



Monthly Newsletter

State of Antitrust

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AND MORE...

Competition and Market Authority blocks merger between JD Sports and Footasylum; UK

A merger between two leading retailers of fashion streetwear and sportswear viz. JD Sports and Footasylum, has been blocked by the Competition and Market Authority ('CMA') following an in-depth Phase 2 investigation. In reaching this final decision, the CMA looked at how closely these two firms were competing with each other and other retailers.

During Phase 2 investigation, the CMA analysed more than 2000 documents pertaining to companies' internal strategy which reflected their decision-making process. The analysis of the documents also showed that JD Sports and Footasylum used to closely monitor each other's activity. Additionally, the CMA conducted two large surveys of the companies' customers which revealed that many JD Sports and Footasylum shoppers see the other firm as their next best alternative. For example, more than two thirds of Footasylum's in-store customers said that they would shop at JD Sports if they could no longer shop at Footasylum. The CMA also noticed that opening of Footasylum stores had negative impact on the sales of nearby JD Sports stores. These scenarios demonstrated to the CMA that JD Sports and Footasylum were close competitors.

On the basis of the above findings, the CMA concluded that the merger between JD Sports and Footasylum would lead to a substantial lessening of competition nationally which, in turn, would leave shoppers with fewer discounts and/or lower quality of customer service.

(Press Release 06th May, 2020)

Competition Commission of South Africa releases guidelines on Buyer's Power and Price Discrimination; South Africa

In line with the recent amendment in Competition Act 1998 (Act), the Competition Commission of South Africa ('Competition Commission') has issued guidelines on Price Discrimination and Buyer's Power with an aim to bring fairness and to strengthen the emerging entrepreneurs and small businesses.

The publication of the final guidelines on the Buyer's Power provides clarity to both dominant buyers and suppliers as to how the new legislation will be enforced by the Competition Commission.

These guidelines not only cover the price discrimination, unfair pricing and trading conditions, but also cover situations where a buyer avoids a class of sellers. For instance, a conduct would be considered a contravention of the provision of the Act, if such conduct tends to avoid buying from designated suppliers with intent to avoid the application of fair treatment under the buyer power provisions to such designated suppliers.

As per the statement of the Competition Commissioner, there was a surge in the practices of powerful buyers unfairly trying to shift their own economic hardship onto their suppliers which jeopardized the sustainability of such suppliers. The Commission has already taken enforcement action against those powerful buyers in the dairy industry and is looking to apply the new provisions urgently in other parts of the food value chain and online services.

These guidelines will also provide clarity to small and historically disadvantaged suppliers about their rights in order to stand strong in their negotiations with powerful buyers.

(Press Release 18th May 2020)

COFECE invites public comments on competition in rail transport; Mexico

The Mexican Federal Economic Competition Commission (COFECE or Commission) has invited decision-makers and public institutions of the railway sector, branches of the Federal Government, freight transport users, industrial chambers, research centers and other interested parties to answer the Public Questionnaire on competition in the public service of rail freight transport.

The COFECE is conducting such exercise in order to prepare a draft document about the competition in the public service for rail freight transport. The Public Questionnaire will enable the COFECE to detect possible obstacles to the efficient development of the sector.

The COFECE in the press release emphasised on the impact of rail freight transport on the development of supply chains and on the national productivity. The COFECE also highlighted availability of preliminary data that indicated lack of competitive pressure in the public rail freight service. This Public Questionnaire will provide a base to the COFECE for taking steps to make the public rail freight service more competitive.

(Press Release 20th May 2020)



Heard at the BAR

*Legal news from
India and the world*

Apotex Corp. agrees to pay \$24.1 Million as a fine for fixing price of Cholesterol medication; USA

The Department of Justice on 7th May, 2020 announced that Apotex Corp., a generic pharmaceutical company, has admitted that it conspired with other generic drug sellers to artificially increase and maintain the price of Pravastatin.

Pravastatin is a cholesterol medication that lowers the risk of heart disease and stroke.

During the period of conspiracy, which began in May 2013, Apotex allegedly communicated with competitors about the price increase and, subsequently, refrained from submitting competitive bids to customers that previously purchased Pravastatin from a competing company.

After admitting the price fixing conspiracy, Apotex agreed to pay \$24.1 million as criminal penalty.

The Antitrust Division also announced a Deferred Prosecution Agreement (DPA) resolving the charge against Apotex. Under the DPA, Apotex has agreed to cooperate fully with the Antitrust Division's ongoing criminal investigation.

Apotex was the fourth company to be charged in connection with antitrust violations in the generic pharmaceutical industry. The previous three corporate charges were resolved by DPA. Four individuals have also been charged. Three entered guilty pleas and the fourth is awaiting trial.

The offence committed by corporations carried a statutory maximum penalty of a \$100 million fine per offence, which could be increased to twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than \$100 million.

(Press Release 7th May 2020)

Competition Commission accepts commitments offered by online travel agents; Hong Kong

Three major online travel agents (OTAs) viz. Booking.com, Expedia and Trip.com have given their voluntary commitments to address the Commission's concerns relating to clauses in the contracts between OTAs and accommodation providers.

