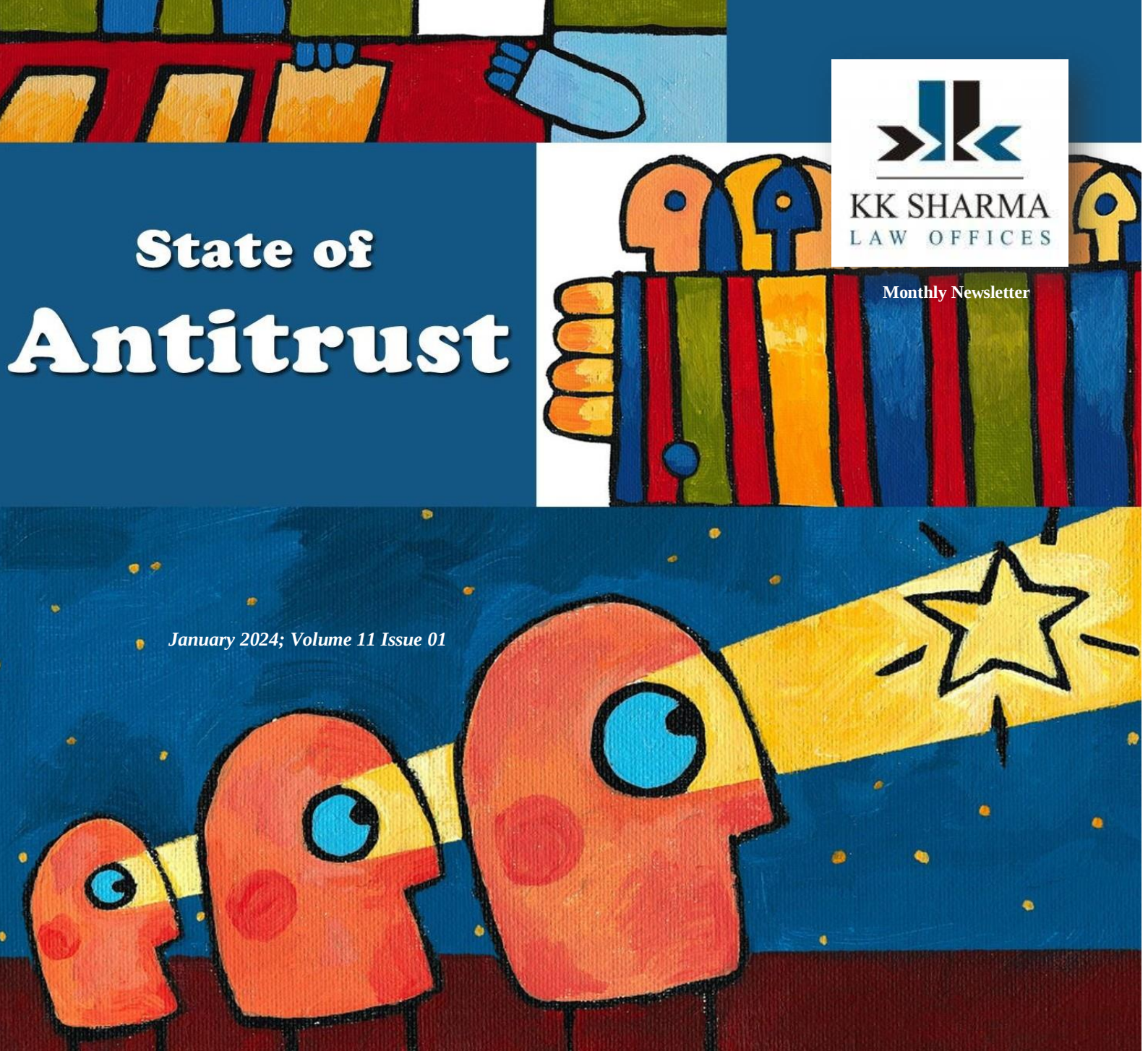

State of Antitrust

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Monthly Newsletter

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CJEU opines that FIFA's & UEFA's prior approval rules violate Art.101 & Art.102 of TFEU

The Court of Justice of European Union **('CJEU')**, in a preliminary ruling, has found Fédération Internationale de Football Association **('FIFA')** & Union of European Football Associations **('UEFA')** rules on prior approval for organisation & marketing of International Interclub Football Competitions **('IIFC')** & exploitation of rights thereof, to be incompatible with the principles of E.U. competition law. As per the CJEU, both, FIFA & UEFA hold a dominant position in marketing and organization of IIFC in the E.U. and *sans* transparent, objective, non-discriminatory & proportionate procedure appears to violating Art. 101 & Art. 102 of the Treaty on Functioning of the European Union **('TFEU')**.

