

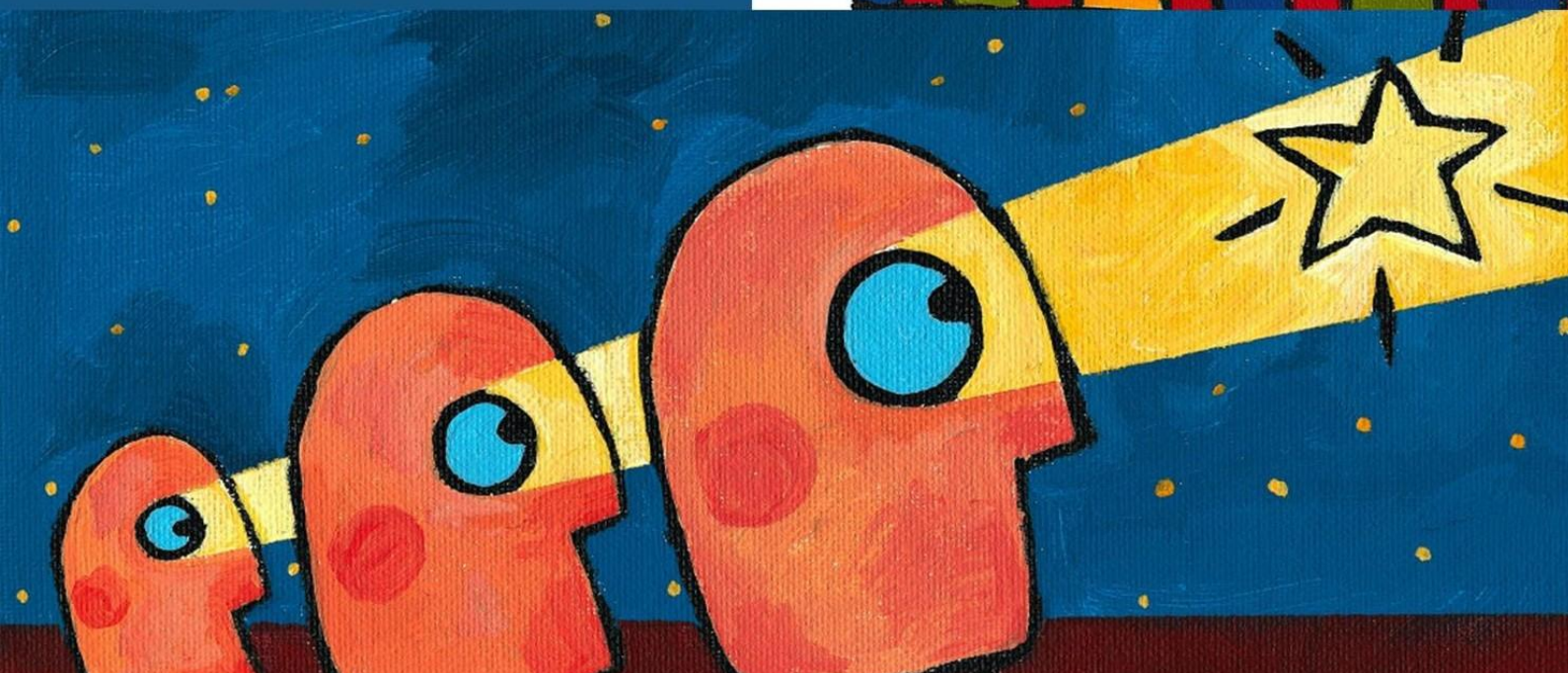


KK SHARMA  
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Monthly Newsletter

# State of Antitrust

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## Highlights of the Competition (Amendment) Act, 2023

The Competition (Amendment) Act, 2023 (**‘Amendment Act’**) has received the assent of the President of India and was published in the Official Gazette of India on 11th April 2023. Although, the Amendment Act has cleared all the due procedural approvals, the enforcement date has not been notified by the Central Government, yet. The Amendment Act is based on the recommendations made by the Competition Law Review Committee in its 2019 report. It brings significant changes to the decade-old Competition Act, 2002 (**‘the Act’**) in order to streamline the competition regime in India with the current global market trends and antitrust framework enforced in other nations. The major changes brought by the Amendment Act are:

