

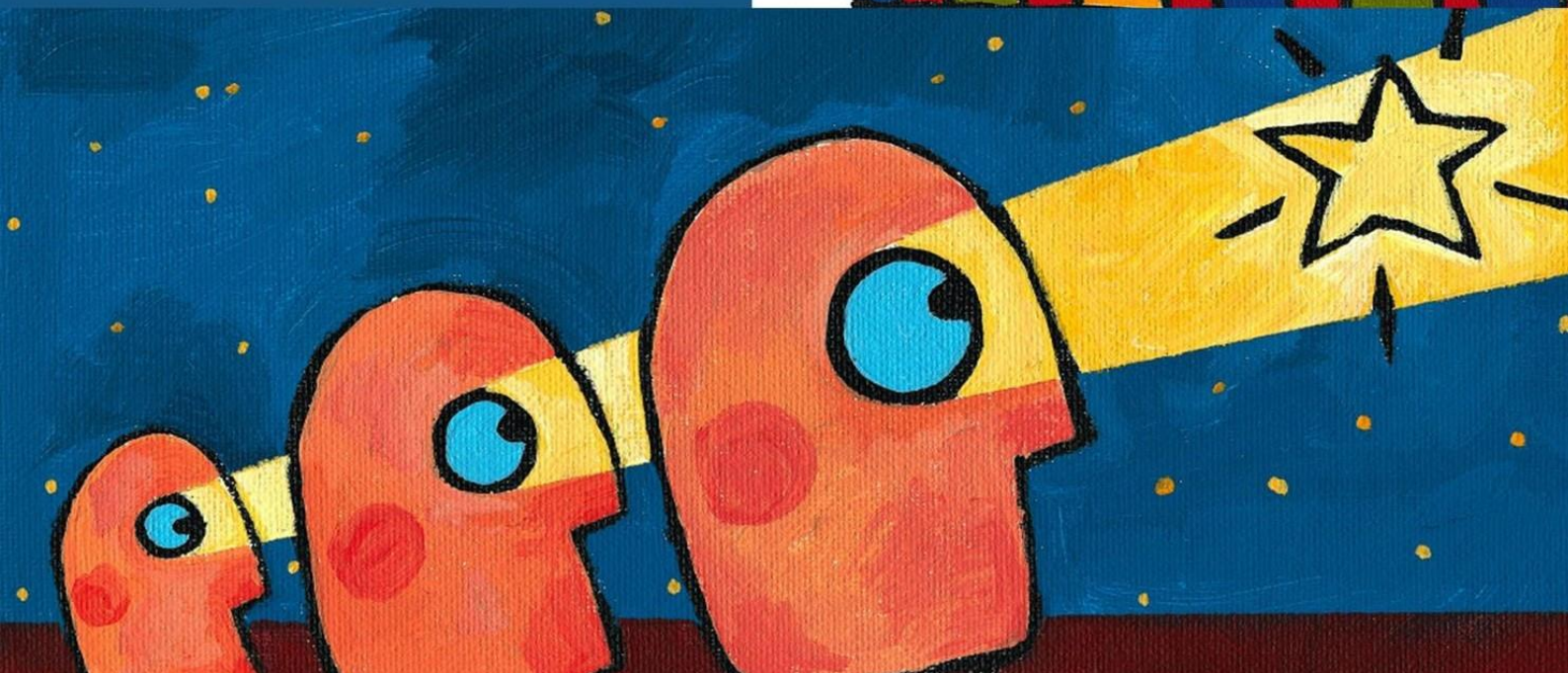


KK SHARMA  
LAW OFFICES

Monthly Newsletter

# State of Antitrust

June 2022; Volume 9 Issue 6



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

- CCI Issues 'Cease & Desist' order against ABFI for Abuse of Dominant Position

## HEARD AT THE BAR

- CMA Investigating Google's Practices in Advertising Technology Intermediation
- Veolia and Suez Merger could hamper Competition: CMA

## BETWEEN THE LINES

- CMA Advises on how a Code of Conduct could apply to Platforms and Content Providers
- Oil Producing Cartels to come under US Antitrust Enforcement

