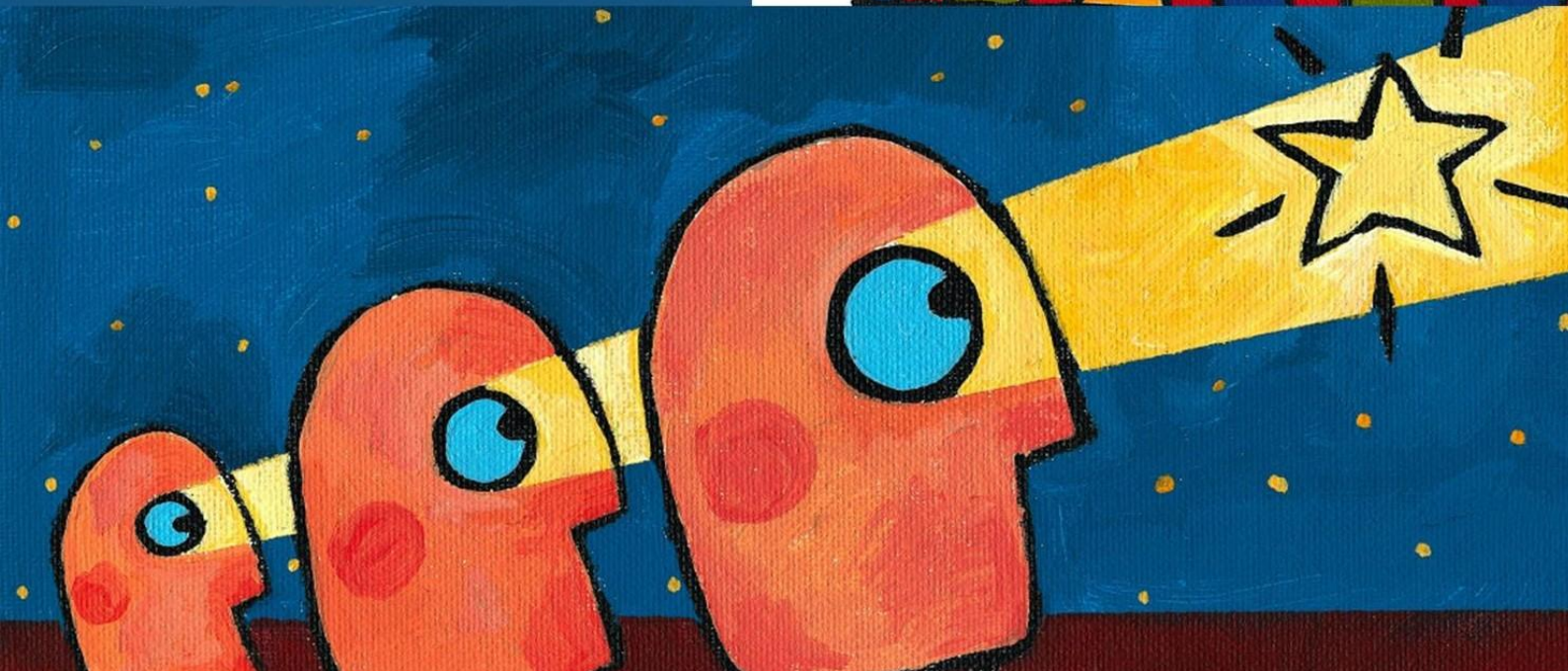




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The CCI Published the Draft Combination Regulations, 2023

The Competition Commission of India (“**Commission**”/“**CCI**”), consequential to the amendments brought in by the Competition (Amendment) Act, 2023 (“**Amendment Act**”) had released the draft Competition Commission of India (Combinations) Regulations, 2023 (“**Draft Combination Regulations**”) for public comments till 25.09.2023. The regulations have introduced several changes of the merger control regime in India including Deal Value Threshold (“**DVT**”), codifying the Pre-Filing Consultation (“**PFC**”) process, outlining a new format for proposing modifications in notified transactions, and granting limited exemptions from standstill obligations for open market purchases.