- 1. Enterprise** – Enterprise is already defined under section 2(h) the Act. However, the Amendment Act adds the words *“department of Government, including units, divisions, subsidiaries”* engaged in any *“economic”* activity. It seeks to bring clarity by emphasizing on the nature of activity i.e., economic activity rather than the form of the enterprise.
- 2. Relevant Product Market** – The definition of the relevant product market has been expanded to include supply-side substitutability. Thus, pursuant to the amendment, relevant product market also includes a market comprising of *“production or supply”* of goods or services, which are regarded as interchangeable or substitutable by the *“supplier”*, by reason of *“ease of switching production and marketing in short-term without incurring significant additional costs or risks in response to small and permanent changes in relative prices”* of the product or service.
- 3. Cartel** – The Amendment Act widens the scope of agreements between enterprises engaged in similar/identical trade to also include agreements/cartels facilitated by another player acting as a Hub which may or may not be engaged in similar trade to that of the other members. Thus, the following proviso has been added to section 3(3) of the Act - ...association of enterprises *“though not engaged in identical or similar trade”* shall also be presumed to be part of the agreement if it *“participates or intends to participate”* in the furtherance of such agreement.
- 4. Other Anti-competitive Agreements** – The Act does not specifically mention horizontal or vertical nature of anti-competitive agreements. Thus, to clarify this ambiguity and to expand the scope of the provision, to include those agreements between enterprises which do not fall under the strict horizontal or vertical relationship, the Amendment Act has included under section 3(4) that – *“Any other agreement amongst enterprises”* including *“but not restricted to”* agreement amongst enterprises or persons at different stages of production chain in different markets. The Amendment Act has further added a proviso to section 3(4), so as to exclude agreements *“entered into between an enterprise and an end consumer.”*
- 5. Deal Value Thresholds** – The Act, as it exists, has *“assets-turnover”* based thresholds for notifying the combination transaction to the Competition Commission of India (**‘CCI’**). The Amendment Act has expanded the criteria of thresholds to include Deal Value Thresholds wherein a transaction becomes notifiable if the value of transaction is more than Rs. 2000 Crores and the target has substantial business operations in India.
- 6. Control** – The Amendment Act has amended the definition of control and has expanded its scope to mean the *“ability to exercise material influence”* over the management or affairs or *“strategic commercial decisions.”*
- 7. Revised Timelines for Merger Control** – The overall time for assessment under merger control has been reduced from 210 days to 150 days, which can be extended to additional 30 days.
- 8. Bar on filing Information/Reference** – A limitation period of 3 years has been prescribed for filing information under section 19 of the Act.
- 9. Penalty** – The Amendment Act has expanded the quantum of penalty that can be levied on a party guilty of violation of section 3 or section 4. The Amendment Act has added Explanation to the term *“turnover”* under section 27(b) to mean *“global turnover derived from all the products and services by an enterprise.”*
- 10. Commitments & Settlements** – Voluntary Settlements & Commitments to settle the violations of Abuse of Dominance or Anti-Competitive Agreements under section 3(4) has been introduced by the Amendment Act. Any alleged infringing party may propose Settlements under section 48A of the Act, after the Director General (**‘DG’**) report has been submitted but before the final order by the CCI. For Commitments, under section 48B of the Act, proposal may be made at any time after the initiation of investigation but before the submission of the report by the DG.
- 11. Leniency and Leniency ‘plus’** – The following changes have been made to section 46 of the Act – **i)** option to withdraw the lesser penalty application furnished by a cartel member; however, the information provided in the application can be used by the DG, except its admission as an evidence; **ii)** the party making leniency application are allowed to furnish additional application containing vital disclosure about the existence of another cartel, which enables the CCI to form a prima facie opinion about the existence of another cartel.
- 12. Appeals** – The Amendment Act added proviso to section 53B of the Act according to which the Opposite Parties, against whom penalty has been imposed, under section 27, have to submit 25% of the penalty amount before filing an Appeal in the Appellate Tribunal, National Company Law Appellate Tribunal (**‘NCLAT’**).

