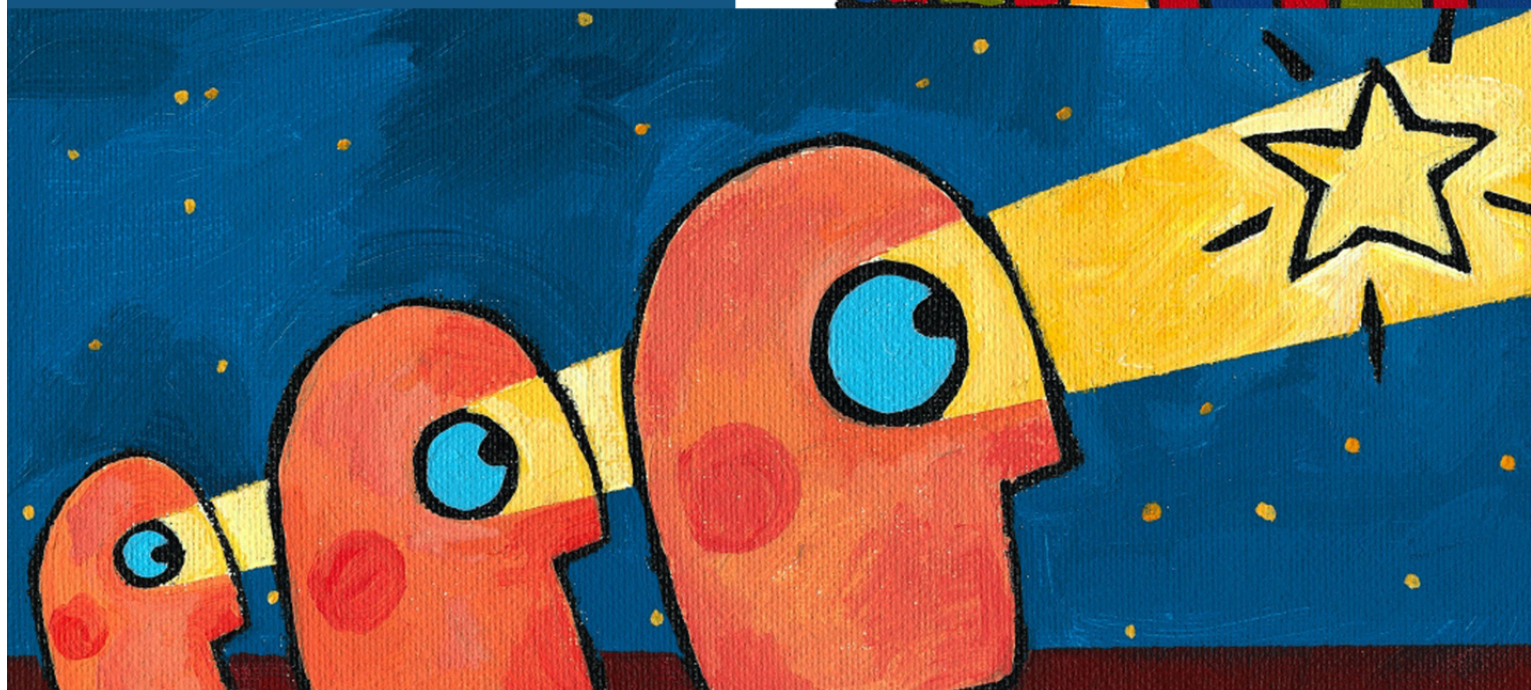


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Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

BETWEEN THE LINES

CCI directs DG to cause investigation into The Esaote Group's alleged abuse of dominant position

In a common order dated 23rd August 2016, the CCI directed the DG to initiate the investigation filed by House of Diagnostics pertaining to alleged abuse of dominant position by the medical diagnostic systems producing company.

HEARD AT THE BAR

Google under Investigation by South Korea's Competition Authority

CMA Looks into VTech and LeapFrog Merger

FAS to Investigate Cartel Agreement in Russian's Domestic Pharmaceutical Market



CCI directs the DG to cause an investigation in the ‘market for dedicated tilting MRI machines in India’ against The Esaote Group’s alleged abuse of dominant position

The Competition Commission of India (“CCI”/“Commission”), on 23.08.2016, passed a common order under Section 26(1) directing the Director General (DG) to cause an investigation into the alleged anti-competitive conduct of Esaote Asia Pacific Diagnostic (Esaote) against the information filed by House of Diagnostics (HOD). The allegations were made in relation to contravention of the provisions of Section 3 and 4 of the Act. The Commission was, prima facie, of the opinion that there exists a contravention of Section 4 of the Act by Esaote, whereas the allegation of contravention of Section 3 of the Act was rejected by the Commission and, thereafter, the Commission directed the DG to cause an investigation into the matter.

The allegations made by HOD were relating to the purchase of three dedicated standing/ tilting MRI machines. HOD alleged that the Esaote group has given an exclusive right to its subsidiary working in the territory of India for servicing the machines and providing after sale support services and thus resulting in the creation of monopoly in the provision of ‘after sale services’ for the upkeep of the machines. Such an action taken up by Esaote has led to users of these machines getting exploited and they are compelled to spend huge amounts of money for spares and services. They further alleged that the Esaote entered into an agreement with another Delhi based diagnostic centre and leveraged from its manufacturing unit position to a service providing unit. As a result, it became difficult for the HOD to compete with Esaote as they can provide the same services to the consumers at a much lower costs.