Deal Value Threshold: The Amendment Act introduced the DVT, according to which the CCI can now review transactions if they meet two conditions: (i) the global deal value exceeds INR 2,000 crore (approximately USD 244 million) and (ii) the acquired entity or the party involved in the transaction has 'substantial business operations in India'. Now the Draft Combination Regulations have provided detailed guidelines for determining the "*value of transaction*" and what constitutes "*substantial business operations in India*."

Value of Transaction: The term "value of transaction" is broadly defined and encompasses all valuable considerations, whether direct or indirect, immediate or deferred, in cash or any other form. This includes non-compete fees, any ancillary arrangements between the parties within the two years preceding the transaction, such as technology assistance agreements or intellectual property rights licensing, the value of interconnected steps taken by the acquirer and the target in the two years prior to the transaction, options and securities to be acquired (assuming full exercise), and any contingencies. If the transaction value isn't explicitly mentioned in the transaction documents the value considered by the board of directors or similar approving authority should be taken into account. Additionally, if the exact transaction value cannot be determined with "reasonable certainty" the notifying party should presume that the DVT has been exceeded and file a prior notification with the Commission.

Substantial Business Operations of the Target: To qualify as having substantial business operations in India the target must meet specific criteria which include having 10% of its global users, subscribers, customers, or visitors from India at any point within the 12 months before the transaction date, having a significant gross merchandise value from India during the same period, or deriving a substantial portion of its turnover from all products or services from India in the preceding financial year.

Exemption from Standstill Obligations for Open Market Purchases: The Indian merger control regime generally imposes a standstill obligation, preventing parties from consummating any part of a transaction until they receive the approval of the CCI. However, the Amendment Act recognizes the burden this places on the parties and exempts open market purchases and transactions on regulated stock exchanges from these standstill obligations. Under the Draft Combination Regulations, these acquisitions must be reported to the CCI within 30 calendar days from the completion of the transaction. The acquirer can exercise certain rights before CCI's approval, such as availing economic benefits, disposing of shares or securities, or exercising voting rights related to liquidation or insolvency proceedings, provided they don't exert any influence over the target.

Increase in Statutory Filing Fees: For combination filings, there are two types of forms - Form I (Short Form) and Form II (Long Form). The Draft Combination Regulations have increased the statutory filing fees for these forms. The filing fee for Form I has been increased from INR 20 lakhs (approximately USD 24,147) to INR 30 lakhs (approximately USD 36,221), while the fee for Form II has increased from INR 65 lakhs (approximately USD 78,480) to INR 90 lakhs (approximately USD 1,08,663).

New Filing Format for Voluntary Modifications: The Draft Combination Regulations introduced a new format for proposing voluntary modifications. The details to be provided include information about the proposed combination, the likely Appreciable Adverse Effect on Competition (“**AAEC**”), a summary of the modifications offered, the sufficiency of these modifications to address the likely AAEC, and details of divestment offered.

Omission of Schedule I Exemptions: The existing Combination Regulations include exemptions for certain transactions, even if they qualify as combinations, due to their perceived lack of risk to competition in the Indian market. These exemptions are detailed in Schedule I Exemptions. However, the Draft Combination Regulations omit these exemptions, which may result in more benign merger notifications being submitted to the CCI.

Omission of Green Channel Route: In 2019, the Combination Regulations introduced the Green Channel Route (“**GCR**”), which allowed for deemed approval of combinations that did not involve horizontal overlap or vertical/complementary relationships between the parties. This provision expedited the CCI's approval for straightforward and unproblematic combinations. However, the Draft Combination Regulations do not mention the GCR provision, causing uncertainty regarding its availability.



