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Monthly Newsletter

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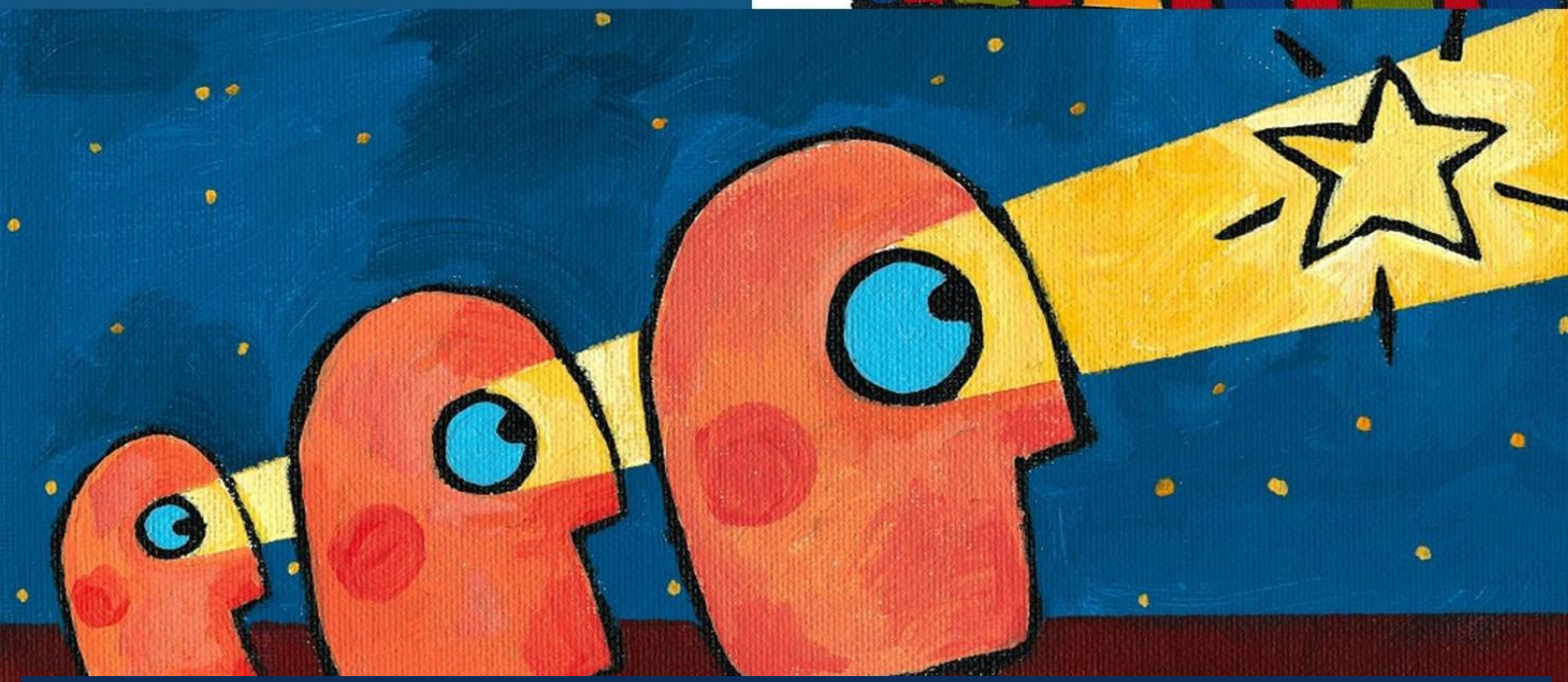

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CCI Penalizes Seven Enterprises Guilty of Cartelization in Railway Tenders

The Competition Commission of India **('CCI'/ 'Commission')**, in a *suo moto* investigation initiated on receiving a lesser penalty application under section 46 of the Competition Act, 2002 **('the Act')**, has found seven companies, and certain individuals of the seven companies, guilty of cartelization in tenders for supply of protective tubes to the Indian Railways.

The CCI, on receiving the lesser penalty application, formed a *prima facie* view that the conduct of the Opposite Parties **('OPs')** has contravened the provisions of section 3(1) and 3(3) of the Act. The CCI, on the *prima facie* view, directed the Director General **('DG')** to initiate an investigation into the matter.