FIFA is an international association, devised with the objective of organization of international football competitions, setting out regulations governing the game of football and to control association football at the global level. Similarly, UEFA is also an association tasked with the objective of promotion, supervision & control of European football. Both, FIFA's & UEFA's governing statute also delegate to them jurisdiction to organize IIFCs at the global & the Europe level, respectively.

By virtue of these governing statutes, any other new IIFC, not recognized by FIFA/continental confederations/member associations, can only be organised with the prior approval of FIFA/continental confederations/member associations (*Art. 71, FIFA statutes & Art. 49, UEFA statutes*). Additionally, FIFA statutes also designate FIFA/continental confederations/member associations as the "original owners" of all media & marketing rights, emanating from competitions coming under their respective jurisdictions.

The case relates to establishment of a new IIFC project known as the '***Super League***'. Super League project was launched by the European Superleague Company SL **('ESLC')** which was established by an initiative of a group of professional football clubs including Atlético de Madrid, FC Barcelona, Chelsea FC, Manchester United etc.

After the launch of the Super League project, FIFA, along with its 6 continental confederations, including UEFA, on 21.01.2021, issued a statement citing their refusal to recognize Super League. The public statement included a *diktat* that any professional football club or player participating in Super League would be expelled from the competitions organized by FIFA & UEFA. The statement further emphasized that as per the FIFA & confederations statutes "*all competitions should be organised or recognised by the relevant body at their* respective *level, by FIFA at the global level and by the confederations at the continental level*." Thereafter, a similar press release was also issued by UEFA.

By contesting the abovementioned press release(s), ESLC approached the Juzgado de lo Mercantil de Madrid **('Commercial Court, Madrid'/ 'Referring Court')** alleging that the rules adopted by FIFA & UEFA prevent, restrict or distort competition in the EU. As an interim protection, Referring Court prohibited FIFA, UEFA or member associations from obstructing Super League's establishment and from imposing any sanctions against the football clubs or players participating in the Super League.

As per the Referring Court observations, both, FIFA & UEFA carry on two distinct but complementary economic activities i.e., organisation, marketing of IIFC in the E.U. & exploitation of various rights associated it. Further, FIFA & UEFA, have been able to sustain a dominant position in the market, not only, due to their economic & commercial monopoly, but also owing to their regulatory, governing & power to impose sanctions. Thus, as per the Referring Court these factors give rise to a barrier to entry, impossible to be overcome by any potential competitors of FIFA & UEFA.

The issues for reference framed by the Referring Court, mainly, comprised of – whether the conduct of FIFA & UEFA, exercised in consonance with their statutory powers, constitute an abuse of dominant position under Art.102 of the TFEU & amounts to an anti-competitive agreement under Art.101 of the TFEU, not exempted by either objective justification or Art.101(3) of the TFEU.

CJEU, firstly, noted that the "*practice of sport*" & "*activities of sporting associations*" are susceptible to the rigorous of EU competition. CJEU made an observation that, apart from those conducts/rules which are purely related to questions of regulation of sport *per se*, sports, when it relates to an economic activity is governed by TFEU provisions. Similarly, the rules governing sporting associations like FIFA's & UEFA's exercise of power related to prior approval for sporting competitions are also susceptible to TFEU.

Abuse of Dominance – The CJEU proceeded on the premise that Referring Court considers FIFA & UEFA as dominant in the "*market for the* organisation *and marketing of interclub football competitions on European Union territory and also the exploitation of the various rights related to those competitions*".

As per the CJEU, rules on prior approval, participation & sanctions in relation to professional football are legitimate in so far as it enables homogeneity and coordination in organization of those IIFCs based on merit and equal opportunities. Nonetheless, the CJEU opined that, rules on prior approval or sanctions, bereft of any substantive criteria & detailed procedures ensuring transparency, objectivity, non-discrimination & proportionality, can result in an abuse of dominant position.

Further, these rules cannot be said to be non-discriminatory, unless, those competing undertaking are not kept at similar footing & the same criteria which applies for FIFA & UEFA is applied for other competing undertakings. Thus, CJEU was of the opinion that, bereft of substantive criteria & detailed procedural rules ensuring transparency, objectivity, non-discrimination & proportionality, the conduct of FIFA & UEFA constitutes an abuse of dominant position.

