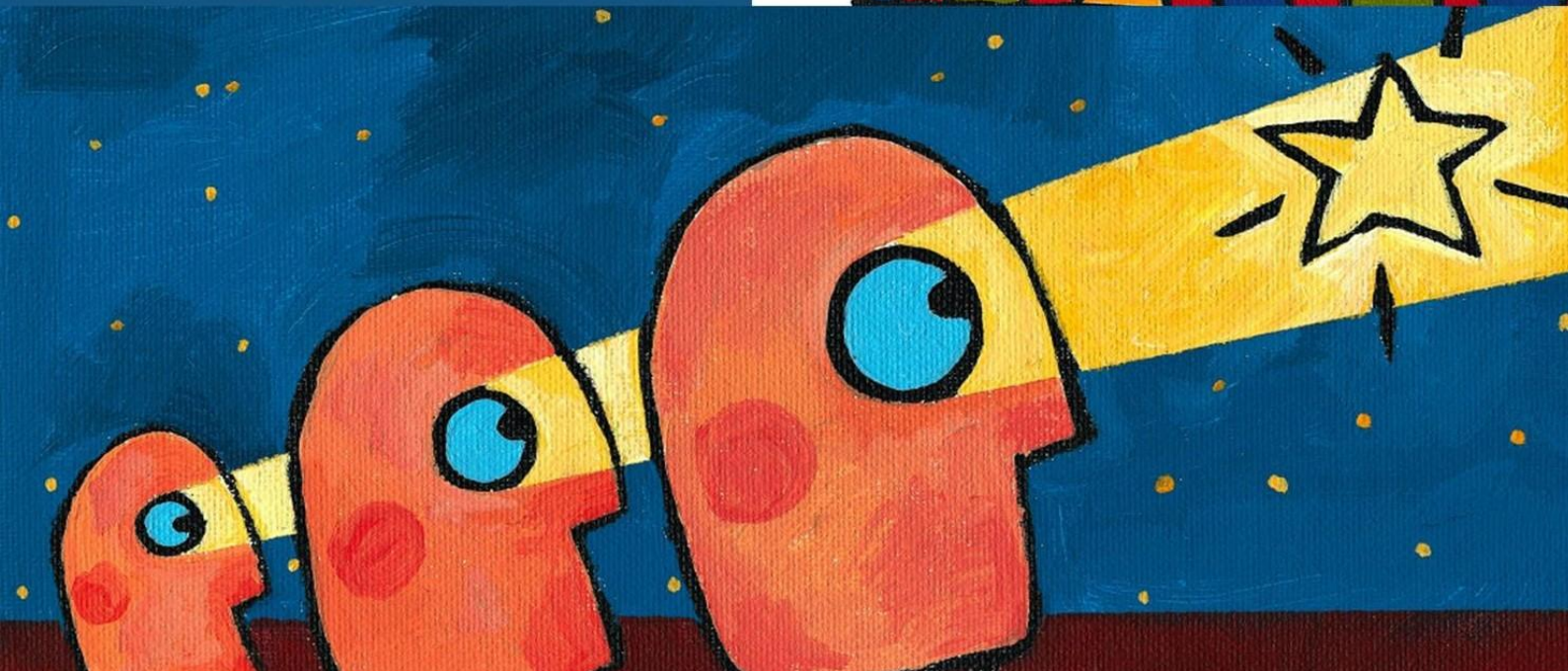




State of Antitrust

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CCI initiates probe against Apple's App Store practices

An Information was filed before the Competition Commission of India ('CCI'/'Commission') by Together We Fight Society ('Informant'), against Apple Inc. & Apple India Private Limited (collectively referred as 'Apple'/'Opposite Party'/'OP'), alleging contravention of various provisions of Section 4 of the Competition Act, 2002 ('the Act').

The OP is engaged in designing, marketing and selling smartphones (including the iPhone), personal computers, tablets, wearables and accessories, and selling a variety of related services. Further, Apple owns and operates the Apple's App Store ('App Store') to distribute applications ('apps') through the App Store.