The DG, in his investigation, found that: **a)** all the 7 OPs were involved in the supply of protective tubes and therefore, fell under the definition of 'enterprise' under section 2(h) of the Act; **b)** the IP address from which the bids were quoted and the directorships/partnerships were the same in case of 3 OPs; **c)** certain e-mail communications between the OPs were found, wherein, they discussed allocation of tender quantity, price to be quoted in the tenders, certain OPs asking the other OPs to withdraw their offers etc. Based on this, the DG found that the OPs were in contravention of the provisions of section 3(3)(a), 3(3)(b), 3(3)(c), and 3(3)(d) read with section 3(1) of the Act.

The CCI analysing the DG report and the replies of the OPs concluded that: **a)** the *modus operandi* of the cartel was that an employee of OP-1 used to keep the record of all the tenders of Indian Railways and based on the allotment value, a predetermined percentage distribution of tenders, allocated tenders to each member; **b)** it is clear from the DG report that 3 OPs, OP-1, OP-2, and OP-3, are sister concerns as all three are run by the same person, yet they participated in the tenders as competitors. The IP address through which the bids were submitted was same for the said 3 OPs. This clearly shows that there was collusion among the OPs; **c)** the argument of OP-5 that mere price parallelism cannot lead to bid rigging in a monopsonist market with a single buyer is of no use in the present situation. The manipulation of bidding is evident from the communication exchanged between the OPs; **d)** the argument of OP-6 & OP-7 that they were informed of the rates to be quoted but they flatly ignored them and quoted independent rates cannot be accepted. A mere e-mail of the rates to be quoted, in the CCI's view, can compromise the independence of quotation of rate in the tenders. Further, a percentage share of the multiple tenders were allocated to OP-6 and OP-7, thereby confirming their participation in the cartel; **e)** the OPs argued that the cartel conduct did not lead to any Appreciable Adverse Effect on Competition **('AAEC')**. The CCI observed that provision of section 3(1) of the Act not only forbids the agreement which causes an AAEC but also the agreements that are likely to cause an AAEC. Further, once an agreement is established under section 3(3), the same is presumed to have an AAEC in India. It was also noted that this presumption of AAEC is rebuttable. To rebut the presumption, the OPs have to show that the cartel conduct engaged in by the OPs had some positive effect in the market in terms of section 19(3) of the Act. In this case, however, the OPs have not been able to rebut the statutory presumption.

Based on the above findings and observations, the CCI found all the 7 OPs (OP-1 to OP-7) and 10 individuals related to the OPs in contravention of the provision of sections 3(3)(a), 3(3)(b), 3(3)(c) and 3(3)(d) read with section 3(1) of the Act and imposed a penalty of 5% of their average relevant turnover of the last three preceding years. However, the CCI granted 100% reduction in penalty to OP-4 and its individuals for being the first lesser penalty applicant.

(Order dated 09.06.22)

FTC Warns US Congress of the Shortcomings of A.I.

The Federal Trade Commission **('FTC')**, United States of America **('US')**, has given its report on Artificial Intelligence **('A.I.')** to the US Congress. The FTC, in its report, has warned the policymakers to apply 'great caution' while relying on A.I. as a policy solution.

The US Congress, in 2021, had directed the FTC to examine ways to use A.I. to identify, remove or take any other appropriate action necessary to address certain specified harms. The particular concerns of Congress regarding online harm include: online fraud, impersonation scams, fake reviews and accounts, bots, media manipulation, illegal drug sales and other illegal activities, sexual exploitation, hate crimes, online harassment and cyber stalking, and misinformation campaigns aimed at influencing elections.

