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Monthly Newsletter

State of Antitrust

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

- CCI probes ,on its own, WhatsApp and Facebook over Updated Terms of Service and Privacy Policy; India

HEARD AT THE BAR

- Digital Market Unit launched to promote online competition; UK
- Cartel conduct now punishable by up to 7 years' jail; New Zealand
- Commission sends 'Statement of Objections' to Apple for distorting competition in the music streaming market; European Union

BETWEEN THE LINES

- CCI closes a case against IATA after 9 years of litigation; India

AND MORE...

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CCI probes, on its own, WhatsApp and Facebook over Updated Terms of Service and Privacy Policy; India

In the last newsletter, we informed our readers about the latest enforcement action of the Competition Commission of India (the 'Commission'/ 'CCI') against WhatsApp and Facebook. It all began, when WhatsApp announced its Policy Update 2021 on 4th January, 2021 ('Latest Update') mandating users to accept its terms and conditions in order to retain their WhatsApp account information. The Commission, being the only regulator who could prevent dominant companies from abusing their dominant position in India, decided to take *suo moto* cognizance of the matter on 19th January, 2021.

Same day, the Commission decided to seek response from WhatsApp and Facebook on certain queries relating to their Latest Update. WhatsApp responded by stating, *inter alia*, that the Latest Update raises no competition concerns as it aims to provide greater transparency by explaining the collection, usage and sharing of data to users. On the other hand, Facebook chose not to answer the queries and, instead, requested the Commission for deletion of its name from the proceedings on the ground that Facebook and WhatsApp are separate and distinct legal entities. The Commission outrightly rejected the request of Facebook for being evasive. Later, in the backdrop of the submissions made by WhatsApp, the Commission proceeded to examine the case on merits.

For examining the abuse by WhatsApp, the Commission relied on its decision in *Harshita Chawla v. WhatsApp Inc.* and delineated the relevant market as the '*market for Over-The-Top (OTT) messaging apps through smartphones in India*'. For assessing the dominant position of WhatsApp, the Commission considered the factors such as market share, dependence of consumers and barriers to entry. The Commission was of the view that due to lack of interoperability with other functionally similar apps/platforms, switching to another platform was difficult and meaningless for the users until all or most of the user's social contacts also switched to the same platform. The Commission noted that users wishing to switch to other platform would have to convince their contacts to also switch to such platform and those contacts would have to persuade their other contacts to do the same. Thus, while it may be technically feasible to switch, the pronounced network effects of WhatsApp significantly circumscribe the usefulness of the same. This, consequentially, caused a strong lock-in effect for users. On this basis, the Commission concluded WhatsApp to be holding a position of strength in the relevant market. To examine the abusive conduct of WhatsApp, the Commission compared Latest Update with two previous privacy policies of WhatsApp dated 25th August, 2016 and 19th December, 2019. The Commission noted that in the previous policy updates, the existing users were provided with an option to choose not to have their WhatsApp account information shared with Facebook. This option to opt-out from agreeing to sharing of personalized data of users by WhatsApp with Facebook was not given in the Latest Policy. The Commission observed from the Privacy Policy as well as Terms of Service , including the FAQs published by WhatsApp, that many of the information categories described therein were too broad, vague and unintelligible. On considering the overarching terms and conditions of the Latest Update in entirety, the Commission was of the *prima facie opinion* that 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein, require a detailed investigation in view of the market position and market power enjoyed by WhatsApp and directed the Director General to cause investigation into the matter.

In recent past, it has become a trend for the enterprises to challenge the orders of the Commission directing investigation before the High Courts under writ jurisdiction. Though, the Hon'ble Supreme Court of India in the case of *CCI v. Steel Authority of India Ltd. & Anr* had already established the law that the order of investigation is not appealable.

Nevertheless, following the trend, WhatsApp and Facebook also approached Hon'ble High Court of Delhi challenging the jurisdiction of the Commission on the ground that the Latest Update is under judicial challenge before the Supreme Court and Delhi High Court. It was averred by WhatsApp and Facebook that the issues, such as, whether the sharing of the information available with WhatsApp with Facebook violates the right of privacy of the users protected under Article 21 of the Constitution of India; and whether WhatsApp and Facebook are under any legal obligation to provide an 'opt-out' facility to the users of WhatApp, are pending adjudication before the Constitutional Bench of the Supreme Court. Thus, according to WhatsApp and Facebook, the Commission wrongly took *suo moto* cognizance of the matter.

