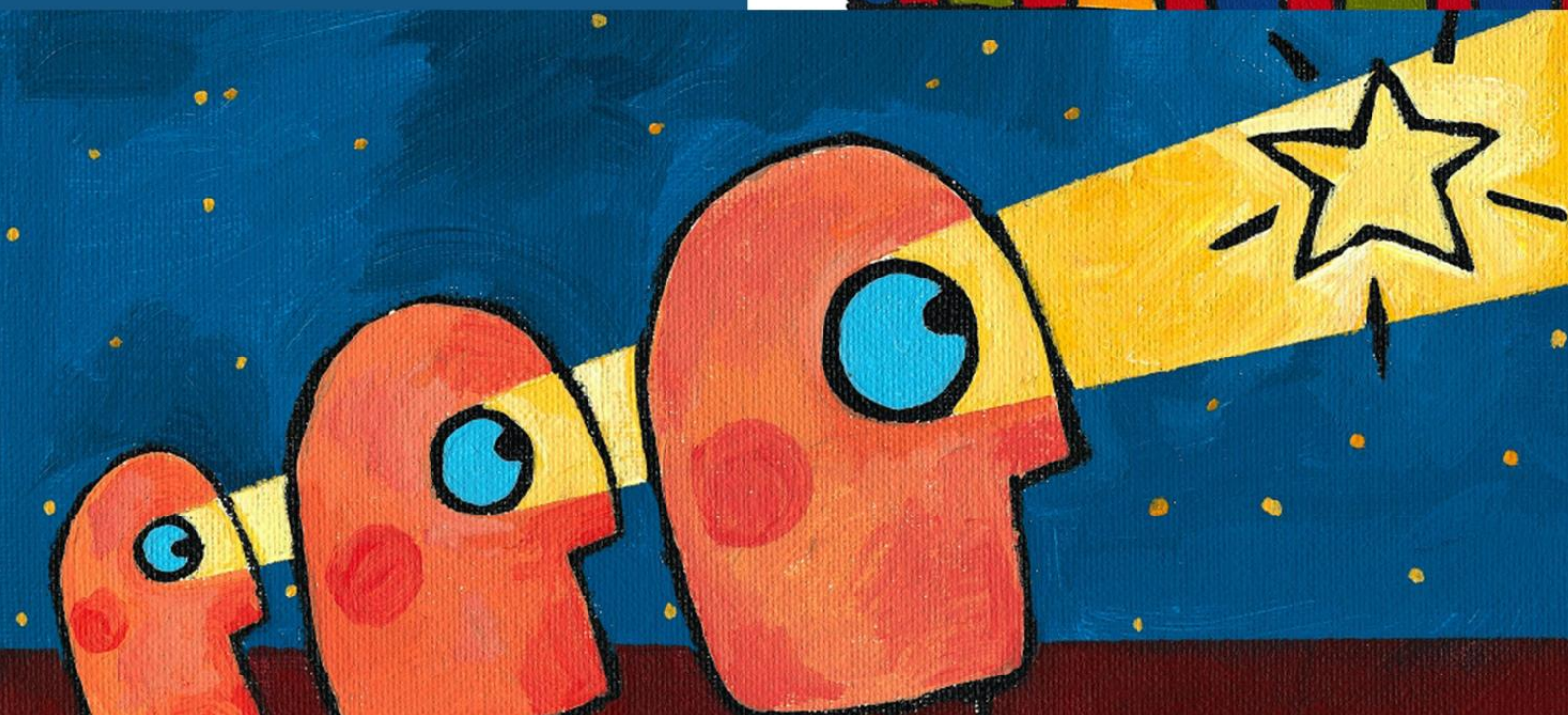




Monthly Newsletter

# State of Antitrust

March 2018; Volume 5 Issue 3



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**Competition Commission of India imposes penalty of Rs. 135.86 Crores on Google for abusing its dominant position in online web search and advertising markets in India**

On 08.02.2018, the Competition Commission of India ('CCI') imposed a penalty of Rs. 135.86 Crores on Google, Inc. and its affiliates ("Google") for abusing its dominant position under the Competition Act, 2002 ("the Act"). In this case, Information was filed before CCI by Matrimony.com Limited and Consumer Unity & Trust Society ("the Informants") alleging that Google was running its core business of search and advertising in an unfair and discriminatory manner and, by search bias and search manipulation, causing harm to the advertisers and consumers. Google provides a large number of vertical search services, including video (YouTube), news (Google News), maps (Google Maps), etc. It was alleged that Google manually manipulated its search results to the advantage of its vertical partners so that Google's own sites would appear prominently on the search results page irrespective of whether they were the most popular or relevant to the search or not. It was also alleged that dominant position of Google in algorithmic search market leads to its status as an unavoidable trading partner in search advertisement market. Based on these allegations, it was averred that Google was abusing its dominant position in the relevant market in India in contravention of Section 4 of the Act. CCI, by forming a *prima facie* opinion, passed an order and directed the Director General ("DG") to cause an investigation.

