA BRO' in Contempt of Court

The Federal Trade Commission **('FTC')**, in the US, has requested the Federal Court to hold Martin Shkreli, famously known as "Pharma Bro" in contempt of Court for his failure to provide certain information that was required to determine whether he was violating orders passed by a Judge against him *"that banned him from working in the pharmaceutical industry for life."* The FTC had requested Shkreli to provide certain documents and sit for an interview as part of the investigation to assess whether he violated the ban imposed by the FTC or not. However, Shkreli refused to comply. In a case initiated by the FTC in January 2020, the US District Court had held that Shkreli was responsible for increasing the price of a lifesaving drug called Darapim, used in treating toxoplasmosis, and ruled that his conduct was anti-competitive and illegal. Further, the Court found that there was drastic increase in price of the Darapim from $17.50 to $750 per tablet. The Court ruled that Martin Shkreli's conduct was *"egregious, deliberate, repetitive, long-running, and ultimately dangerous,"* therefore, banning him from participating in the pharmaceutical industry for his lifetime and held him liable for $64.6 million in disgorgement. Following the ruling, the FTC invoked the compliance reporting and access-to-information clauses in the order in October 2022, however, Shkreli refused to comply. This led the FTC to file for civil contempt against Shkreli.

(Press release dated 20.01.2023)

Heard at the BAR

Legal news from India and the world

CADE Grants Conditional Approval to a Joint Venture in the Automotive Sector

The competition authority in Brazil, Administrative Council for Economic Defense (‘**CADE’**), conditionally approved a joint venture between 11 automotive businesses. Volkswagen, BMW, Mercedes-Benz, BASF, Bosch, Henkel, SAP, Schaeffler, Siemens, T-Systems, and ZF entered into an agreement creating a joint venture aiming to establish an automotive market innovation and technological cooperation organization, headquartered in Germany. Each firm will own 9.1% of the new organization's share capital in the form of membership interests.

The agreement aims to create a non-discriminatory, collaborative cloud-managed data network that is open to all players in the automotive industry. The companies submitted that the data network will also be open to their respective partners who develop activities in the production chain to enable data processing and improve decision-making. The companies claim that the joint venture will benefit all players in the automotive sector throughout the production chain by: **(i)** increasing efficiency in processes; **(ii)** improving product quality and; **(iii)** helping in achieving sustainable goals.

On analysis, the CADE concluded that the proposed transaction will not result in increased market share of the concerned companies since the aim of the joint venture is to create a data network for data exchange in the automotive sector. Further, it is likely that the new system proposed by them could solve market foreclosure concerns as it is non-discriminatory and broadly accessible by interested users.

However, there was still some concern regarding the possibility of exchange of competitively sensitive information between the parties to the agreement. The CADE’s Commissioner, Gustavo Augusto noted that “*In face of the uncertainty of which information will be exchanged, it is necessary to take measures that protect consumers and the market from potential harm.*”

Therefore, CADE proposed some remedies including: **(i)** the monitoring of information exchanged between users in the systems of the companies; **(ii)** appointment of a professional who will be responsible for issuing protective rules and to ascertain complaints alleging antitrust violation and; **(iii)** to create and adopt software that is able to track possible antitrust violations. The CADE’s clearance will only be given to the companies that adopted the remedies proposed by CADE.

(Press release dated 03.01.2023)

Bundeskartellamt has Opened Proceedings against PayPal.

The German competition authority, Bundeskartellamt, has opened proceedings against PayPal (Europe) S.à.r.l. et Cie, S.C.A. **(‘PayPal’)**, suspecting that it contravened competition law provisions through its clauses, *"Rules regarding Surcharging"* and *"Presentation of PayPal,"* included in its user agreement in Germany.

The terms and conditions in the user agreement prevent merchants from offering their goods and services at lower prices if the consumers choose a cheaper payment method compared to PayPal. The PayPal user agreement also restricts the merchants from expressing a preference for other payment methods, either by making their use more convenient, or through any other method.

As per market studies, PayPal is the leading online payment scheme and the most expensive online payment service in Germany. Its standard rate is 2.49%-2.99% of the payment amount + 34-39 cents for each payment.

