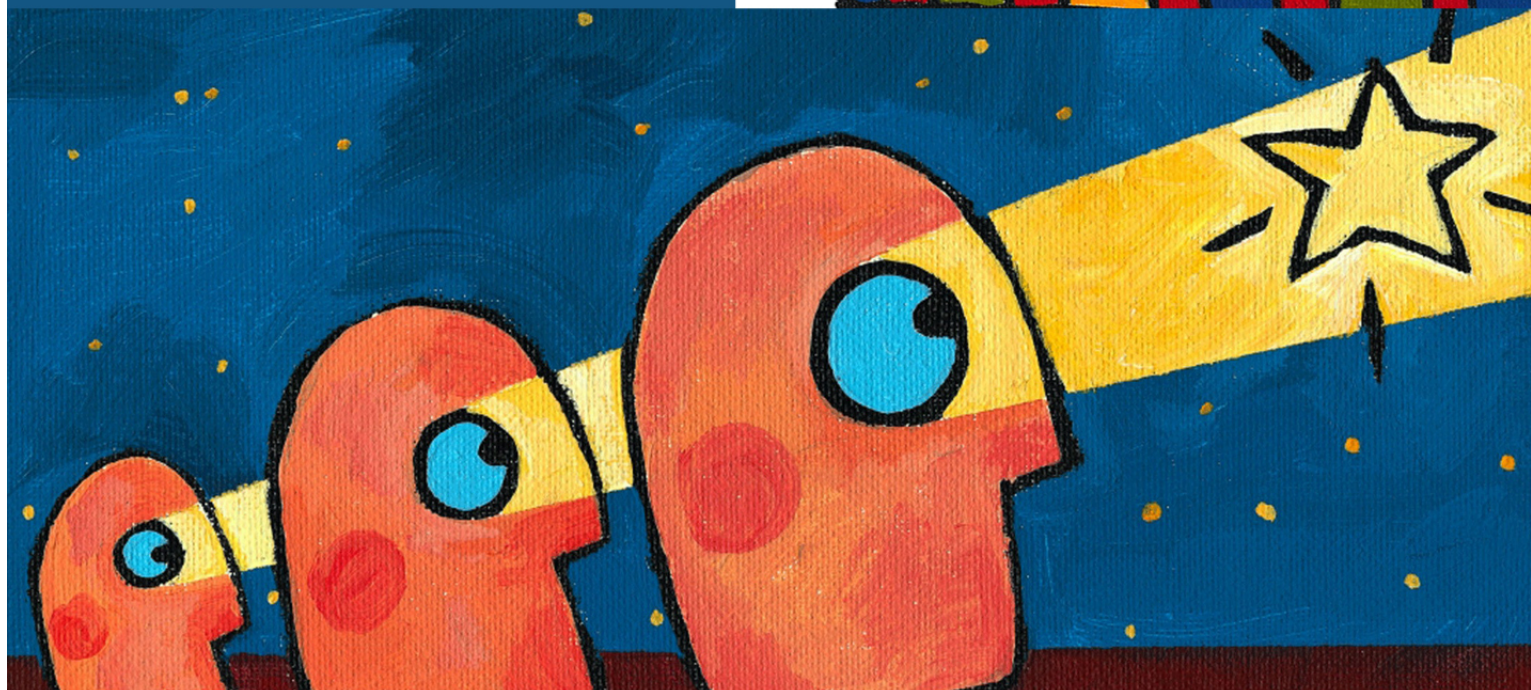


Monthly Newsletter

State of Antitrust

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CCI closes case against WhatsApp; India

The Information was filed by a person aggrieved by the automatic installation of WhatsApp Pay on existing WhatsApp messenger user's devices. The Informant alleged that the automatic installation of WhatsApp Pay was unfair condition on the users/consumers of WhatsApp messenger. The Informant stated that WhatsApp used its dominant position in 'Internet based instant messaging App' market to favour and protect its WhatsApp Pay in the 'UPI enabled Digital Payments Applications' market. It was also alleged that the conduct of WhatsApp also amounted to bundling of its messaging services with the UPI enabled Digital Payments Apps. The Informant relied on the market share, size and resources of the enterprises, size and importance of the competitors, dependence of the consumers on the enterprise and countervailing buyer power of the WhatsApp and Facebook to state that both of them were dominant in the two relevant markets i.e. '*market for UPI enabled digital payment applications in India*' and '*market for internet-based Messaging Apps through smartphones in India*'. In response to these allegations, WhatsApp stated that the market share of WhatsApp, being static and fixed at a point in time, does not reflect the dynamics of competition in the industry. Further, as per WhatsApp, competitors in the relevant market included large established global companies who exerted significant competitive constraints on WhatsApp.