Anti-competitive Agreement – The CJEU considered the question of whether decisions taken by "*associations of undertakings*", as undertaken as per FIFA and UEFA rules, violates Art.101 TFEU. As per the CJEU, such decisions are susceptible to Art.101 TFEU, if their conduct/decision have the '*object*' or '*effect*' of prevention of competition.

The CJEU while taking note of the fact that from the contents of FIFA & UEFA rules, it seems that the rules confer power to authorise and control the sport through which FIFA & UEFA can set the conditions of access to the market for organisation of IIFC and determine the degree of actual & potential competition from any potential competing undertaking. The CJEU further opined that in doing so, FIFA & UEFA not only completely deprive professional football clubs & players from participating in those IIFCs, but also deprive spectators & television viewers from attending or watching the broadcast. The manner in which these rules have been laid out, as per the CJEU, *prima facie* reinforce the anticompetitive '*object*' inherent in any prior approval mechanism that is bereft of any restrictions, obligations and review. Thus, according to CJEU, such rules by their very nature seem to cause sufficient degree of harm to competition, thus violating Art. 101 of TFEU.

While the CJEU left the final adjudication, in relation to violation of Art.101 & Art.102 of TFEU in the present case open to be finally decided by the Referring Court, it laid down the broad factors, deduced from the case laws, which the Referring Court must examine in order to grant exemption under Art.101(3) of the TFEU or justified under Art.102 TFEU.

(Order dated 21.12.2023)

ACCC admonished companies for misleading consumers, Federal Court imposes hefty fine on Techtronic, Airbnb etc.

- *Power Tool Supplier – Techtronic to pay highest ever penalty imposed for engaging in Resale Price Maintenance*

The Federal Court of Australia **('FCA')** has imposed a fine of $15 million on a power tools company – Techtronic Industries Australia Pty. Ltd. **('Techtronic')** for restricting its retailers & dealers' autonomy to determine resale price of the product. Techtronic is an Australian subsidiary of Hong Kong based Techtronic Industries Co Ltd. and is a major supplier of power tools in Australia. Between 2016 & 2021, Techtronic entered into resale price maintenance agreements with 97 of its retailers & dealers, by way of which Techtronic restricted the minimum prices, of its '*Milwaukee*' branded power tools, hand tools and accessories, below which Techtronic's dealers & retailers were not allowed to resale, offer to supply, advertise or market the goods for sale '*Milwaukee*' products. Techtronic even admitted of taking coercive actions, in the form of issuing warning & also withholding supply once against retailers who failed to comply with specified minimum price provided by Techtronic.

(Press release dated 01.12.2023)

- *Airbnb to pay $30 million for misleading consumers regarding currency of prices on its platform*

The FCA has held Airbnb Ireland UC **('Airbnb')** liable for misrepresentation in the currency of accommodation prices on its platform and has imposed a fine of $15 million on Airbnb. Additionally, Airbnb was also directed to give compensation to the affected consumers, which sums at around $15 million. In usual operations, Airbnb's platform is meant to show prices in Australian Dollars, unless selected otherwise by the consumer. However, as per the case records, between January 2018 & August 2021 for approx. 70,000 Australian consumers visiting Airbnb's platform the accommodation prices were shown in US Dollars rather than Australian Dollars. Further, the prices were shown with a '$' sign without any reference to its currency, whether it is in Australian Dollars or US Dollars. This was considered as misleading conduct since value of US Dollar is higher vis-à-vis Austrailian Dollar leading the consumers to pay higher prices on Airbnb's platform and also depriving them from making an informed choice.

(Press release dated 20.12.2023)

- *Honda to pay $6 million for making false representations about closure of its car dealerships*

The FCA has imposed a fine of $6 million on Honda Australia Pty Ltd. **('Honda')** for misleading its customers by making false statements regarding closure of three of Honda's authorised dealerships namely, Honda Australia dealerships Brighton Automotive Holdings Pty Ltd **('Astoria')**, Tynan Motors Pty Ltd **('Tynan')**, and Buick Holdings Pty Ltd **('Burswood')**. Prior to 2021, Honda operated through a Franchise model in Australia, but through a resolution in 2020, Honda decided to transition to an Agency model. It was noted that, between January 2021 & June 2021, Honda had sent communications to its customers stating that, owing to Honda's restructuring, some franchise agreements with authorised dealers were being terminated, and thus, these dealerships at Astoria, Tynan and Burswood would close & would no longer service Honda vehicles. Meanwhile, in reality, the 3 dealerships continued to operate as independent service centres for providing vehicles' services and repairs, including that of Honda. According to ACCC, by its conduct, Honda curtailed opportunity to consumers from making informed choices regarding the options for servicing their Honda vehicles.