### CCI Issues 'Cease & Desist' order against ABFI for Abuse of Dominant Position

The Competition Commission of India ('Commission'/ 'CCI') issued a 'cease and desist' order against Amateur Baseball Federation of India ('ABFI'/'OP') for abusing its dominant position in organization of Baseball leagues/events/tournaments in India. The Confederation of Professional Baseball Softball Clubs ('CPBSC'/ 'Informant'), a non-profit organisation, whose sole objective is promotion of the sport of baseball, had filed an information against the ABFI, a registered society and a recognized national sports federation of the Government of India which works for general promotion of baseball and its players, that ABFI has breached the provisions of Section 4 of the Competition Act, 2002 ('the Act').

The genesis of filing the information was a baseball tournament named 'Club National 2021', organised by CPBSC, with an objective of bringing the best baseball clubs to compete with each other also leading to the players enhancing their skills. CPBSC received 14 registrations, for participation, out of which it shortlisted 8 for the tournament. Later, however, the clubs who had participated in the tournament started withdrawing their registrations resulting in the cancellation of the tournament and monetary losses to the CPBSC. It later came to the knowledge of CPBSC that the OP had sent letters to State Associations directing them to not deal with the bodies and leagues not recognized by ABFI and threatening the players with on disciplinary action on their participation in any such tournaments. The CPBSC, later, rescheduled the tournament from 30.03.2021 to 04.04.2021. The OP also announced a baseball championship at the same time i.e. from 29.03.2021 to 03.04.2021 and the terms of the championship included that no club can leave the championship till the closing ceremony of the championship was over. Based on the above conduct, the CPBSC alleged that this baseball championship was organised by the OP to sabotage the Club Nationals organised by the CPBSC and ,therefore, the OP have breached the provisions of Section 4(2)(c), 4(2)(a)(i), and 4(2)(b)(i) of the Act by abusing its dominant position.

The CCI, based on the above averments made by the Informant and after going through the submissions made by the OP, formed a *prima facie* view that there seems to be a violation of the provisions of the Act, by the OP, thereby directed the Director General ('DG') under Section 26(1) of the Act to cause an investigation into the matter concerning the allegations in the Information.

The DG in his investigation found that the OP has violated Section 4 of the Act. However, with respect to the violation of Section 3 of the Act, the DG concluded that the relations between ABFI and its affiliated units was of a vertical nature with ABFI being on the top. Therefore, the letter of the OP, restricting the participation of the affiliated units, cannot be termed as an agreement between the parties and, hence, no contravention of the provision of Section 3(3) of the Act can be made out.

The Commission, after considering the DG report and objections & submissions of the parties, held the following: **(a) On OP as enterprise-** the OP had contested that it did not indulge into any commercial activity and, therefore, is not an 'enterprise' under the provisions of the Act. However, this stand of the OP is not correct as the definition of 'enterprise', under the Act, gives emphasis to the economic nature of the activities and it is immaterial if the economic activities undertaken are for profit making or not. Therefore, even the non-commercial economic activities will be subject to the provisions of the Act; **(b) On Relevant Market-** after establishing the OP as an enterprise, the Commission went on to delineate the relevant market to ascertain the abuse. It was defined as "*market for organization of Baseball leagues/events/ tournaments in India*"; **(c) On Dominant Position-** the OP is an Apex institute in the field of baseball in the Country. It is involved in various activities such as organising National Championships, selection in National, International and Olympics. Further, it is affiliated to World Baseball Softball Confederation and Baseball Federation of Asia. Moreover, there are a number of regulatory barriers in the sport of baseball and ABFI is the only body recognized by Ministry of Youth Affairs & Sports, Government of India, International Baseball Federation and Indian Olympic Association , therefore, making ABFI a monopoly and a dominant player in the relevant market; **(d) On Breach of the Provisions-** it was observed that ABFI's letter requesting the affiliated State Baseball Associations and their players not to participate in any tournament organised by unrecognised bodies has violated the provisions of Section 4(2)(c) of the Act. Further, this conduct resulted in limiting and restricting the provisions of services and market. Therefore, it is in contravention of the provisions of Section 4(2)(b)(i) of the Act. Furthermore, the letter of the OP warned strict action against players who participated in tournaments organised by the bodies not recognised by ABFI, thereby, imposing unfair conditions on the players and, therefore, being in contravention of Section 4(2)(a)(i) of the Act.

