



State of Antitrust

AUGUST 2019; Volume 6 Issue 8



Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

- EC opens an investigation against Amazon for using competitively sensitive data of sellers on its platforms
- Bundeskartellamt obtains amendments in the terms of business for sellers on Amazon's online marketplace

HEARD AT THE BAR

- EC fines Qualcomm €242 million for abusing its dominant position in 3G baseband chipsets market

- EC approves acquisition of Pfizer's Consumer Health Business by GlaxoSmithKline, with conditions

BETWEEN THE LINES

- CCI directs investigation against Maruti Suzuki India for forcing dealers to limit customer discounts

AND MORE...

EC opens an investigation against Amazon for using competitively sensitive data of sellers on its platforms

The European Commission ('EC') has opened an investigation against Amazon to examine whether Amazon's use of sensitive data collected from independent retailers, who sell products on its marketplace, has breached the EU competition rules.

It is seen that, as practice, Amazon continuously collects data and tracks the activity of independent sellers, while providing a marketplace to them to sell their products to the consumer. The EC, in its preliminary findings, observed that Amazon may have used competitively sensitive information of the sellers, their products and information generated from transactions between the sellers and buyers on its marketplace.

As a part of its in-depth investigation, the EC will look into the standard agreements between Amazon and marketplace sellers, which enable Amazon's retail business to collect, analyse and use third party sellers' data. In particular, the EC will be focusing on assessing that how the use of accumulated marketplace seller data by Amazon affects competition in the E-commerce market.

If proven, the practices under investigation may breach EU competition rules on anticompetitive agreements between companies [Article 101 of the Treaty on the Functioning of the European Union (TFEU)] and/or on the abuse of a dominant position (Articles 102 TFEU).
(Press release, July 17, 2019)

Bundeskartellamt obtains amendments in the terms of business for sellers on Amazon's online marketplace

In November 2018, following a large number of complaints from many Amazon sellers, the Federal Cartel Office of Germany ('Bundeskartellamt') initiated proceedings for abuse of dominant position against Amazon to examine Amazon's general terms of business with sellers. In response to competition concerns raised by Bundeskartellamt, Amazon has decided to amend its general terms of business for sellers on its marketplace. These amendments are said to achieve considerable improvements for marketplace sellers without adversely affecting the interest of customers on the marketplace.

Some of the important amendments introduced by Amazon are: (a) any change in the conditions of contract between the seller and Amazon has to be announced with a 15 days' notice; (b) exclusivity of Luxembourg courts has been removed from Amazon's terms of business for all European marketplaces and now, any domestic court can be the competent court; (c) with regards to return policy, earlier, Amazon's decision to reimburse the customer could not be objected to by the seller, but now, if a seller considers that a return was unjustified, it can claim compensation from Amazon and; (d) Amazon's unlimited right to terminate and block sellers' accounts has been modified; now a 30 days prior notice will be given before termination of a seller's account; (e) Amazon is restricted to use product material and property rights of the seller. This will enable manufacturer & sellers to make their own websites more attractive in terms of quality; and, (f) Amazon will ease on sellers' obligation of making public statements about their business relations with Amazon. The Bundeskartellamt maintained close contact with the European Commission, which is examining Amazon's collection and use of transaction data under EU competition law.*(Press release, July 17, 2019)*

Portuguese Competition Authority takes a firm stand against use of algorithms to coordinate market prices

The Portuguese Competition Authority ('Autoridade da Concorrência'/'AdC') has warned the firms on the practice of using algorithms to coordinate prices as it is incompatible with Portuguese Competition law. This move of the AdC is a result of a study conducted on digital ecosystem and big data, where the AdC found changes in consumption patterns of consumers due to emergence of new business models seen in the digital ecosystems.

The AdC in its study observed that incumbent platform firms may engage in exclusionary practise by exploiting consumer behaviour by using pricing algorithms. These algorithms may allow firms to personalise price which can help the firms to enhance their ability to extract consumer surplus and expand their output. These algorithms allow price monitoring, ranking and recommendations which can have positive effects in terms of product discovery and price comparison, but, at the same time, may also result in the reaching and sustaining collusive equilibrium in the market. However, the AdC has not found evidence to show widespread use of pricing algorithms but the analysis has showed implications of pricing algorithms in some markets.