The Hon'ble Delhi High Court, relying on various judgments of the Supreme Court, opined that mere pendency of a reference before the larger bench does not denude other courts of their jurisdiction to decide on the *lis* before them. Similarly, merely because some of the proceedings relating to similar issues are pendency before the Supreme Court and this Court, the Commission cannot be said to be bound to necessarily hold its hands and not exercise the jurisdiction otherwise vested in it under the Competition Act, 2002. On this reasoning, *inter alia*, the Delhi High Court dismissed the writ petition challenging the jurisdiction of the Commission.

(Suo Moto Case No. 01 of 2021 & W.P(C) 4378/2021)

Heard at the BAR

Legal news from India and the world

Digital Market Unit launched to promote online competition; UK

With an aim to prevent tech giants such as Facebook and Google from exploiting their market dominance, a Digital Markets Unit (DMU), based in the Competition and Markets Authority (CMA) has been launched. The DMU will take measures, that will give consumers more choice and control over their data, promote online competition and crack down unfair practices which may leave businesses and consumers with less choice and more expensive goods and services. As its first course of action, DMU will be looking to frame code of conduct to govern the relationship between digital platforms and groups such as small businesses, content publishers etc. which rely on them to advertise or use their services to reach their customers.The DMU will work closely with the CMA enforcement teams already taking action to address practices by digital firms, which harm competition and lead to poor outcomes for consumers and businesses. This includes taking enforcement action against Google and Apple, and scrutinising mergers involving Facebook and eBay.The formation of Digital Market Unit is in line with the recommendations made in the market study conducted by CMA into online platforms and digital advertising.

(Press Release 7th April, 2021)

Cartel conduct now punishable by up to 7 years' jail; New Zealand

Effective from 8.04.2021, with coming into force of the Commerce (Criminalization of Cartels) Amendment Act, 2019, the cartel conduct is a punishable offence with 7 years' jail. Before this, the Commerce Commission of New Zealand (the 'Commission') undertook a campaign to increase awareness of cartel conduct and the new criminal penalties. The financial penalties for cartel conduct were already significant. For instance, individuals participating in a cartel could be fined up to $500,000 and the companies could be fined up to $10 million, three times commercial gain or 10% of turnover per year of breach.

Now, with the amendment coming into force, businesses and individuals can be liable for criminal conviction, and individuals convicted of engaging in cartel conduct could face a term of imprisonment as well.

(Press Release 8th April 2021)

Commission sends 'Statement of Objections' to Apple for distorting competition in the music streaming market; European Union

The European Commission ('EC'), following its in-depth investigation has found that Apple has been distorting competition in the market for distribution of music streaming apps through its App Store, by abusing its dominant position. The EC notes that the mandatory use of Apple's own '*In-app Purchase Mechanism*' ('IAP') resulted in high prices for the consumers. Apple was charging a commission of 30% as fee from App developers for all subscriptions purchased by the consumers through the mandatory IAP. The EC also found that Apple prevented App developers from informing iPhone and iPad users of alternative, cheaper purchasing possibilities.

The EC's preliminary view is that Apple's conduct distorted competition in the market for music streaming services by raising the costs of competing music streaming App developers. This in turn lead to higher prices for consumers for their in-app purchase of music subscriptions on iOS devices.

Now, as a procedural step, the EC has sent the 'Statement of Objections' to Apple for its comments.

(Press Release 30th April 2021)

CAT increases fine after musical instrument firm breaks settlement bargain; UK

In June 2020, the Competition and Markets Authority (CMA) fined the musical instrument firm Roland just over £4 million for restricting online discounting of its electronic drum kits between 2011 and 2018.The fine imposed by the CMA was reduced under its leniency and settlement programmes to take account of the fact that Roland admitted acting illegally and cooperated with the CMA's investigation.

In a highly unusual move, Roland appealed to the Competition Appeal Tribunal (CAT) against the amount of the fine which it had itself agreed to pay as part of its settlement with the CMA. The CAT unanimously upheld the CMA's decision in its entirety, dismissing Roland's arguments that its conduct was not sufficiently serious to justify such a high fine. The CAT also agreed with the CMA that, by appealing against the CMA's decision, Roland breached its bargain with the CMA to accept a lower fine in return for agreeing not to appeal.