Based on the above findings and observations the Commission passed a 'cease and desist' order on the OP for the breach of Section (4)(2)(a)(i), 4(2)(b)(i), and 4(2)(c) of the Act. The Commission further prohibited ABFI from indulging in any such future conduct violating the provisions of the Act. However, no monetary penalty has been imposed on the OP as the OP has already withdrawn the impugned letter and, to that extent, the necessary market correction has already taken place.

(Order dated 03.06.2022)



## Heard at the BAR

*Legal news from  
India and the world*

### CMA Investigating Google's Practices in Advertising Technology Intermediation

After initiating an [investigation in the 'Jedi Blue' agreement](#) between Google LLC ('Google') and Meta Platforms, Inc (formerly Facebook), in March 2022, the Competition and Markets Authority ('CMA'), United Kingdom ('U.K.'), has now initiated an investigation on Google's practices in Advertising technology intermediation ('ad tech stack').

Ad tech stack is a complex set of services which enables and facilitates the sale of online advertising space between sellers (publishers, like online newspapers) and buyers (advertisers). Google holds a strong position at various levels of this ad tech stack, as it charges fees from both advertisers and publishers.

The main concern of CMA is that millions of people enjoy access to free information online every day and any weakening of competition in this area will lead to less revenue for the publisher who then will be forced to either reduce the quality of their content or to hide their content behind paywalls. The three parts of the ad tech stack that CMA will examine are: (a) Demand-Side Platforms ('DSPs') which allows the advertisers to buy the space available for advertising with the publishers; (b) Ad exchanges which allows real time auction of publishers' inventory by connecting them to multiple DSPs; (c) Publisher ad servers which manage the publisher's inventory and decide which ad to show based on the bids received from different ad exchanges or direct deals between publishers and advertisers.

The CMA suspects that Google may have used its position in ad tech to favour its own services by using its own publisher ad server and its DSPs to favour its own exchange services to the detriment of its competitors and the consumers. Therefore, the investigation of CMA will focus on assessing Google's conduct in the above

mentioned three parts of the ad tech stack to ascertain whether the conduct of Google in these parts have led to any distortion in competition and further, whether Google limited the interoperability of its ad exchange with third-party publisher ad servers or contractually tied these services together, making it more difficult for rival ad servers to compete.

The cases of investigation in 'Jedi Blue' agreement and this 'ad tech stack' have come after the CMA conducted its market study on 'Online Platforms and Digital Advertising' where it identified significant issues and made an assessment of possible solutions to address market power in ad tech.

The Chief Executive of CMA in the press release said: *"It's vital that we continue to scrutinise the behaviour of the tech firms which loom large over our lives and ensure the best outcomes for people and businesses throughout the UK."*

[\(Press Release dated 26.05.22\)](#)

### Veolia and Suez Merger could hamper Competition: CMA

CMA, investigating the merger of Veolia Environnement S.A. ('Veolia') and Suez S.A. ('Suez') has provisionally found that the merger between the two would hamper competition in the supply of several waste and water management services in the U.K.

The companies, Veolia and Suez, supply water and wastewater management services to industrial customers and are two of the largest suppliers of waste management services to businesses and councils in the U.K.

Further, the companies are active across waste management supply chain which range from collection of waste to operation of composting and incineration facilities.

CMA initially had launched an investigation into the merger in October 2021, which was then

referred for an in-depth investigation, to an independent inquiry group, in December 2021. The CMA's in-depth investigation focused on 8 markets in waste and water management sector where these merging companies compete. Further, the investigation considered a lot of evidences including the concerns raised by the customers and the other competitors of these companies.