The Informant alleged that, (a) Apple uses numerous anti-competitive restraints in markets for distribution of apps to users of smart mobile phones and tablets and processing of consumers' payments for in-app content, which refers to digital content used within iOS mobile apps. (b) It imposes unreasonable and unlawful restraints on app developers from reaching users of its mobile devices (e.g., iPhones and iPads), unless they go through the App Store, which is controlled by Apple. (c) It requires app developers, who wish to sell digital in-app content to their consumers, to use a single payment processing option offered by Apple, which carries a 30% commission. Whereas on the other hand, app developers can make their products available to users of an Apple personal computer in an open market, through a variety of stores or even through direct downloads from a developer's website, with a variety of payment options and competitive processing fees that average 2-5%.

In its defence, the OP submitted the following:

(a) The App Store Guidelines have been put in place to ensure that the App Store is a safe and secure place for consumers to discover and download apps and purchase digital content and, therefore, are not unfair or arbitrary. (b) The commission charged by Apple is not unfair or excessive and, in fact, most developers using the App Store pay no commission. Further, for those that do pay, most pay only a commission of 15%. It also claimed that it never exceeded the standard industry rates. (c) The commission, collected through Apple's In-App Purchase ('IAP') feature, is Apple's compensation for providing these developers with a built-in user base and significant technical and marketing know-how. (d) The Informant is a proxy party and is likely acting in concert with parties with whom Apple has ongoing disputes globally.

The CCI made the following observations:

(a) With regards to the argument of Apple stating Informant to be a proxy party, the CCI observed that, as per the *extant* statutory framework, the Informant has a limited role before the CCI. The CCI is purely guided by the merits of the matter in terms of the provisions of the Act. (b) The relevant market, *prima facie*, appears to be the 'market for app stores for iOS in India'. Therefore, it would include all the app stores which are meant for iOS platform. The CCI is *prima facie* of the view that Apple is dominant in the relevant market. (c) The mandatory use of Apple's IAP, for paid apps & in-app purchases, further restricts the app developer's choice to select a payment processing system, especially considering when it charges a commission of up to 30% for app purchases and IAPs. (d) Tying of two distinct products (*i.e.*, distribution service and payment processing service for IAPs) does not allow the app developers to take the advantage of a competitive payment gateways market. It further creates conducive condition for expropriation of the app developers as they cannot use alternate payment gateways and negotiate/pay commission at a competitive rate. The high fee charged by Apple is sustained through its imposed tying of distribution service with payment processing service. (e) In numerous cases, Apple's proprietary apps are competing with third party apps on iOS platform. Therefore, such high fee would increase the cost of competitors and create an uneven ground for competition as Apple's own apps have their fees internalized. Furthermore, such a policy of App Store may disadvantage its competitors in the downstream markets, such as music streaming, video streaming, e-books, *etc.* Due to this policy, if app developers increase their subscription fees, it will affect user experience, choice and cost. On the other hand, if they internalize the cost, it will affect their profitability, which will further lead to reduction in their ability to invest in innovation. (f) These conditions also limit the ability of app developers to offer payment processing solutions of their choice to the users for app purchases as well as IAPs. (g) Furthermore, it requires to be seen whether Apple would have access to data collected from the users of its downstream competitors, which would enable it to improve its own services, however, its competitors may not have access to this data. This will create a disadvantageous situation for Apple's competitors. (h) Intermediation by Apple, between the app developer and app user for payment-processing purposes, would result in leveraging on the part of Apple as it is using its dominant position in the app store market to enter/protect its downstream market. (i) Furthermore, App Store, which is pre-installed on every iPhone or iPad, is the only channel for app developers to distribute their apps to iOS consumers, and the third-party app stores are not allowed to be listed on App Store, which further restricts the market for app store for iOS for potential app distributors.

In accordance with the above-mentioned, the CCI was of the opinion that there existed a *prima facie* case of violation of the provisions of section 4(2)(a)/(b)/(c)/(d)/(e) of the Act by Apple, and therefore, the Director General was directed to cause an investigation into the matter and submit the investigation report within a period of 60 days.