With regards to allegation of imposition of unfair conditions, WhatsApp stated that there was no imposition or element of coercion, as users had full discretion on whether to register for or use WhatsApp Pay or not. The allegation of use of dominant position by WhatsApp to enter UPI enabled payment services was defended by WhatsApp by stating that WhatsApp simply offered users WhatsApp Pay as a feature to the user with full discretion of them to use it or not. There was no restrictive or abusive conduct or any "use" of an alleged dominant position. Lastly, on allegation of bundling of WhatsApp Pay app with WhatsApp messenger app, WhatsApp stated that the users were neither required to register for or use WhatsApp's payment feature in order to use the WhatsApp messenger service nor the use of WhatsApp messenger service was conditional upon the usage of its payments feature.

The WhatsApp also challenged the Information on the ground that the Informant had no *locus standi* and were indulging in forum shopping. These two grounds of the WhatsApp were rejected by the Competition Commission of India ('Commission') as they were against the intent of the Competition Act, 2002 and established jurisprudence. The Commission, while defining the relevant market, took note of the primary and most dominant feature of the applications in question and held that the relevant product market in which WhatsApp operates was the '*market for Over-The-Top (OTT) messaging apps through smartphones*'. With respect to the second relevant market, the Commission agreed with the Informant and delineated the second relevant market as '*market for UPI enabled Digital Payments Apps in India*'.

Regarding the dominant position of OPs, the Commission noted that the data provided by the Informant for establishing dominant position can be used as a proxy to view the trends. Further, due to dependence of consumers on the enterprise, countervailing buyer power and barriers to entry, the Commission found the WhatsApp to be dominant.

As regards imposition of unfair conditions, the Commission agreed with the submissions of WhatsApp, wherein, it was stated that to enable WhatsApp payment, the user had to separately register for it which necessarily required the users to accept terms of the service agreement and privacy policy of WhatsApp Pay.

On the allegation of bundling, the Commission opined that the nature of bundling as alleged by the Informant was akin to 'tying' as understood in the antitrust context generally. The Commission noted certain conditions, established by other competition authorities, which were necessary to conclude a case of tying were (i) the tying and tied products are two separate products; (ii) the entity concerned is dominant in the market for the tying product; (iii) the customers or consumer does not have a choice to only obtain the tying product without the tied product; and (iv) the tying is capable of restricting/foreclosing competition in the market. The Commission found that the WhatsApp satisfied the first two conditions however, the third and fourth conditions were not satisfied by the WhatsApp in given facts and circumstance of the case.

With respect to allegation of use of dominant position by WhatsApp to enter and favour WhatsApp Pay in second relevant market, the Commission opined that the UPI market was quite established with renowned players competing vigorously and it was implausible that WhatsApp Pay will automatically garner a market share merely on account of its pre-installation.

On the basis of the above, the Commission was of the opinion that there was no *prima facie* case against the OPs and closed the case.

Competition Bureau seeks input from market participants to inform on ongoing investigation against Amazon; Canada

The Competition Bureau ('Bureau'), in its ongoing investigation against Amazon, had invited market participants to provide relevant information to inform the Bureau about market practice carried on by Amazon in Canadian marketplace.

The Bureau is examining whether Amazon.ca has engaged in any abusive conduct in its Canadian marketplace which might have impacted competition or harmed the businesses in Canada. The Bureau is focusing on the areas such as:

- Seller's willingness to offer their product at a lower price for sale on other retail channels like their own website or other online marketplaces being impacted by past or existing Amazon's policies.
- Success of third party sellers on Amazon marketplace without using its "Fulfillment by Amazon" service; and
- Influence over the consumers to purchase products that it offers using strategies over the offers for sale by other competing sellers.

The Bureau expects the sellers and businesses to provide relevant information to the Bureau to complete the investigation.

(Press release 14th August 2020)

FAS found Apple abusing its dominant position in the mobile apps market; Russia

The Federal Antimonopoly Service of Russian Federation ('FAS') has found that Apple abused its dominant position on the developers of parental control mobile applications and restricted competition in the market for distribution of applications on mobile devices running on the iOS operating system.

The FAS noted that from October 2018, Apple implemented a policy which restricted the tools and capabilities for

developing parental control applications on iOS.

The implementation of this policy coincided with the release of the Apple's own pre-installed Screen time application, which had functionality similar to that of parental control applications.

Investigation by the FAS also showed that Apple occupied a dominant position with a 100% share in the market for distribution of mobile applications on the iOS operating system, since the applications on iOS running devices could only be installed from App Store.