## Apple Declared to be of Paramount Significance to Competition under German Competition Laws

The competition authority of Germany, Bundeskartellamt, declared Apple Inc. ('Apple') as an 'undertaking of paramount significance' for competition across markets and subjected Apple and its subsidiaries to the stricter abuse control laws as per section 19a of the German Competition Act, 1958 ('GWB'). Section 19a was included in the GWB in January 2021 to empower the Bundeskartellamt to effectively tackle anti-competitive practices of large digital corporations through early intervention.

Noting the economic position of Apple across markets, the President of the Bundeskartellamt stated that, *"Based on its mobile end devices such as the iPhone, Apple operates a wide-ranging digital ecosystem which is of great importance to competition not only in Germany, but also throughout Europe and the world. With its proprietary products iOS and the App Store, Apple holds a key position for competition as well as for gaining access to the ecosystem and Apple customers."*

Apple holds at least a powerful position, if not a dominant position, in all vertically related market levels based on smartphones, tablets, smart watches, proprietary software systems and the App Store. Apple, with its tight proprietary vertical structure and an installed base of 2 billion active devices worldwide, is active in many business areas that are linked to one another, which enables it to tie its users into its complex ecosystem on a long-term basis. Apple is in a position that allows it to control access to its customers and set rules for third parties (for example, app developers) to interact with its users. Great financial strength, wide user base, access to relevant data for competition and the market value of "Apple" allows the undertaking to expand and safeguard its ecosystems, either through investment in research and development or by acquiring companies focused on technology. Considering this, the Bundeskartellamt decided that

Apple is of paramount significance for competition across markets and subjected it to special abuse control rules set out in section 19a(2) of the GWB.

[\(Press release dated 05.04.2023\)](#)

## The European Commission gives nod to Google's Acquisition of Photomath

The European Commission ('EC') has unconditionally approved, under the European Union Merger Regulation, the proposed acquisition of Photomath, Inc. ('Photomath') by Google LLC ('Google') and concluded that it will not cause any competition concerns in the markets for: (i) online homework and study help tools that include math as a subject offering; and (ii) general search services in the European Economic Area.

Google is a tech giant that offers a variety of services, including online search, app store services, and several online homework and study help tools. Google acquired Photomath which provides both free and premium versions of an online homework and study help application that scans the math problem using a smartphone's camera and provides the solution.

During the investigation, the EC observed that the proposed acquisition will result in only a limited combined market share and there are many alternative players in the market for "online homework and study help tools that include math as a subject offering." It also noted that the acquisition will not substantially strengthen Google's position in the market of "general search services" since maths search queries form a very small part of all general search queries. Further, the EC found that access to Google's search engine or its in-app-store-search is not of significant importance to Photomath or its rivals to gain new users for math tools since these users can be acquired through other channels, such as personal recommendations, social media, and advertisements. Based on these observations, the EC cleared the proposed transaction unconditionally.

[\(Press release dated 28.03.2023\)](#)



## Heard at the BAR

*Legal news from India and the world*

## FTC Orders Illumina to Divest GRAIL's Assets and Business

The Federal Trade Commission ('FTC'), in the United States ('US'), issued an Opinion and Order requiring Illumina Inc. ('Illumina') to divest GRAIL Inc. ('GRAIL') in accordance with a detailed divestiture plan approved by the FTC within 180 days of the Order, since it determined that the acquisition would stifle competition in the cancer detection test market in the US.

GRAIL produces early detection liquid biopsy tests that can screen multiple types of cancer in asymptomatic patients using DNA sequencing. Illumina is, and for a reasonably near future will be, the only viable supplier of Next-Generation Sequencing ('NGS') platforms, which are essential inputs in analysing genetic material from the blood drawn to conduct the multi-cancer early detection tests. The acquisition raised competition concerns since: (i) Illumina is the only current viable supplier of an essential input needed for the cancer detection test; (ii) Illumina can foreclose GRAIL's competitors by withholding, degrading access to, or by increasing the cost of the NGS platforms and; (iii) Illumina has the incentive to ensure that GRAIL wins the innovation race for developing early cancer detection test.