(Order dated 31.12.2021)



Heard at the BAR

Legal news from India and the world

Withdrawal of merger notification in Scrap Recycling Sector due to competition concerns: Germany

Due to the competition concerns raised by the Bundeskartellamt, in the merger of the companies TSR Recycling GmbH & Co. KG and Rhein-Main Rohstoffe GmbH, Frankfurt, (hereinafter referred as 'Companies'), the Companies have withdrawn their merger notification.

TSR Recycling GmbH & Co. KG is the parent company of the TSR Group, an association of undertakings active in the field of trading in secondary raw materials. Rhein-Main Rohstoffe GmbH is a Frankfurt-based waste-disposal company specialising in scrap metal.

Following were the concerns raised:

(i) Scrap iron can only partly be sold directly to steel mills and other end customers. A large part of the iron scrap has to be cut into predetermined sizes before it can be sold to end customers as secondary raw material. For this purpose scrap shears are used to process the material. (ii) The added value created with the shears cannot be achieved through other means. Due to the time and labour involved in cutting torches to manually process scrap iron, just like other scrap iron processing system, suppliers of scrap iron, therefore depend on shear operators that buy and process the material. (iii) Analysis of the supply streams of the Companies active in this market concluded that, scrap iron which is to be processed with scrap shears, is traded regionally, mostly due to the high transportation costs involved, making it economically unviable to trade over longer distances. (iv) In the region of Frankfurt, where both Companies operate large shares and are the leading providers, the merger would have resulted in a dominant position, with a joint market share of around 50%. (v) Further, the merger between the Companies would have led to a creation of legal and actual barriers to the market entry of new competitors.

[\(Press release dated 14.12.21\)](#)

Microsoft's Acquisition of Nuance approved unconditionally by EC

The European Commission ('EC'), unconditionally approved the proposed

acquisition of Nuance Communications, Inc. ('Nuance') by Microsoft Corporation ('Microsoft'). As per the EC, the transaction would raise no competition concern in the European Economic Area.

Nuance is a US based transcription Software Company with a strong focus on the healthcare sector and customer engagement solutions. Whereas, Microsoft, another US based company, offers productivity and business software, cloud computing, and personal computing.

The EC during its investigation examined certain points; a few of them are as follows: (i) Horizontal overlaps between the activities of Nuance and Microsoft in the markets for transcription software: Both the companies offer very different products, while Nuance offers mostly out-of-the-box solutions to end-users, on the other hand, Microsoft provides application programming interfaces ('APIs') as part of its Azure Cognitive Services, which is used by developers to integrate speech recognition technology into their programmes. Further, the EC considers that the merged entity would continue to face strong competition from other players in the market. (ii) Vertical link between Microsoft's cloud computing and Nuance's downstream transcription software for healthcare: The EC's investigation found that the competitors are not dependent on Microsoft for cloud computing service. (iii) Use of data transcribed with Nuance's software: In this regard the EC found that, because of the contractual restrictions and data protection legislation, the data can be used by Nuance only for providing its services, and further, the access of such data to Microsoft, won't give it any advantage to shut out competing healthcare software providers.

Therefore, the EC concluded that the merger won't raise any competition concerns in any of the markets examined and, thus, cleared the deal unconditionally.

[\(Press release dated 21.12.21\)](#)

Netherlands Competition Watchdog directs Apple to adjust unreasonable conditions applying to Dating-App Providers

The Netherlands Authority for Consumers and Markets ('ACM') found Apple to be abusing its dominant position and imposing unreasonable conditions in its App Store applying to dating-app providers ('DAPs'). The ACM has ordered Apple to amend & adjust these unreasonable conditions in its App store.

Apple charges an annual fee of 99 USD from app providers using App Store. Further, if an app provider is offering paid services or subscription within its app (like dating apps), they are required to pay a commission of 15-30%. The ACM found these conditions to be anti-competitive.

The Dutch market consists of various dating services which are offered through apps, majority of consumers either have an android or iPhone, and therefore, most dating apps use Google Play Store and Apple's App Store. The DAPs, for maximizing their reach and providing better services to consumers, are required to be available in both of these stores. Any app on iPhone, including dating apps, can only be offered through the App Store, which further increases reliance of DAPs on Apple. Therefore, due to the dominant position of Apple, these DAPs have no option other than accepting these unreasonable conditions.