Based on its in-depth investigation the CMA found that the merger will raise competition concerns in 7 out of the 8 markets, in waste and water management sector, on which the investigation has focused.

The investigation found that the companies compete very closely in each of these markets and that the merger would limit the competition faced by the merged entity to a very large extent.

Further, the CMA is also concerned that the merger will lead to high cost and the low-quality services to the councils, thereby having an effect on taxpayer, and businesses in U.K.

CMA has asked the interested parties, to the merger, to provide responses on its provisional findings. Further, CMA will publish its final report, on the merger, by 17 July 2022. However, the merger of Veolia and Suez has already been cleared in the European Union and Australia following certain divestment commitments by Veolia.

[\(Press Release dated 19.05.22\)](#)

### **CMA Advices on how a Code of Conduct could apply to Platforms and Content Providers**

The Digital Secretary of U.K. in April 2021, had asked the Digital Market Unit ('DMU') of CMA and Office of Communications ('Ofcom'), a government-approved regulatory and competition authority for the broadcasting, telecommunications and postal industries of the U.K., to 'look at how a code would govern the relationships between platforms and content providers such as news publishers, including ensuring they are as fair and reasonable as possible'.

In response to the above, a new pro-competitive regime along with an enforceable Code of Conduct ('Code') has been proposed which will apply to digital firms designated as Strategic Market Status ('SMS'), a designation given, by DMU, to the firms which have substantial and entrenched market power, in at-least one digital activity, providing them with a strategic position. The new regime is very broad and encompasses a broad range of activities and users of SMS firm's services.

The CMA and Ofcom found a number of ways in which large platforms' behaviour adversely affect publishers. Further, after consulting with digital platforms, news publishers, and other stakeholders the CMA, on application of Code to platforms and content providers, is of the view that an enforceable Code where DMU can set requirements would be effective in securing fair compensation for use of content by: (a) addressing transparency of algorithm concerns; (b) provide publishers with appropriate control over branding and presentation of their content; (c) bringing improved data sharing practices between publishers and platforms that host their content; (d) providing a framework for the determination of fair financial terms for publishers' content thereby solving the problem of imbalance in bargaining power in negotiations between publishers and platforms.

According to the CMA, this Code would try to control the impacts of a SMS business's market position by ensuring that a SMS firm does not unjustly utilize its market strength and strategic position to distort or weaken competition among the consumers of the SMS firm's services. However, the Code is merely one method of resolving concerns of market power between SMS platforms and content suppliers. Further, the CMA is hopeful that the Code will sit alongside pro-competitive interventions which would tackle the market power of the platforms more directly.

[\(Press Release dated 06.05.22\)](#)

### **Oil Producing Cartels to come under US Antitrust Enforcement**

The Senate of the United States ('US') has introduced a new amendment to the Sherman Act, 1890 named '*No Oil Producing and Exporting Cartels Act of 2021*' or '*NOPEC.*' By this amendment, a new Section 7A: 'Oil Producing Cartels' is added to the Sherman Act.


This amendment is introduced to make the Organization of the Petroleum Exporting Countries ('OPEC') and other oil cartels amenable to antitrust lawsuits in the US. The Attorney General of the US is given the sole authority to bring an action to enforce this new Section.

The new Section 7A makes it illegal for foreign States, their instrumentalities or agents to act collectively or in combination with each other, in any form, to: (a) "*to limit the production or distribution of oil, natural gas, or any other petroleum product*"; (b) "*to set or maintain the price of oil, natural gas, or any petroleum product*"; (c) "*to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product.*" Further, the amendment also invalidates the traditional defences taken by the Countries including act of state, foreign sovereign compulsion and political question doctrine and direct the Courts to make a decision on the merits of the action.

[\(Press release dated 05.05.22\)](#)

### **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](http://www.kkslawoffices.com)  
[globalhq@kkslawoffices.com](mailto:globalhq@kkslawoffices.com)  
[operations@kkslawoffices.com](mailto:operations@kkslawoffices.com)  
[legal@kkslawoffices.com](mailto:legal@kkslawoffices.com)