Therefore, the CAT decided that Roland should lose the benefit of its 20% settlement discount.

As a result, Roland's fine was increased to just over £5 m, an increase of more than £1 m.

The judgment from the CAT sends a strong message that when a company agrees to end an investigation through a settlement, it cannot reopen the question by appealing without losing its discount. This reinforces the CMA's view that settlements should be final.

(Press Release 19th April 2021)

CCI closes a case against IATA after 9 years of litigation; India

After a chequered journey, information against International Air Transport Association ('IATA'/'OP-1') and its Indian subsidiary ('IATA (India)'/'OP-2') by association of cargo agents ('ACAAI') , alleging unilateral acts of OP-1, through a licensing system run by OP-2, adversely affecting the interest of the members of ACAAI, saw a literal and figurative closure before Competition Commission of India ('Commission'/'CCI') recently. The ACAAI was , inter alia, against the introduction of Cargo Accounts Settlement System ('CASS') , requiring cargo agents to make full payment on due dates for freight and other dues to all the airlines through IATA – CASS offices to be disbursed to individual airlines. This, claimed ACAAI, is not in conformity with the directions of Ministry of Civil Aviation which had approved the relevant resolutions of IATA with the reservation of a commission of 5 % to all IATA accredited agents. The antitrust issues , against IATA, being raised against the OPs in other jurisdictions like the USA and EU was also taken as a ground for scrutiny of the agreement between the Informant and the IATA under the provisions of Indian competition law. The Commission directed Director General ('DG') to investigate the matter. DG held OPs to be 'enterprise'(s) under the Act but did not agree with the violations of section 3 and 4 of the Act because, firstly, the provisions of the Act having come into force on 20.05.2009 and CASS , still not being mandatory and at a pilot stage. After examining the report of the DG and hearing the contesting parties, the Commission concurred with the DG and closed the matter under section 26(6) of the Act only to be set aside by the Competition Appellate Tribunal ('COMPAT'), through an order dated 15.11.2016, directing DG to conduct a fresh investigation.

The report by DG, after COMPAT directed investigation, was submitted on 14.06.2018. The DG, in the new report, examined the questions the OPs being an 'enterprise', if yes, the relevant market and whether OPs were dominant in the said market as well as examine any fresh evidence for violation of section 3 of the Act. If the answer to the raised questions was in the affirmative, only then was conduct of the OPs to be held foul of section 4 of the Act. Holding that the OPs are not falling within the definition of 'enterprise', DG did not go into other questions. After considering the second DG Report, the Commission held OPs to be 'enterprise' under the Act and , for the purpose of subsequent examination, the relevant market as 'market for account settlement services in respect of air cargo segment in India'. Thereafter, the Commission directed the DG to conduct further investigation in the light of these observations and submit a supplementary report. The Commission considered the final investigation report, submitted thereafter, and heard the OPs through Video Conferencing before arriving at a decision. Informant questioned the report of DG not being in conformity with the earlier decision of the Commission and asserted that the condition prevailing in domestic and international markets being different, the 'relevant market' should be 'the services of facilitating international cargo business (inbound and outbound) with international airlines in India'. On limiting of the relevant period by DG, Informant protested that no such restriction was placed by COMPAT. The OPs questioned the criteria adopted by DG for calculation of market share of CASS and questioned the computation of relevant market.

After considering all material on record, Informant and OPs, the Commission reiterated its earlier view of OPs as 'enterprise', with OP-2 as a part of OP-1, constituting a 'group'. After examining different factors, the Commission stuck to its earlier definition of the relevant market. The Commission also concurred with DG that adoption of CASS was not as wide as claimed by the Informant, on the contrary, it did not exceed 21.18% till 2018-19. This made the Commission hold that the OPs were not dominant in the relevant market with the market share of the OPs being NIL from 2009-10 to 2012-13 and the CASS not being mandatory but only an option with there being substitutability in the relevant market with the alternative payment settlement systems having been pointed out by the DG himself. Before closing the matter, the Commission also pointed out that there were no strong grounds for Informant to expect de novo examination under section 3(3) of the Act in absence of any fresh evidence coming before the DG. The issues on the basis of which COMPAT had directed the DG to investigate and submit the report having been examined, the Commission did not consider it appropriate to go further into the matter, held that no contraventions of provisions of the Act was made out against the OPs and closed the matter.

(Case No. 79 of 2012)