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

The Indian Antitrust Watchdog suspends Amazon-Future deal & imposes a penalty of 202 Crores on Amazon

The CCI, through its order dated 17.12.21, withdrew the approval given to 'Amazon & Future deal of 2019' ('Deal'/'Combination'), in relation to its acquisition of 49% shareholding in Future Coupons Private Limited ('FCPL'). FCPL filed an application dated 25.03.21 alleging that [Amazon has taken completely contradictory stands in the arbitration proceedings and constitutional courts](#) compared to the representations and submissions made by it before the CCI. The CCI, in pursuant to the above-mentioned application by FCPL, issued a show cause notice ('SCN'), dated 04.06.21. Through this SCN, the CCI raised certain queries and also stated that, *prima facie*, after going through the application and submissions of Amazon before different authorities, they are of the view that Amazon had concealed its strategic interest over Future Retail Limited ('FRL'). Through its response, Amazon denied the contents of SCN. After going through the material available, including the application of FCPL and response of Amazon to SCN, the CCI observed that: (a) Before the CCI, Amazon initially stated that the purpose of the combination was to create long term value and provide return on the investment made by Amazon. However, the internal correspondence (emails) of Amazon, wherein it was stated that the actual purpose was to acquire interest in FRL, showed a totally contrary picture. (b) Amazon failed to notify FRL Shareholding Agreement and other commercial arrangements, as parts of the combination between the parties and, therefore, suppressed the material facts of the Combination, which is in contravention of the provisions of the Act.

The above-mentioned act of suppression of the actual scope and purpose of the deal is deliberate on part of Amazon, and, therefore, the CCI imposed a penalty of Rs. 202 Crores in total, under the provisions of section 43A, 44 and 45 of the Act.

[\(Order dated 17.12.21\)](#)

Italian Competition Authority imposed a fine of € 1,128 Billion on Amazon for abusing its Dominant Position

The Italian Competition Authority, Autorita' Garante Della Concorrenza ('AGDC'), had imposed a penalty of € 1,128 Billion on Amazon, for breach of Article 102 of the Treaty on the Functioning of the European Union ('TFEU'). The already existing dominant position, in the Italian market for intermediation services on marketplaces, was sought to be leveraged in the downstream market to favour its own logistic services- *Fulfilment by Amazon* ('FBA')- by sellers active on *Amazon.it* to the detriment of the logistics services offered by competing operators, as well as to strengthen its own dominant position.

As per AGDC, sellers using FBA service by Amazon had access to certain exclusive benefits, including *Prime* label, which allows sellers to participate in well-known special events promoted by Amazon, such as *Black Friday*, *Cyber Monday*, *Prime Day*, and increases the likelihood of a seller's offer to be selected by 7 million most loyal and high-spending consumers of Amazon. Therefore, these sellers obtain a better visibility and sales prospects on the website compared to sellers using third party delivery platforms. Further, unlike sellers who are non-users of FBA service, the sellers using FBA service did not face stringent performance requirements from Amazon.


Due to the wide usage of *Amazon.it* by the consumers in Italy, the Amazon's abuse of dominance harmed the competition in e-commerce logistics operators, as it prevented them from presenting themselves to online sellers as providers of services of comparable quality to Amazon's FBA. This conduct also increased the gap between Amazon and its competitors in the delivery of e-commerce parcels, leading to increase in market share for Amazon. Additionally, competing marketplaces also suffer as sellers who adopt Amazon's logistics, in a bid to avoid duplicating warehousing costs, are discouraged from offering their products on other online platforms.

Considering the above-mentioned conduct, the AGDC, while imposing the fine, emphasized on the seriousness & duration of these anti-competitive conducts of Amazon. Further, to restore competitive conditions in the relevant markets, behavioural measures were imposed on Amazon, which are subject to review by a monitoring trustee.

[\(Press release dated 09.12.21\)](#)

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