



Monthly Newsletter

# State of Antitrust

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## **COVID boost to digital platforms and the connected competition issues**

As elsewhere, so in Australia, the COVID-19 pandemic had its own impact on work and life in general. Looking into this aspect and the related competition issues, on 23.10.2020 Australian Competition and Consumer Commission ('ACCC') issued its first Digital Platform Services Inquiry Interim Report ('Report'), which shows as to how the digital platforms grew significantly during the COVID-19 pandemic. It shows how the digital platforms grew in eminence, as educational institutions starting from school to university as well as workplaces had to cope with the times and move to remote access. The demand of times compelled the people seeking alternatives to 'face to face' communication.

Though the Report has been commissioned and released by ACCC but the issues and the impact are universal, more so in urban settings. The Report updates the previous findings on social media and search services of ACCC and identifies Competition and Consumer issues across different digital platforms.

With 14.7 million monthly active users of Facebook Messenger and about 8 million monthly active users of WhatsApp, the use of online private messaging apps in Australia is substantial. This has only gone up during COVID-19 pandemic. The issue commonly found in all such platforms is that the consumers commonly choose to use the biggest provider because their friends, family, colleagues and acquaintances are also more likely to use them. Because of the limitation that most online messaging services do not permit consumers to send or receive messages to users of different services or if permitted the terms of service substantially differ. This practice followed by most of the online messaging services, means that big players have a significant competitive advantage over small entrants. This is true of the digital world generally. However, The Report clearly showed that many digital platforms, including online private messaging providers and suppliers of advertising services do track user's activity online and on mobile apps through the use of cookies, software development kits and other technologies.

The research commissioned by ACCC showed that large platforms and advertising service providers are able to receive a range of user information. Similarly, examination of the terms and policies of online private messaging services indicated that the broad statements allowing for the collection of extensive information about users is a potential means of collection of huge information about users. On the contrary, these statements rarely provide any clarity on how users data would be collected, used or shared with others. The Report further notes that emerging technologies, such as voice activated devices and augmented and virtual reality services are likely to provide greater ability to collect data on consumers to providers of these services.

Chairman of ACCC Rod Sims stated that 'as large platforms continue to collect vast amount of consumer information, they are also expanding into new sectors, growing their 'ecosystems' and with it, their market power and ability to draw in, lock in, consumers'. He further said that 'these expanded services can deliver benefits to Consumers, but the impacts on Competition and Consumer choice need to be closely monitored and considered'. This Report also had a look at that standard agreements between the platform and the businesses seeking to advertise on those platforms. It reached the conclusion that these standard agreements between the digital platforms and small businesses left the small businesses at a significant disadvantage and are likely to be unfair. This was broadly inferred from the fact that the terms gave platforms, broad discretion to remove content, suspend or terminate accounts, and vary terms without notice.

The good part is that the ACCC plans to continue to monitor platforms and the issues identified over the five year term of the digital platform services inquiry and will also continue to work closely with the international competition and consumer agencies to address competition and consumer concerns regarding digital platforms. The above Report is quite timely and should be on the agenda of every competition agency. The offerings of digital platforms are becoming ever more omnipresent and it cannot be denied that all these digital platforms and apps intend to make life of the public at large more convenient. However, the competition and consumer agencies should not lose sight of the fact that though appearing to be free in most of the cases, they are not free in reality and, therefore, the way information and data is being collected and used or disseminated is a matter on which competition agency should keep a watch as it may give rise to not only the unevenness in the transactions, but also misuse of the data collected. ....**Cont on page 2**





## Heard at the BAR

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Going by the fact that a number of cases involving global digital giants have landed at the door of the Competition Commission of India ('Commission'), it is high time that the Commission also wakes up to the reality of strengthening and huge expansion of the digital platforms which got a great boost, on account of fears of the transmission of virus in these pandemic times. Though, specific data may not be available but, even after the restrictions of movements have been lifted, many businesses may adapt 'work from home' as an alternative, and it has already begun with public announcements in the consultancy firms, law firms and other subsidiary professional service providing firms. Therefore, unwittingly COVID-19 pandemic may pave the way for a new world order, which is predominantly over shadowed by digital platforms.

### Bonanza in the times of COVID-19 scare

Readers would recall not long ago, a medicine by the name of CORONIL TABLET 80 TAB 70 GM was launched by Patanjali Ayurved in India to reap benefits on the disproportionate fear of novel coronavirus the basic cause of COVID-19 and it resulted in a small controversy. Back at home, Patanjali Ayurved clarified that it was essentially an immunity booster. Such practices to ride on the wave of fear of COVID-19 pandemic, which is still not fully known, in so far, as its multiple effects on the body and brain are concerned, is giving rise to a large number of fertile minds, to make disproportionate money in this pandemic time. In this connection, following a public comment period, the Federal Trade Commission ('FTC') has approved a final administrative consent order settling charges that a California based marketer

of a supplement called Thrive, consisting essentially of Vitamin-C and herbal extracts, made baseless claims that it can treat, prevent or reduce the risk of COVID-19. In terms of the complaint before FTC Marc Ching, doing the business as Whole Leaf Organics, advertised and sold Thrive online, though his Whole Leaf Organics website. In March, 2020, he began marketing Thrive as an 'antiviral wellness booster' that treats, prevents or reduces the risk of COVID-19. The complaint also alleged that Ching used his Whole Leaf Organics website to deceptively advertise and sell these products. The final FTC order settling the complaint bars Ching's false and unsubstantiated health claims and requires him to send written notices to customers and retailers of Thrive explaining that it will not treat, prevent or reduce the risk of COVID-19. Finally, the letters from Ching must also inform the customer and retailers of settlement with the Commission.