These concerns of the FTC were supported by the past behaviour of Illumina since during the time when GRAIL was wholly owned by.....

[\(Continued on next page\)](#)

Illumina, GRAIL received special pricing and other benefits not available to the rivals. Considering the above, the FTC has decided to order Illumina to divest the assets and business of GRAIL. The FTC's Order will become final unless a review petition is filed before the Federal Court of Appeals within 60 days of the Order. [\(Press release dated 03.04.2023\)](#)

### **CMA Prohibits the Acquisition of Activision by Microsoft**

The Competition Markets Authority ('CMA') in the United Kingdom ('UK') has decided to prohibit the acquisition of Activision-Blizzard Inc. ('Activision') by Microsoft Inc. ('Microsoft'), as the acquisition is likely to result in a Substantial Lessening of Competition ('SLC') in Cloud Gaming Services in the UK.

Microsoft operates in the Gaming industry through – Xbox Console, Xbox Game Studios, Gaming Subscription services, Xbox Cloud Gaming and Digital distribution (Microsoft Store). Activision is a game developer and publisher that also produced 'Call of Duty' ('CoD'), which is among the most-played games in the last couple of years in the UK, generating the highest revenue in its portfolio, and is considered as one of the most valuable titles in console gaming industry.

Gamers can play games on gaming consoles, Personal Computers ('PC') or mobile devices. However, the CMA determined console gaming to be distinct from others. Mobile gaming is less demanding and has lower quality; similarly, characteristics and intended use of PC is different as compared to gaming consoles, which are solely utilized for gaming purposes. Recently, "cloud gaming" format has gained significance; allowing games to be streamed over the internet. The gamers, through cloud gaming can play on low end devices, not requiring high-end gaming infrastructure needed to play high quality games.

The CMA in the present case delineated two theories of harm:

#### **(i) Whether Microsoft would be able to harm gaming console rivals by making CoD title exclusive to Xbox?**

The CMA found that the merged entity has to face significant losses if it wishes to make CoD exclusive to Xbox. Although in the past, Microsoft has acquired games studios and made its offering exclusive to Xbox, those titles were not as significant as CoD. Thus, Microsoft lacks the incentive to engage in total foreclosure strategy in console gaming segment using CoD.

#### **(ii) Whether Microsoft would be able to harm gaming console rivals by making Call of Duty and other Activision games exclusive to its cloud gaming offering?**

Microsoft accounts for an estimated 60-70% of global cloud gaming services; thus, having a strong position in the cloud gaming industry through its Windows Operating System ('OS') and other ancillary cloud based services. In the counterfactual, Activision would start providing games via cloud platforms in the near future. Therefore, considering the nascent nature of cloud gaming market and its rapid growth, the CMA concluded that there is strong likelihood of Microsoft making Activision's titles exclusive to its cloud offering, if the proposed acquisition is approved, which would undermine the innovation that is crucial for the development of the segment.

To address the concerns of the CMA, Microsoft proposed 'Microsoft Cloud Remedy' under which Microsoft offered to provide royalty-free access to CoD and other popular titles to certain cloud gaming providers and allowing consumers to stream titles on other cloud gaming providers for a period of 10 years. However, CMA opined that considering the dynamic nature of the market, the likely entry of competitors/players and the development of cloud gaming services market, using different OSs and business models, the remedy is insufficient. The remedy proposed by Microsoft will not be able to cure the SLC that might arise in the cloud gaming services market post-merger.

Therefore, the CMA, in light of nascent and dynamic nature of cloud gaming segment, concluded that the acquisition is likely to have significant and sustained adverse effects which outweigh any pro-competitive effects, efficiencies and relevant consumer benefits. Hence, the acquisition is prohibited.

[\(Final Report/Order dated 26.04.2023\)](#)

### **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**



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