Accordingly, the DG submitted its investigation report to CCI, wherein the following relevant markets were delineated by the DG:

a) Relevant market of *Online General Web Search Service in India*. b) Relevant market of *Online Search Advertising in India*.

Based on the market share of Google, the DG found Google to be a dominant enterprise in both the relevant markets. Further, the DG found that Google biases its search results and imposes unfair conditions on its advertisers and its distribution and intermediation agreements restrict competition, in violation of Sections 4(2)(a)(i), 4(2)(b)(ii), 4(2)(c) and 4(2)(e) of the Act.

CCI considered the Investigation Report submitted by the DG and framed the issues to be determination of (i) relevant market(s); (ii) dominant position of Google; and (iii) its abusive practices in the said relevant market.

Before discussing the main issues, CCI dealt with the preliminary issue raised by Google that applicability of Section 4 does not arise, since Google provides search services to users for free. CCI observed that the issue raised by Google is flawed as it ignores the role of big data in the digital economy. CCI, while dismissing the fallacious argument of Google, stated that users offer indirect consideration to Google by: (a) providing their attention or "eyeballs"; and (b) allowing Google to collect and use their information, both of which facilitates generation of revenues by Google as it attracts more advertisers.

Thereafter, CCI agreed with the findings of DG and held that relevant *market for online general web search services in India* (RM: 1) and *market for online search advertising services in India* (RM: 2) to be two distinct relevant markets

CCI on the issue of dominant position in RM: 1 stated that Google has the highest market share, which is exponentially greater than its nearest competitor. For assessing Google's dominance in RM: 2, CCI stated that '*in the high technology markets, innovation is the key and in multi-sided markets, market shares should be transient. However, Google's market shares have been consistently high, which suggests that it has got other advantages, besides technical advantages, which insulate its market position.*' Considering all these factors, CCI held Google to be in a dominant position in both the relevant markets.

Before discussing the abuses, CCI dealt with the procedural deficiencies highlighted by Google and found no merit in the same, including the allegation that DG has expanded its scope by investigating Google Ireland Ltd., stating that inclusion of Google Ireland Ltd. was sanctioned by the order of CCI. Thereafter, CCI held that Google, through its search designs, has not only placed its commercial units right at a prominent position on search result pages, it has also allocated *disproportionate real estate* thereof to those units resulting into either pushing down or pushing out of the verticals which were trying to gain market access. Consequently, users may have been devoid of additional choices of results and, therefore, such conduct amounted to imposition of unfair conditions on the users availing search services and in contravention of section 4(2)(a)(i) of the Act.

For the allegation of unfair or discriminatory conditions in advertising, CCI did not agree with the findings of the DG and the Informant. CCI found that Google provides sufficient data to advertisers on the performance of their ads and does not discriminate in favor of house ads. For the issue regarding trademarks, it was opined that allowing trademarks to be bid as keywords is advantageous to competition as it is another way that competitors can target their ads to users who have mentioned a rival and is beneficial to consumers as it helps them in reviewing and locating a wide choice with respect to the products. Hence, Google was not found guilty of imposing unfair conditions on its advertisers. In relation to Google's distribution agreements, CCI held that the findings of DG were based upon the supposition that through such agreements, Google has the "potential" to strengthen its market position to the exclusion of other search engines. However, these findings were unfounded and these agreements are neither exclusive nor had it been established that such arrangements denied market access to any of the competing search engines thus there was no case of contravention of the provisions of Section 4(2)(c) of the Act made out. Finally, with respect to the intermediation agreements, CCI held that by restricting publishers from partnering with competing search services, Google was denying its competitors access to the search business and further marginalizing competitors and endangering their viability while strengthening its own position. These restrictions amounted to a de-facto imposition of online search exclusivity which resulted in an abuse of its dominant position and was in contravention of section 4(2)(e) of the Act. CCI passed desist orders for this conduct and with regard to the penalty, CCI found it appropriate to impose a penalty on Google for Rs. 135.86 Crores determined at the rate of 5% of their average total revenue generated from India operations for 2013, 2014 and 2015. (*Case 07 & 30 of 2012*)