Heard at the BAR

Legal news from
India and the world

CMA Clears UnitedHealth's £1.2bn Acquisition of EMIS Following In-Depth Investigation

The Competition and Markets Authority (“CMA”), after its Phase 2 investigation into UnitedHealth Group Incorporated's (“UnitedHealth”) £1.2 billion acquisition of EMIS, a UK-based healthcare software provider, has cleared the acquisition.

The CMA initially raised concerns during the Phase 1 investigation, fearing the deal could potentially restrict competitors' access to EMIS's patient record system. EMIS, a major supplier of electronic patient record systems to National Health Service (“NHS”) General Practitioners (“GP”), holds a dominant market position.

UnitedHealth, a major player in the US healthcare industry, operates through its subsidiary Optum Health Solutions (UK) Limited (“Optum”) in the UK. Optum provides medicines optimization software, which suggests alternatives to doctors during prescription to enhance effectiveness and reduce costs, as well as Population Health Management services that leverage data analytics and advisory services to improve health outcomes across populations.

After the in-depth investigation, the CMA determined that the transaction does not pose significant competition concerns. The merged entity comprising Optum and EMIS will not have the practical ability to utilize EMIS's data to harm rivals' competitiveness. This is largely due to the NHS's oversight role, which would prevent such strategies.

In specific markets, including data analytics and advisory services for Population Health Management as well as medicines optimization software, the CMA found that limiting access to EMIS's patient record system would not be commercially beneficial to the merged business. Any potential gains from such a strategy would be constrained and subject to intervention by the NHS.

Kirstin Baker, chair of the independent inquiry group overseeing the investigation, emphasized the importance of ensuring that NHS retains

access to evolving technological innovations for the delivery of high-quality healthcare. Following a comprehensive assessment of evidence and consultations with stakeholders, the CMA is confident that the deal will not diminish competition or negatively impact the NHS and its patients.

[\(Press release dated 29.09.2023\)](#)

A Joint Venture in the Defence Industry Cleared by Bundeskartellamt

The Bundeskartellamt, Germany, has cleared a joint venture between Rheinmetall Landsysteme GmbH (“Rheinmetall”) and Ukrainian Defense Industry (“UDI”). The joint venture is for the provision of service & maintenance, assembly, manufacturing and development of military vehicles.

Rheinmetall is a global technology company known for producing armoured military vehicles including Leopard battle tank, Puma infantry fighting vehicle etc. On the other hand UDI is a Ukrainian state-owned umbrella company, comprising of various companies operating in the production of arms and military equipments, controlled by the Cabinet of Ukraine.

The joint venture, for now, will be active exclusive in the Ukrainian territory. The Bundeskartellamt has cleared the joint venture as there are no overlaps in terms of Competition in Germany, and further, there are no indications that competition concerns would arise in the future.

The president of Bundeskartellamt giving clearance to the joint venture stated *“Given the current geopolitical situation, there is considerable movement in the defence industry. The joint venture between Rheinmetall and Ukrainian Defense Industry which the Bundeskartellamt was to assess is to be based in Ukraine and will operate in the construction and maintenance of military vehicles. The project does not result in any overlaps in terms of competition in Germany. We have cleared the project quickly.”*

[\(Press release dated 28.09.2023\)](#)

The European Commission Imposes Fine of €1.2 Million on Diehl in Cartel Settlement

The European Commission (“EC”), of the competition authority of European Union (“EU”) has fined Diehl Defence GmbH & Co. (“Diehl”), a defence equipment manufacturing company, €1.2 Million for forming a cartel, involving the sale of military hand grenades, with its rival RUAG Holding (“Ruag”).

The investigation of the EC revealed that Diehl and Ruag had divided the national markets in the European Economic Area (“EEA”) amongst themselves for almost 14 years, from 2007 till 2021. According to the agreement, among the 2 companies, only the designated company was allowed to sell military hand grenades in its allocated area. This conduct of the companies led to violation of Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement which prohibits cartels and other restrictive business practices. Further, this is the first case of cartel in the defence sector.