However, Director of the FTC's Bureau of Consumer Protection has said that *"nobody should treat AI as the solution to the spread of harmful online content."* The FTC reported that relying on A.I. as a solution could lead to additional harms, rather than resolving the current issues, including: **i)** A.I. detection tools have built in imprecision and inaccuracies as they are inherently limited by unrepresentative datasets, faulty classifications, etc.; **ii)** A.I. tools can result in unfair or biased results, reflective of the biases of their developers; **iii)** A.I. tools can enable invasive commercial surveillance as they can manage huge amounts of data. The FTC suggested to the Congress to consider formulating a legal framework to prevent potential harm by the use of A.I. ***(Press release dated 16.06.22)***

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Heard at the BAR

Legal news from India and the world

1 Billion Euros Fine Imposed on Qualcomm by EC, Annulled by General Court of Europe

The General Court of Europe **('EGC'),** stating "*a number of procedural irregularities affected Qualcomm's rights of defence and invalidate the Commission's analysis of the conduct alleged against Qualcomm,*" annulled the 2018 findings of the European Commission **('EC'),** based on which it had fined Qualcomm Technologies Inc. **('Qualcomm')** 1 billion Euros.

Qualcomm is the world's largest supplier of Long Term Evolution **('LTE')** baseband chipsets. Apple Inc.**,** being an important smartphones and tablets maker, is a key customer of LTE baseband chipsets. EC, after investigation in 2018, found that Qualcomm in 2011 had entered into an agreement with Apple committing to make significant payments to Apple on the condition that the company would exclusively use Qualcomm chipsets in its "iPhone" and "iPad" device. This exclusive agreement, according to EC, was against the antitrust laws of the European Union **('EU')** because Qualcomm's competitors were denied the possibility to effectively compete for Apple's significant business irrespective of how good their products were. Further, certain internal documents found during the investigation showed that Apple gave significant consideration to the exclusivity agreement, until it ended in 2016, in its decision to change the supplier of the baseband chipsets.

The EC, based on the above, found Qualcomm to have been abusing its dominant position in LTE baseband chipsets by preventing competition on the merits and imposed a fine of 1 billion Euros on Qualcomm.

The EGC, however, reasoned that **a)** there were a number of procedural irregularities which affected Qualcomm's right of defence; **b)** the EC has not considered the fact that Apple had no technological alternative to Qualcomm LTE chipsets for the time period concerned; **c)** the EC has failed to take into considerations all the relevant factual circumstances. Based on these considerations, the EGC has reversed the decision of the EC.

(Press release dated 15.06.22)

EC Investigates Vifor Pharma for Potential Anticompetitive Disparagement

The EC has started an antitrust investigation against Vifor Pharma Ltd., Vifor Pharma Management Ltd. and Vifor Pharma Deutschland GmbH (collectively, '**Vifor'**) to check if their activities amount to restriction of competition in any manner pursuant to a complaint filed by Pharmacosmos A/S. Pharmacosmos is a family owned Danish pharmaceutical company involved in the business of treatment for iron deficiency conditions. Vifor is a pharmaceutical company based in Switzerland and operates globally through its subsidiaries.

In the business of treatment of iron deficiency, Vifor has one significant competitor, Pharmacosmos. Vifor's conduct indicated that they were obstructing the competition for their iron treatment medicine, Ferinject.

Executive Vice-President of the EC, Margrethe Vestager, stated that *"Competition in the pharmaceutical sector is important. It provides access to affordable and innovative medicines to patients."* The Commission is worried that Vifor was spreading false information in relation to the drugs sold by Pharmacosmos, to healthcare professionals primarily, since many years. The spread of misleading information regarding the safety of Pharmacosmos's drug could hinder the uptake of the competitor's drug. If Vifor's conduct is proven, it may amount to a violation of article 102 of the Treaty on the Functioning of the European Union. In furtherance of this, the EC decided to conduct a detailed inquiry into the matter.

(Press release dated 20.06.22)

Antitrust Suit Filed to Block EverWatch's Acquisition by Booz Allen Hamilton

The Department of Justice **('DoJ'),** US, has filed a civil antitrust lawsuit to block the acquisition of EverWatch Corp. **('EverWatch')** by Booz Allen Hamilton holding Corporation **('Booz Allen').** Booz Allen is a public company involved in the business of providing services and solutions in areas of technology, consulting and engineering. EverWatch is a private equity firm who is a subsidiary of EC Defense Holdings LLC. It provides services related to the defence and intelligence sector in the areas of data science, cyber security etc.

The DoJ's complaint stated that the two entities were actually eminent competitors in the market fighting to win the National Security Agency's **('NSA')** contract. The DoJ is under the impression that this acquisition would eliminate competition for the defence contract to be proposed by the NSA and it would create a condition where the NSA would be forced to face a monopoly bidder who is present in the market.