**KK SHARMA**  
LAW OFFICES

## **Bundeskartellamt launches sector inquiry into market conditions in online advertising sector**

On 01.02.2018, the German Competition Regulator, Bundeskartellamt, launched a sector inquiry into the online advertising sector to focus on the effects of current and future developments on market structure opportunities of various players. It will examine the significance of how they function and the different technical services including options for measuring visibility, collecting data and preventing fraud as well as services directly related to marketing and procurement of ad spaces. As a first step it will hold discussions with various companies from the business communities concerned to gain a close insight into their individual views on the above aspects and to limit the scope of the investigation. Bundeskartellamt may conduct a sector inquiry if specific circumstances suggest that competition in a sector may be restricted or distorted. Sector inquiries are not proceedings against specific companies but take a look at a sector as a whole. *(Press release 01.02.2018)*

## **ECJ upholds fine imposed by EC on companies for participation in cartels in the international air Freight forwarding service sector**

On 01.02.2018, the Court of Justice of the European Union (ECJ) upheld the €169 million fine the European Commission (EC) had imposed in its decision on 28.03.2012 upon Kühne + Nagel International, Schenker, Deutsche Bahn, Panalpina World Transport, Ceva Freight (UK) and EGL3 for their participation in a cartel in the market for international air freight forwarding services. The Commission held that the conduct of the companies between 2002 and 2007 amounted to 4 different cartels: the new export system' (NES) cartel; advanced manifest system' (AMS) cartel; 'currency adjustment factor'

(CAF) cartel and the 'peak season surcharge' (PSS) cartel. *(Press release 01.02.2018)*

## **Philippine Competition Commission fines parties to merger for failure to notify transaction beyond P1-billion threshold.**

On 19.02.2018 the Philippine Competition Commission (PCC) fined Udenna Corporation and KGL Investment Cooperatief U.A. (KGLI Coop) the amount of P19.6 million, for failing to notify PCC of the merger between them even after the transaction met the P1-billion threshold. The Philippine Competition Commission is an independent, quasi-judicial body formed to implement the Philippine Competition Act. It was founded on 27th January, 2016. The Commission found the transaction to be worth USD120 Million, well past the threshold imposed by the authority. "This is a reminder for companies to comply with the Philippine Competition Act, including filing a sufficient notification prior to consummation of a merger that meets the thresholds," PCC said in a statement.

*(Press release 19.02.2018)*

## **CCI fines ITC with a token amount for failure to notify combination relating to trademarks**

Competition Commission of India (CCI) recently imposed a token penalty of INR 5 lakhs (approx. USD 7800) on ITC Limited (ITC) for its failure to notify a combination relating to ITC's acquisition of the trademarks "Savlon" and "Shower to Shower", along with other related assets, from Johnson & Johnson by way of two separate asset purchase agreements entered into on 12 February 2015. The CCI held that trademarks to be assets for the purposes of the Competition Act, 2002 and re-emphasizes that the Indian merger control regime



# **Heard at the BAR**

*Legal news from India and the world*

relates to not only an acquisition of one or more enterprises but also acquisition of control, shares, voting rights or assets of another enterprise. In future, similar transactions relating to acquisition of intellectual property in particular and assets in general may be exempt on account of the MCA Notification. Nonetheless, this case unequivocally establishes that intellectual property rights are assets for the purposes of the Act.

*(Press release 15.01.2018)*

## **European Commission approves Discovery's acquisition of Scripps; rejects referral request by Polish competition authority**

The European Commission on 06.02.2018 has approved, under the EU Merger Regulation, the proposed acquisition of Scripps by Discovery, while rejecting a request from Poland to refer the merger to the Polish competition authority for assessment under Polish competition law. Discovery of the US, is a global media company that provides non-fiction TV shows and documentaries, as well as sports entertainment channels (such as Eurosport), across multiple distribution platforms, including linear platforms such as pay television, free-to-air, and various digital distribution platforms around the world. Scripps of the US, is a global media company providing primarily home, food, travel and other related programming.

*(Press Release 06.02.2018)*

## CCI orders an investigation against Gujarat Energy Transmission Corporation Limited for abuse of dominant position

On 31.01.2018, the Competition Commission of India ('CCI') passed an order, under section 26(1) of the Competition Act, 2002 ('CA02'), and initiated an investigation against State Load Dispatch Centre, GETCO, Gujarat for alleged contravention of sections 4(2)(b)(i), 4(2)(c) and 4(2)(e) of CA02.

As per the details provided in the order, HPCL-Mittal Pipelines Limited ('HMPL'), a company operating in the business related to crude oil receipt, its storage and cross-country transportation, filed the information against Gujarat Energy Transmission Corporation Limited ('OP-1'), an electrical power transmission company in the State of Gujarat, India, State Load Dispatch Centre, GETCO Gujarat ('OP-2'), statutory body constituted under Section 31(1) read with Section 31(2) of Electricity Act, 2003(EA03) and Paschim Gujarat Vij Company Limited ('OP-3'), a company which is one of the 4 electricity 'Distribution Licensees' as defined under Section 2(17), EA03 in the State of Gujarat, alleging, *inter alia*, contravention of the provisions of Section 4 of the CA02.