The President of the Bundeskartellamt has expressed concerns that the clauses in the user agreement may restrict competition and result in PayPal abusing its market position. If merchants are unable to take into account the differences between costs of various payment methods and cannot impose surcharge or grant discounts due to the restrictions in the user agreement, then other and new payment schemes will find it hard to enter the market and/or compete on price. This could result in foreclosing the market for competitors. Further, there are also concerns that this could result in consumer harm. The merchants/sellers incur different fees for using payment service depending on the payment scheme. The fees incurred by them are generally included in the prices of the products and, therefore, the customers ultimately bear the costs for payment services even when they are not separately charged for it. To prevent excessive payment method surcharge for consumers, Article 62(4) of the European Payment Services Directive (*Directive (EU) 2015/2366*) was formulated to prevent sellers from seeking separate charges for certain payment methods that involved comparatively low costs. However, PayPal does not fall within the scope of the directive.

Therefore, the Bundeskartellamt initiated proceedings against PayPal for possibly foreclosing competitors and restricting price competition. The antitrust proceedings are based on both competition laws, the European Union’s Treaty on the Functioning of the European Union and Germany’s Gesetz gegen Wettbewerbsbeschränkungen, to assess whether PayPal abused its dominant position or entered into anti-competitive agreements in contravention of the law.

(Press release dated 23.01.2023)

CMA Accepts Education Software Solutions Limited's Commitments and Closes its Investigation

The Competition and Market Authority **('CMA')**, in the United Kingdom **('UK')**, closed its investigation against Education Software Solutions Limited Group **('ESS')** after it offered and signed binding commitments that addresses the competition concerns of the CMA.

The CMA had launched an investigation in April 2022 into the conduct of ESS to assess whether it limited consumer choice and excluded its competitors from the market of supply of Management Information System **('MIS')** software to state-funded schools in England and Wales in violation of competition law. ESS is the largest provider of school MIS software in England and Wales. Most State schools in the UK are required to have an MIS to manage information about their staff and students.

ESS significantly extended the duration of its contract with schools by requiring them to move from one-year contracts to three-year contracts and the CMA was concerned that the schools were not given sufficient time to weigh their options of alternative providers of MIS software. The contractual change made it difficult for alternative providers of MIS software to compete with ESS as selecting a MIS software is a lengthy and complex procedure for the schools.

The ESS offered commitments to address the concerns of the CMA. It committed to allow certain schools (that are interested in switching MIS software providers but did not have enough time to consider their options) to apply to an independent adjudicator for a 12-month break clause. If their application is granted, the schools will be able to exit their current three-year contract with ESS a year earlier and choose alternative provider of MIS software.

While the investigation is now close, the CMA will continue monitoring whether ESS is complying with the commitments accepted by the CMA. It is expected that the commitments will bolster competition in the supply of MIS software to state funded schools in England and Wales and provide more choices to the schools.

(Order dated 10.01.2023)

SC Affirms the NCLAT Order Refusing to Stay the CCI's Order in the Android Dominance Case

The Supreme Court of India **('SC')** declined to intervene in the ruling of the National Company Law Appellate Tribunal **('NCLAT')**, which refused to stay the order of the Competition Commission of India **('CCI')** in the Google Android Case, dated 20.10.2022. The CCI had imposed various directions on Google, to comply with, to curb its anti-competitive practices and imposed a penalty of Rs. 1,338 Crores on Google for abusing its dominant position in relation to Android mobile devices.

Google had filed an appeal to the NCLAT seeking stay on the CCI's order. The NCLAT had instructed Google to deposit 10% of the penalty imposed by the CCI but did not grant stay in respect of the directions issued by the CCI. It was contended in the SC that while the NCLAT noted the urgency of the matter, the appeal was listed for 03.04.2023. Further, the NCLAT did not express even a *prima facie* opinion on the merits of the case to evaluate whether a case for interim stay is made out or not.

The SC decided to only consider whether a case for interim relief is made out on the merits of the case such that it warrants interference at this stage.

However, the SC refused to give a finding on the merits of the submissions of the parties since any expression of the SC's opinion on merits would affect that proceedings pending in NCLAT. It did note, however, that the findings of the CCI cannot be said to be either without jurisdiction or suffering from a manifest error that requires interference in the appeal by the SC, at this interlocutory stage.

The SC refused to interfere with the order of the NCLAT that declined to grant interim relief to Google and instead, requested the NCLAT to dispose of the appeal by 31.03.2023.

(Order dated 19.01.2023)

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