(Press release dated 15.12.2023)

- *Fitbit directed to pay $11million for giving false information regarding consumer guarantee rights*

The FCA has directed US-based consumer electronics and Fitness Company – Fitbit LLC **('Fitbit')** to pay $11 million in penalties after Fitbit admitted that it has been making false/misleading representations to its customers regarding "*consumer guarantee rights*" for refund or replacement. According to ACCC, Fitbit denied replacement or refund to approx. 58 customers who made complaints regarding the fault(s) in the products. Every consumer has "*consumer guarantee rights*" under the Australian Consumer Law, which entitles them for replacement of goods if they are not of acceptable quality. Fitbit admitted making false or misleading representations to its customers in Australia having the effect of misleading or deception in the minds of consumers.***(Press release dated 12.12.2023)***

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Between The Lines...
Comments & Analysis

DHC affirms impleadment of BAI in cement cartel case

The High Court of Delhi **('DHC')** has dismissed the writ petition filed by UltraTech Cement Ltd. **('UltraTech')** challenging the order impleading Builders' Association of India **('BAI')** to be impleaded as a party, passed by the Competition Commission of India **('CCI')** in the on-going cement cartel case before the CCI. The main case was instituted by CCI after it took suo moto cognizance of multiple correspondences alleging cartelisation by grey cement manufacturers. UltraTech operates, *inter alia*, in the business of manufacturing and marketing of grey cement and was thus arraigned as an Opposite Party **('OP')** in the main case.

Pending investigation, BAI approached the CCI to be impleaded as an '*Informant*' in the case, which was rejected noting the advanced stage of investigation. Thereafter, BAI filed a writ petition before DHC challenging CCI's order, which was disposed of by the DHC with the liberty to approach CCI in terms of Reg.25 of the Competition Commission of India (General) Regulations 2009 **('General Regulations')** to participate in the proceedings of the main case. Thereafter, BAI filed a fresh impleadment application, which was allowed the CCI in terms of the impugned order. Thus, UltraTech challenged the impugned order by way of writ of certiorari before the DHC.

Before the DHC, UltraTech broadly contended that – firstly, CCI failed to satisfy or lay down reasons for its satisfaction of two-fold test, as given under Reg.25 of the General Regulations. As per the DHC, the impugned order recognizes that BAI is the largest consumer of grey cement in India & suffers a direct impact from the anti-competitive practices of the OPs. Thus, the DHC was of the view that adequate reasons have been set out in the impugned order by the CCI satisfying the two-fold test namely, existence of '*substantial interest*' of the impleading party, & such impleadment to be in the furtherance of '*public interest*'.

Secondly UltraTech contended that CCI failed to adhere to principles of natural justice by failing to provide notice to UltraTech, being an OP, before impleading BAI in the case. However, the DHC noted that the CCI, prior to passing the impugned order, had passed another order on 06.10.2022 through which it allowed a copy of CCI's order of investigation & the non-confidential version of the DG Report to BAI, a copy of which was also furnished to the OPs. Thus, as per DHC, UltraTech had full knowledge & was provided sufficient notice regarding impleadment of BAI.

Further, UltraTech contended that the impugned order is *ultra vires* Section 57 of the Competition Act, 2002 **('Competition Act')**, as it allowed sharing of sensitive commercial information of the OPs, without obtaining prior consent in writing from the OPs. However, the DHC from perusal of the impugned order, noted that the order only allowed grant of non-confidential records, in terms of Reg.37(1) of the General Regulations. Since, Reg.37(1) of the General Regulations is subject to the restrictions as given under Section 57 & Reg.35 of the General Regulations, the DHC rejected the argument advanced by UltraTech. Lastly, a supplementary question regarding the exercise of claim through compensation application under Section 53N of the Competition Act being an effective alternate remedy was also rejected by the DHC on the ground that, neither there exists a viable option nor any reason for BAI to prefer compensation application in light of the expressly carved out provision of Reg.25 of the General Regulations allowing a party to take part in the proceedings before the CCI. Thus, the DHC dismissed the writ petition.

(Order dated 18.12.2023)

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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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