The aggressive mergers by data companies, targeting small or potential competitors so as to close the entry point in the market was also studied. This has also sparked a debate to adjust the threshold in the legal competition framework so as to capture deals which result in harming competition.
(Press Release 01.07.2019)



Heard at the BAR

Legal news from
India and the world

EC fines Qualcomm €242 million for abusing its dominant position in 3G baseband chipsets market

The European Commission ('EC') has found that Qualcomm abused its dominant position by indulging in predatory pricing between mid-2009 and mid-2011, with an aim to force Icera, its competitor, out of the market.

The EC observed that Qualcomm held high market shares of approximately 60% (almost three times the market share of its biggest competitor). The investigation revealed that Qualcomm sold certain quantities of three of its Universal Mobile Telecommunications System ('UMTS') chipsets below cost to Huawei and ZTE, two strategically important customers, with the intention to eliminate Icera, its main rival from the market segment, offering advanced data rate performance.

Qualcomm resorted to predatory pricing at a time when Icera was becoming a viable supplier of UMTS chipsets providing high data rate performance, thus posing a threat to Qualcomm's chipset business.

The EC found that price concessions made by Qualcomm allowed it to maximise the negative impact on Icera's business, while minimising the effect on Qualcomm's own overall revenues from the sale of UMTS chipsets. Additionally, there was no evidence to show that Qualcomm's conduct created efficiencies that could justify its practice.

On this basis, the EC concluded that Qualcomm's conduct had a significant detrimental impact on competition, which prevented Icera from competing in the market, stifled innovation and ultimately reduced choice for consumers.

With an aim to deter market players from engaging in such anti-competitive practices, the EC imposed a fine of € 242 million representing 1.27% of Qualcomm's turnover in 2018.

(Press release, July 18, 2019)

EC approves acquisition of Pfizer's Consumer Health Business by GlaxoSmithKline, with conditions

The European Commission ('EC') has approved, under the EU Merger Regulation, acquisition of Pfizer's Consumer Health Business by GlaxoSmithKline ('GSK'). The decision is conditional upon the global divestment of Pfizer's topical pain management business carried out under the *ThermaCare* brand.

After concluding the investigation, the EC raised its concerns on the possibility of reduced competition for topical pain management products, which may result in increase in prices in the European Economic Area ('EEA') countries, including Austria, Germany, Ireland, Italy and the Netherlands. For topical pain management products, GSK is a leading OTC supplier in the EEA with its range of *Volta*-branded products whereas, Pfizer is mostly active in the EEA with its range of *ThermaCare*-branded products, consisting of non-medicated patches.

To address these concerns, the companies offered to divest Pfizer's topical pain management business carried out under the *ThermaCare* brand globally. Consequentially, all relevant assets of *ThermaCare* will be divested as a package to one suitable purchaser to be approved by the EC.

The EC is of the view that the commitment will remove almost entirely the overlaps between GSK and Pfizer's Consumer Health Business in the topical pain management category in the EEA.

Therefore, the EC concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns in the EEA. The EC's decision is conditional upon full compliance with the commitments.

(Press release, July 10, 2019)

Canadian Competition Tribunal fines Ticketmaster with \$4.5 million for misleading pricing case

Ticketmaster LLC, TNow Entertainment Group, Inc. and Ticketmaster Canada LP have agreed to pay a \$4 million as fine and \$500,000 for costs incurred by the Competition Bureau ('Bureau') during investigation into allegedly misleading pricing claims in online ticket sales.

The advertised price by Ticketmaster was misleading as they added mandatory fees during the later stages of the purchasing process, which in some cases was as high as 65% of the advertised price.

The consent agreement has concluded the Bureau's legal action against the companies. As part of the consent agreement, registered with the Competition Tribunal, the companies will establish a compliance program to ensure their advertising practices complies with the law and the companies will implement new procedures to prevent advertising issues in the future.