As per 'Open Access' defined under the EA03 consumers were provided with opportunity to choose amongst a large number of competing power companies (Generator/Distributor) instead of being forced to buy electricity from their existing distribution licensee. As per EA03, large users of power, having connected demand load of 1 megawatt (MW) and above, are eligible to apply for open access so that they are able to purchase cheaper power from a source. HMPL, an industrial consumer of electricity, having a contract demand of 6.7 MW, was an eligible open access consumer and being desirous of taking electricity through an alternative supplier (open access), sought permission of OP-2, on 12 different occasions, but the same was denied on the ground of 'upstream network/system constraint' on 10 occasions and for 'non-submission of undertaking' on 2 occasions. HMPL claimed that because of the anti-competitive conduct of the OPs, it has incurred substantial losses towards purchasing of expensive power from OP-3. HMPL, in the Information, alleged that arbitrary and consistent denial of open access by OP-2 has led to the contravention of Section 4(2)(a)(i) of CA02. Further it was alleged that by denying open access permission to HMPL and other similarly placed consumers/power generators, OP-2 (also OP-1) has limited and restricted production of electricity and the provision of supply of Open Access Electricity, in contravention of Section 4(2)(b)(i) of CA02. Contravention of Section 4(2)(c) was also alleged as consistent denials by OP-2 has led to denial of market access to the HMPL as well as other power generators who can supply to the HMPL through open access. Lastly, it has been alleged that OP-1 has manipulated the downstream distribution market in favor of its sister-concern distribution facility (*i.e.* OP-3) by virtue of being a parent entity for OP-2 and thereby contravened the provisions of Section 4(2)(e) of the CA02.

Before analyzing the main allegations, the CCI dealt with the preliminary issues raised by OP-1 regarding the maintainability of the present case on account of lack of CCI's jurisdiction to entertain the present matter, which, as per OP-1/OP-2, falls under the sole domain of the electricity regulator. Further, OP-2, by relying on the ratio of COMPAT in *Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran Nigam Limited*, stated that the EA03 has its own system of addressing the issue of abuse of dominant position. The CCI considered the issue raised regarding jurisdiction of sectoral regulator and stated that the aforesaid ratio of the Hon'ble erstwhile COMPAT was only with respect to matters pertaining to electricity tariff under the EA03. The CCI relied on the latin maxim of *generalia specialibus non derogant* which suggests that a general statute and a special statute relating to the same subject matter cannot be reconciled, the special statute ordinarily will prevail. The CCI stated that for any competition related matter, the CA02 is a special statute, being the market regulator mandated to promote and regulate competition in the market and it does not appear that the provisions of the CA02 are in any way superseded by the EA03, in the context of the allegations under consideration. For the purposes of discussing the dominant position and abuses the CCI delineated the relevant market as *market for services relating to use of transmission facility for availing open access electricity in the State of Gujarat*. The CCI observed that every consumer desirous of availing open access for supply of electricity in Gujarat has to obtain the approval of OP-2, which is the condition precedent. Thus, considering this statutory compulsion of approaching OP-2 for every open access request, it was apparent that OP-2 holds a dominant position in the relevant market. The CCI stated that contravention of Section 4(2)(a)(i) cannot be made out since in the allegation was that of outright denial of permission, and not of imposition of unfair/discriminatory terms/conditions in the sale of goods or services. Further, the CCI observed that by denying open access permission, to the HMPL and possibly to other consumers, OP-2 appears to have curtailed or discouraged the demand for open access electricity and has limited and restricted production of electricity and the provision of supply of open access electricity in contravention of the provisions of Section 4(2)(b)(i) of CA02. Further the CCI stated that the denial of open access permission to the HMPL has resulted in a violation of Section 4(2)(c) of the Act and stated that OP-2 has leveraged its dominant position in the relevant market to adversely affect the competition in the downstream market, where it is present through its group entity OP-3 thus, contravened the provision of section 4(2)(e) of CA02. Based on the above reasoning, the CCI passed an order under section 26(1) of the CA02. (*Case 39 of 2017*)

### 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

384, Asiad Village  
New Delhi – 110049  
India

+91-11-41081137  
+91-11-26491137

www.kkslawoffices.com  
globalhq@kkslawoffices.com  
operations@kkslawoffices.com  
legal@kkslawoffices.com