Assistant Attorney General of the DoJ's Antitrust Division said that "*Booz Allen's agreement to acquire EverWatch imperils competition in a market that is vital to our national security."* The DoJ alleged, in the complaint, that the merger will be in violation of section 1 of the Sherman Act, 1890 by reducing the companies' incentive to bid aggressively and section 7 of the Clayton Act, 1914 by substantially lessening competition in the market.

(Press release dated 29.06.22)

CMA Report on Apple and Google's Market Dominance in Mobile Ecosystems

Competition and Markets Authority **('CMA')**, in the United Kingdom **('UK'),** released its final report of its market study into mobile ecosystems. The report details the dominant positions that Apple Inc. **('Apple')** and Google LLC. **('Google')** enjoy in the mobile ecosystem. The findings of the report are given below:

On dominant position of Apple and Google in the market: It was seen that Apple and Google, in case of the mobile ecosystem, i.e. Operating Systems **('OS')**, web browsers and app stores enjoyed a dominant position in the market. Both of them through their rules and regulations created entry barriers for other such web developers' startups etc. These two players unilaterally made rules regarding their mobile ecosystem which has made it very difficult for other players to make a lasting impact in the market. Most smart phones in the market use either Apple's iOS or Google's Android OS**.** It was seen that most of the apps on each OS were 'native,' that is, they could be written and run only on that specific OS. In this respect, it was seen that in Apple devices all apps could only be downloaded from Apple's App Store and in Google's Android devices, 90% of the apps were downloaded from Google's Play Store. In the case of mobile browsers, it was seen that Google's Chrome and Apple's Safari, combined, had a 90% share in the mobile browsers market in the UK.

On unfair restrictions imposed on other web developers, businesses and start-ups in the market: During the course of the study many complaints from web developers, businesses etc. were received regarding difficulty of entering the mobile ecosystem because of the impact of restrictions set, particularly, by Apple's OS. The complaints were mostly of how separate copies of apps had to be made especially to run on Apple's OS. There were also complaints regarding the disproportionate income that had to be shared with Apple and Google to run apps on their platforms. It was shown that this held back innovation and increased the cost for the consumers.

On Apple and Google's stronghold on the market: The report presented that Apple and Google had little or no competitors. This was substantiated by showing the consistent growth and extreme profits that both companies made every year. Apple made a profit of 81 billion Euros in 2021 with a return on capital invested of over 100%. Google made a profit of 57 billion Euros in 2021 with an average return on capital invested of 39% (from 2011-2021). This demonstrates how Apple and Google made very high profits, higher than what companies would usually make in a competitive environment.

On Apple's restrictions on other App stores/Apps/Search Engines: The study reported how Apple did not allow any other app store to be on its platform and how it effectively blocked 'cloud gaming' on its platform. 'Cloud Gaming' is a technology that allows users to play games without being restricted by the type of games that can be played on their device's processing and storage abilities. This isn't available on Apple, however, it is available on Google's Android. Apple also restricts functionality of other search engines on its platform. It uses Webkit in its search engines meaning all other apps also have to use the WebKit to be on an Apple device. Apple has also blocked hardware and software functionality for other app developers in its iPhone. An example of this is the technology enabling contact less payments using Near Field Communication chips. This payment method on Apple devices can only be done through the Apple Wallet. Google has lesser restrictions, nevertheless, even Google was shown to make it difficult for other apps to function in an Android device by giving preference to native apps.

On Measures that should be taken to increase competition given in the report: The report conceded that there weren't any quick fixes that could be taken to immediately solve all problems. To effectively deal with market players like Apple and Google, a new digital regime must be made wherein such market players are constantly monitored. In the context of UK, the government has already discussed plans of bringing in a new pro-competitive regime. A Bill is set to be introduced in the Parliament in 2022. The report also mentions how global cooperation in context of such digital markets is required. It states that the EU's Digital Markets Act is a welcome step. The report concludes by stating that further investigation must be undertaken to understand other such issues in digital markets and to understand how to effectively solve them.

(Market study dated 10.06.22)

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, ShahpurJat,
New Delhi – 110049
India

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

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