The cartel was revealed by Ruag and therefore, it received a full immunity from the penalty, which would have amounted to €2.5 Million. However, a penalty of €1.2 Million was imposed on Diehl after it received a 50% reduction in penalty for its cooperation in the EC's investigation and a further 10% reduction under the EC's 2008 Settlement Notice.

[\(Press release dated 21.09.2023\)](#)

Ofcom Refers Public Cloud Infrastructure Services Market to CMA for Investigation

The Office of Communications (“Ofcom”), of the UK, to ensure fair competition in the Public Cloud Infrastructure Services Market has referred it to the Competition and Markets Authority (“CMA”) for an independent investigation. Ofcom is the government-approved regulatory and competition authority for the broadcasting, telecommunications and postal industries of the UK. This move comes as cloud services, which enable remote access to computing resources over a network, have become integral to various businesses and digital services, with the UK's market estimated to be worth up to £7.5 billion in 2022.

Earlier Ofcom had conducted a market study in the Public Cloud Infrastructure Services Market and identified several concerns regarding the supply of cloud services that potentially hinder competition. The primary concerns include: **i) Egress Fees**- These are charges that customers incur when moving their data out of a cloud provider; **ii) Discounts**- Some providers offer incentives that may encourage customers to exclusively use one cloud provider, potentially limiting competition; **iii) Technical Barriers to Switching**- Existing technical hurdles may make it challenging for customers to switch between different cloud providers or use multiple providers. Further, Ofcom's report also pointed out concerns regarding the software licensing practices of certain cloud providers, particularly singling out Microsoft Inc.

The CMA, entrusted with this task, will conduct a thorough investigation to assess the state of competition within the Public Cloud Infrastructure Services Market. Sarah Cardell, CEO of the CMA, emphasized the market's significance and its role in underpinning a wide range of online services. Effective competition in this market is crucial to maintain a level playing field and unlock the full potential of these rapidly evolving digital markets.

The CMA has assembled an independent panel to form an inquiry group, which will serve as the decision-makers during the investigation. In the coming days the group will release an issues statement outlining the primary areas of focus for the investigation and inviting public consultation. The CMA is expected to conclude its investigation by April 2025.

[\(Press release dated 05.10.2023\)](#)

Bundeskartellamt has No Competition Concerns in area of Wire Harnesses in the Automotive Industry

The Bundeskartellamt has informed the participants of Innovation Initiative Wire Harness (“IIWH”), a project under the Arena2036 research campus, that it does not have any competition law concern on their ‘standardisation initiative for cable sets’. The IIWH is a cooperation project between different companies from all levels of the value chain in the automotive industry which aims to explore opportunities for more automation in the production of wire harness.

The wire harness is one of the most complex and expensive vehicle components and practically comprises of all the wires in a vehicle. The production of wire harness, for now, is largely manual and the automation of the production process has been very complex as it depends on the vehicle type and individual combination of the equipment. Further, with the vehicles becoming more and more digital the wire harness will become even more important and complex. This initiative intends to find methods and tools to facilitate the automation of the wire harness process, including developing plug connections and cable routings method.

The project is a combination of both Research & Development and the Standardisation aspects and as such it raises the question of legal requirements based on which its compliance with competition law is to be assessed. Therefore, the Bundeskartellamt has given guidance on the competition law requirements the project had to meet. Further, the president stated that *“Standardisation projects are cooperation projects between companies and as such must always comply with the principles of competition law. As part of such processes companies agree on shared norms and standards instead of competing with one another to find the best solution. Competition law does not stand in the way of such projects. However, it has to be ensured that such cooperation projects are objectively intended to promote standardisation and that the standardisation process is non-discriminatory, transparent and open to all companies concerned.”*

[\(Press release dated 05.09.2023\)](#)

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



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