The Commission was concerned that clauses requiring accommodation providers to always give the OTA the same or better terms than those offered through other sales channels were depriving consumers of the benefits of effective competition.

The Commission was of the opinion that these clauses had the effect of softening the competition among OTAs and hindering the entry and expansion of new or smaller OTAs.

The acceptance of the commitments by the Commission implies complete removal of such clauses from the contract by the OTAs.

Each of the OTAs have been given 90 calendar days to amend their existing and future contracts with accommodation providers, as necessary, for compliance with the commitments.

The commitments will remain in force for a period of 5 years starting on the day on which the relevant contracts are amended by each of the OTAs.

The Commission has the power to withdraw its acceptance of commitments under the conditions as provided in section 61 of the Ordinance, which includes material change of circumstances or failure of the person to comply the commitment.

(Press Release 13th May 2020)

Suppliers of face masks prosecuted for exorbitant price increase; South Africa

The Competition Commission of South Africa ('Commission') has referred two major suppliers of face masks to the Competition Tribunal for prosecution as they allegedly charged excessive prices for the face masks.

After conducting investigation, the Commission found that Sicuro Safety CC ('Sicuro') and Hennox 638 CC t/a Hennox Supplies ('Hennox') increased the prices of face masks astronomically by more than 969.07% and 956% respectively.

Both the firms failed to provide reasonable explanation to the Commission for such an excessive increase in price.

The Commission contended that Sicuro's and Hennox's pricing was a direct reaction of the COVID-19 pandemic and its unprecedented impact on the world in general and South Africa in particular.

In order to address this concern, the Commission asked the Tribunal to issue an injunction prohibiting the firms from continuing with any excessive pricing conduct.

The Commission has also asked the Tribunal to impose a maximum penalty.

(Press Release 12th May 2020)



KK SHARMA
LAW OFFICES

Delhi High Court finds no reason to interfere with CCI's order directing probe against Monsanto; India

Between The Lines...

*Comments
& Analysis*

Monsanto Holdings Pvt. Ltd & Ors ('Monsanto'), by way of writ petition, challenged the jurisdiction of the Competition Commission of India ('CCI') for passing an order for investigation under section 26(1) of the Competition Act, 2002, by raising an argument that the abuse of any rights granted to the patentee under the Patents Act would fall exclusively within the remedies provided under the Patent Act and not within Competition Act.

Elaborating the argument, Monsanto averred that the CCI could examine the abuse of dominance or an unfair trade practice only after a finding as to the jurisdictional facts has been returned by the Controller of Patents ('Contoller'). To support the argument, Monsanto relied on the decision of the Hon'ble Supreme Court in the case of **Competition Commission of India v. Bharti Airtel Ltd. And Ors.** wherein, it was held that the CCI could exercise its jurisdiction only after the Regulator (TRAI) had returned the findings, on the basis of which any order under the Competition Act could be passed by the CCI. Monsanto further argued that the remedy in case where a patentee had unjustifiably withheld the grant of a license lies under Section 84 of the Patents Act i.e. compulsory license and the jurisdiction to entertain such issues was with the Controller. Lastly, Monsanto argued that by virtue of Section 3(5) of the Competition Act a clause in an agreement, which is designed to restrain infringement of IPR, including patents, was excluded from the purview of the Competition Act and the CCI could have not examined such agreements.

The Hon'ble Delhi High Court ('DHC') extensively relied on its decision in the case of **Telefonaktiebolaget L.M. Ericsson v Competition Commission of India & Another** while rejecting the arguments of Monsanto. The DHC stated that the decision of the Supreme Court in Bharti Airtel (supra) was certainly not an authority for the proposition that wherever there was a statutory regulator, the complaint must be first brought before the Regulator and examination of a complaint by the CCI was contingent on the findings of the Regulator. With respect to the argument of Monsanto that the remedy in case where a patentee had unjustifiably withheld the grant of a license, was under Section 84 of the Patent Act, the DHC, while rejecting the same, reasoned that the orders passed by the CCI under Section 27 of the Competition Act in respect of abuse of dominant position by any enterprise are materially different from the remedies that are available under Section 84 of the Patents Act. The DHC further opined that in certain case it may be open for a prospective licensee to approach the Controller for grant of a compulsory license. However, the same would not be inconsistent with the CCI passing an appropriate order under Section 27 of the Competition Act.

Regarding the argument of the Monsanto that section 3(5) of the Competition Act precludes the CCI from examining an agreement which is to protect and restrain any infringement of patentee rights, the DHC disagreed and held that only such agreements that are "*necessary for protecting any of his rights which have been or may be conferred upon him under*" the specified statutes are provided the safe harbor under Sub-section (5) of Section 3 of the Competition Act and only to such limited extent. The question whether an agreement was limited to restraining infringement of patents including the reasonable conditions imposed to protect patent rights, was required to be determined by the CCI. Further, the DHC opined that Subsection (5) of section 3 of the Competition Act did not mean that a patentee could be free to include onerous conditions under the guise of protecting its rights.

Lastly, the DHC rejected the writ petition by concluding that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act and, therefore, the jurisdiction of the CCI to entertain complaints regarding abuse of dominance in respect to patent rights could not be excluded. **(W.P.(C) 1776/2016 dated 20.05.2020)**

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