### Canadian Competition Bureau paves way for cross border enforcement with five foreign counterparts.

The Canadian Competition Bureau ('CCB') signed competition enforcement framework with Australian Competition and Consumer Commission, the New Zealand Commerce Commission, the United Kingdom Competition and Markets Authority, the United States Department of justice and the United States Federal Trade Commission. The Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities ('MMAC') will improve CCB's ability to cooperate with these five counterparts in an increasingly digital and global economy, the MMAC will enable the

signatory competition authorities to cooperate more effectively on investigations, share experiences and work on joint products. It also includes a template that different competition agencies can use to establish bilateral or multilateral cooperation instruments, focused on investigative assistance, like sharing confidential information and cross border evidence gathering.

This may be mentioned that CCB already has cooperation in place with 16 jurisdictions, viz. Australia, Brazil, Chile, Colombia, European Union, Hong Kong, India, Japan, Mexico, New Zealand, the People's Republic of China, Peru, Republic of Korea, Singapore, Taiwan and United States of America.

### 2020 John Sherman Award goes to Judge Douglas H. Ginsburg

The Antitrust division of Department of Justice on October 23, 2020 presented Judge Douglas H. Ginsburg with John Sherman Award 2020 for his lifetime contributions to the development of antitrust law and preservation of economic liberty. This award is the highest antitrust honour DOJ. Mr. Makan Delrahim, the Assistant Attorney General presented the award to Judge Ginsburg and gave remarks on the contribution of Judge Ginsburg in a virtual ceremony. The John Sherman Award created in 1994 is presented by the Justice Department's Antitrust Division to a person or persons for outstanding contributions to the field of Antitrust Law, to protection of **American consumers and the**



KK SHARMA  
LAW OFFICES

## ACM imposes fine on Innova Energie for offering consumers contracts with too high termination fees

Between  
The Lines...

Comments  
& Analysis

The Netherlands Authority for Consumers and Markets (ACM) has imposed a fine of 1,250,000 Euros on Dutch energy company Innova Energie B.V. for offering energy contracts with too high termination fees to consumers who are listed in the Dutch Chamber of Commerce (KvK). In most of these cases, energy was supplied to self-employed workers (or independent contractors) at their home addresses. These individuals used this energy mostly for private purposes. Energy suppliers are required to check actively whether customers are entitled to consumer protection, and if that is the case, energy suppliers cannot set its termination fees higher than the statutory maximum. In March 2017, ACM already reminded, in writing, Innova Energie of these rules. However, Innova Energie still continued to offer contracts with too high termination fees to customers who are entitled to consumer protection. Now the company has been fined for these practices. All fines collected by ACM go to the Dutch treasury. Funds from the Dutch treasury are used to make investments that benefit society as a whole. Publication of this case by ACM was delayed because Innova had asked the court to stop publication of the decision. Now the court has ruled that ACM can publish the decision.

(Press Release On 30<sup>th</sup> September 2020)

### Growth of digital markets and new tools for policing them: EU

To address the risks faced by the users availing services from digital platforms and protect their rights, the EC aims to propose rules, on responsibilities of digital service providers, to ensure a modern system of cooperation for the supervision of digital platforms and guarantee effective enforcement. In the EC's own words to 'set the rules of the game for their users and their competitors', it intends to propose rules on unfair trading practices covering large online platforms that can be regarded as the 'gatekeepers' as well. The second pillar in the regulatory package of EC is the New Competition Tool ('NCT') through which EC expects to be given powers to impose ex-ante measures on digital platforms with significant market power which, in many cases, amounts to a dominant position. On October 19, 2020, the EU Competition Commissioner Vestager announced that NCT would be repackaged to be a part of a broader Digital Markets Act ('DMA') also incorporating obligations for gatekeepers which would thus not be part of the eventual DSA. In terms of what the Commissioner said, EC also intends to provide for market investigation framework to investigate markets prone to market failure and creation of new gatekeepers. Thus, the intention of EC appears to be to establish one single set of rules on gatekeepers, prohibiting on the one hand, unfair trading practices by these gatekeepers and on the other hand allowing the EC to expose ex-ante measures on them.

Though there is not complete clarity of the shape DSA or DMA will take, both the proposals are expected to be released somewhere later this year. Going by the past trend of enforcement actions against the digital platforms, we notice that these are characterised by two-sided network effect: A platform becomes more attractive for sellers or advertisers, if it has more users and vice versa. These direct or indirect network effects may lead to 'market tipping' and/or 'winner takes-it-all' market dynamics, eventually, resulting in only one platform remaining in the market. These platforms then develop into something like a gatekeeper. The undesirable behaviour by gatekeeper platforms may include self preferencing whereby a platform favours its own services, directly or indirectly, in situations when it has a dual role of providing the platform and competing on the same platform. It can also lead to anti-steering, whereby a platform prevents business users of platforms from 'steering' consumers to other offers than those provided by the platforms that may be cheaper or otherwise potentially attractive alternatives. This can also lead to tying and bundling and 'no or selective' data sharing. Though the exact contours of coming regulation in EC is still unclear but these trends underscore the fact that the competition agencies across the globe are waking up to the reality of new technical advances and, accordingly, want to ensure that competition violations do not flourish even with new innovations at the cost of the consumers.

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