As a result, Ticketmaster has already made a number of changes in its websites and mobile applications, and has applied these changes across Canada. The Bureau's work related to similar practices has led to a total of \$9.95 million in penalties paid to date by Ticketmaster and major car rental companies

(Press release, June 27, 2019)



KK SHARMA
LAW OFFICES

**Between
The Lines...**

*Comments
& Analysis*

Competition Commission of India directs investigation against Maruti Suzuki India for forcing dealers to limit customer discounts

The Competition Commission of India ('CCI') has initiated an investigation, under Section 26(1) of the Competition Act, 2002 ('Act'), after receiving an anonymous e-mail alleging Resale Price Maintenance(RPM) resorted to by Maruti Suzuki India Limited ('MSIL').

The allegation consisted of restricting the dealers of MSIL from giving extra discount to their customers and, if found giving extra discount, penalty was imposed on them by MSIL. This conduct of MSIL was in lieu of a discount control policy ('DCP') which was implemented by MSIL's independent agency. This Agency used to conduct a 'Mystery Shopping Audit', by sending a fake customer to visit dealers, to find, if, an extra discount was being offered by any dealer. If a dealer was found giving discounts, MSIL used to penalise the dealers in absence of a satisfactory explanation for the same.

After considering the email, the CCI decided to hold a preliminary conference with MSIL, wherein MSIL submitted that no agreement existed between MSIL and its dealers involving DCP but only a Dealership agreement was entered between MSIL and Dealers, which apart from encouraging the dealers to give discounts also supported schemes, proposed by dealers, to sale vehicles at a price lower than the Maximum Recommended Retail Price. After perusal of allegations and submissions, the CCI observed that MSIL dealers are penalised for non-compliance with DCP. Further, the CCI observed that MSIL *inter alia* operated in the upstream market of manufacture of passenger cars while its dealers operate in the downstream market of distribution and sale of Maruti passenger cars to consumers. On the basis of above, the CCI opined that a thorough and detailed investigation is required, to ascertain the factual position and *modus operandi* resorted to by MSIL as allegations *prima facie* reveal a fit case for investigation in respect of the alleged resale price maintenance arrangement in contravention of the provisions of Section 3(1) with Section 3(4)(e) of the Act. **(Case No. 01/2019)**

Competition Commission of India orders investigation against Google for abusing its dominant position

The Competition Commission of India ('CCI') has ordered an investigation against Google for allegedly abusing its dominant position in Android mobile operating system-related markets.

The informant alleged that majority of smartphones and tablet manufacturers in India use the Android operating system, in order to install Google's proprietary applications and services i.e. the Google Mobile Services (GMS), which includes Google Maps, Gmail, and YouTube, device manufacturers need to enter into Mobile Application Distribution Agreement ("MADA") and Anti Fragmentation Agreement ("AFA") with Google. Informant stated that end-users cannot avail GMS services directly. It was further alleged that Google mandates smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services which hinders the development and market access of rival mobile applications or services.

The CCI delineated the primary relevant market as '*market for licensable smart mobile device operating systems in India*' and other associated relevant market as '*general web search services*' in which Google was previously found dominant by the CCI in *Matrimony.Com Limited v. Google LLC & Ors.* and '*app stores for the Android mobile operating system*'. The relevant geographic market was taken as India as conditions of competition were homogeneous in whole of India.

The CCI after perusal of information and submissions of Google observed, that MADA requires the device manufacturers to preinstall the entire suite of Google apps. The CCI was of the *prima facie* opinion that since Google Play Store is a 'must have' app and users expect it to be preinstalled on their devices, marketability of Android devices may get restricted if these agreements are not signed, making these agreement *de facto* compulsory and this amounted to imposition of unfair condition on the device manufacturers and thereby in contravention of Section 4(2)(a)(i) of the Act. The CCI noted that the plea of Google that MADA pre-installation conditions are not exclusive or exclusionary, can only be examined after investigation. Thus, the CCI directed the Director General to cause an investigation under Section 26(1) of the Act.

(Case No. 39/2018)

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