In light of these findings, FAS will issue a ruling to the Apple for elimination of these violations.

(Press release 11th August 2020)

CCCS concludes investigation into Online Food Delivery and Virtual Kitchen Sectors; Singapore

After receiving feedback from the industry, Competition and Consumer Commission of Singapore ('CCCS') initiated an investigation into the online food delivery and virtual kitchen sectors in Singapore on 30 September 2019.

It was noticed by the CCCS that in recent years, online food delivery providers in Singapore – Deliveroo, Foodpanda and GrabFood – had started to provide additional services to Food & Beverages (F&B) operators in the form of virtual kitchens.

Virtual kitchens are basically integrated and optimised commercial kitchen spaces provided to F&B operators for food preparation, predominantly for online food delivery services. Virtual kitchens provide another channel for F&B operators to start small and gradually expand their business through online food deliveries, without the costs associated with running a dine-in restaurant.

In the virtual kitchens services sector, Smart City Kitchens ('SCK') was



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Legal news from India and the world

and was one of the competitors of Deliveroo, Foodpanda and GrabFood but it was not providing online food delivery service.

Thus, SCK was dependent on the Deliveroo, Foodpanda and GrabFood to fulfill deliveries for the F&B operators that were operating out of its virtual kitchens.

The conduct investigated by the CCCS was refusal to supply online food delivery services to F&B operators using SCK's virtual kitchens.

Following the CCCS's investigation, GrabFood and Deliveroo started supplying their online food delivery services to F&B operators in SCK's virtual kitchens which already had access to Foodpanda's online food delivery service.

As a result, F&B operators using SCK's virtual kitchens now have the choice of using multiple online food delivery providers to expand their consumer reach.

There is greater competition in the virtual kitchen sector after the investigation by the CCCS, and consumers are also able to enjoy a greater choice of food ordered online.

Though, the CCCS has ceased its investigation, but it will continue to monitor market practices and take necessary enforcement actions against any anti-competitive conduct in these sectors.

(Press release 5th August 2020)

Competition Commission consults on proposed commitments from Hong Kong Seaport Alliance; Hong Kong

The Hong Kong Seaport Alliance ('Alliance') between four container terminal operators in Hong Kong, namely Hong Kong International Terminals Limited, Modern Terminals Limited, COSCO-HIT Terminals (Hong Kong) Limited, and Asia Container Terminals Limited ('Parties') have proposed commitments to address the Competition Commission's ('Commission') concerns arising from the investigation in the proposed joint venture by the Parties.

The Commission, during the investigation, assessed whether the Alliance would give rise to anti-competitive effects in three primary markets in which the Parties provided port terminal services viz. the *International Transshipment market*, the *Barge Transshipment market*, and the *Gateway market*, as well as the potential impact on other related markets.

The Commission's investigation found out that the Alliance would not likely give a rise to competition concerns in the *international Transshipment* and *Barge Transshipment* markets where several alternative suppliers of services for shipping line customers were available at major ports in East Asia and at ports in the Pearl River Delta respectively. The Parties' combined market share in these markets was also not at a level to raise concerns in light of the specific market dynamics in both markets.

However, competition concerns were likely to arise in the *Gateway market* where the Parties had a very high combined market share with lack of significant alternative service suppliers, which, in turn, would benefit the Parties to potentially increase charges, or reduce service levels, harming the competition and customers.

The Alliance, according to the investigation, was likely to give rise to competition concerns with regard to the various services at Kwai Tsing to customers such as truck operators and freight forwarding companies, by enabling the Parties to raise charges for these services.

The investigation also found out that the competition concerns would also arise in the provision of reciprocal overflow services to DP World, the Parties' only competitor at Kwai Tsing. The Alliance could potentially allow the Parties to increase the rates they charge to DP World or stop providing it the services altogether.

The Commission's investigation has resulted in the commitments having been offered by the Parties which would last for up to 8 years from their effective date, with the exception of the proposed commitment for service levels, which would last for the duration of the Alliance. Compliance with the proposed commitments would be monitored by an independent Monitoring Trustee on behalf of the Commission.

The Commission considers that the proposed commitments are appropriate to address its concerns, and it therefore proposes to accept them.

(Press release 12th August 2021)

Dawn raids in the ferry boat connections sector; Greece

The Hellenic Competition Commission carried out dawn raids on undertakings and conglomerates which are active in the ferry boat connections sector. The unannounced inspections, which were carried out at the premises of the undertaking and conglomerates, were a part of the investigation into the anti-competitive practices. The Competition Commission is the guardian of the efficiency of the free market.

(Press release 14th August 2020)

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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