Esaote was alleged to be misusing its dominant position by refusing to perform its obligations under the contract and has unilaterally changed the essential terms of the contract which has had a major impact on the business of HOD. Further allegations made against Esaote pertained to failure in providing brand new machines as per the purchase order and supplying machines having defects and not able to give the best image results. Esaote had also agreed to provide light weight perforated ‘See Through R.F. Cage’ (PTC) to be manufactured by it, but failed to provide the same and outsourced it to M/S ETS-Lindgren, which did not have the requisite skill to manufacture PTC.

In order to determine the alleged abuse of dominant position by Esaote, the Commission first determined the relevant market and thereafter went on to examine if Esaote was a dominant player in the relevant market or not. The Commission observed that the case relates to ‘standing/tilting MRI machines’ manufactured by Esaote. The machine was unique in nature and had no substitute available in the market. Hence, based on the above reasoning, the Commission held the relevant product market to be the ‘*market for dedicated tilting MRI machines*’. Further, with regard to the relevant geographic market, the Commission considered the location of the product in question, the existence of national distribution networks, the need for technical support and maintenance services and the legal framework. Therefore, based on these parameters, the relevant geographic market was held to be the whole territory of India. Hence, the Commission considered the relevant market in this case to be ‘*market for dedicated tilting MRI machines in India*’.

Further, the Commission observed that Esaote had held 100% capital of its subsidiary in India. Thus, they were held belonging to the same group in terms of Explanation (b) to Section 5 of the Act. Further, Esaote was the only supplier of the dedicated tilting MRI machines in India having 100% market share in the relevant market and therefore, the Commission, prima facie, held that Esaote is in a dominant position in the relevant market.

The next step for CCI was to examine the alleged abusive conduct and the Commission observed, “*being a dominant player in the relevant market, Esaote Group has not acted as per the agreed terms of the contract and changed the terms and conditions of contract unilaterally to the detriment of the consumers*”. Esaote failed to provide ‘after sale service’ to HOD even after receiving money. This conduct emanating from an enterprise in a dominant position in the relevant market, prima facie, amounted to imposition of unfair conditions on the HOD, the Commission held.

Thus, the CCI deemed it fit to direct the case for investigation by the DG under Section 26(1) of the Act.

(Source- Case No. 09 of 2016)

Google Under Investigation by South Korea's Competition Agency

Korean Fair Trade Commission(KFTC) has officially confirmed its scrutiny of the Mountain View, California based search engine company. The local reports suggest that the scope of investigations pertains to the pre-installing of Google apps on smartphones powered by Google android operating systems. Several media reports also suggests that the KFTC is looking into Google's advertising policy, after Korean advertising agents had filed a complaint to the KFTC relating to non payment of commission for online advertising.

However, in 2013, the KFTC had already cleared Google of any wrongdoing pertaining to anti-competitive practices in the local search engine market. It is still not clear whether this probe will lead the KFTC to press any formal charges or not but this situation certainly is not a good news for Google. Recently Google was charged with a penalty of \$6.8 million by the Federal Antimonopoly Service of the Russian Federation and faces several antitrust charges in the European Union. Thus, Korea adds to the growing number of jurisdictions currently investigating whether Google is abusing its dominant position in the market to muscle its rivals out. Google itself has had a tendency to underplay these scrutinies and has depicted itself as , to a great extent, the victim of unwarranted allegations by envious competitors.

FAS to Investigate Cartel Agreement in Russian's Domestic Pharmaceutical Market

Andrey Tenishev, head of the department of fight against cartels of

Antimonopoly Services (FAS), the regulatory body is planning to start an investigation against few foreign pharmaceutical manufacturers operating in the Russian pharmaceutical market.

The preliminary investigation suggests that the drug manufacturers were involved in price fixing by coming into an informal agreement for drugs supplied to Russian hospitals on the pre-fixed limit on prices. It is also a matter of suspicion that the manufacturers involved were able to coordinate prices of the state sanctioned tenders for supply of drugs for state requirements. The names of the company haven't been disclosed due to secrecy of the investigations. Mr. Tenishev also mentioned, the price of the pharmaceuticals will decrease by 15%-30% if the alleged companies stop themselves engaging in cartel agreements during public procurement.

CMA Looks Into VTech and LeapFrog Merger

VTech and LeapFrog, two of the world's leading manufacturer of children's toy brands are facing a scrutiny before the Competition and Markets Authority (CMA) , of UK, following their proposed \$72m merger in April. According to CMA, their merger could lead to "substantial lessening of competition". The initial investigation reveals that both the companies are dealing with closely related products in the market and there are very few other competitors present in the market.

Kate Collyer, Deputy Chief Economic Advisor and decision maker in this case, said, "*VTech and LeapFrog are 2 of the largest and best known brands*



Heard at the BAR

Legal news from India and the world

supplying electronic toys and learning products for children. Retailers see them as close rivals and rely on competition between the companies to keep prices down".

The investigation also revealed that in a scenario where no merger would have been taking place, both the companies would have been close competitors in the supply of their manufactured products.

"We are concerned that the merger could lead to prices rising, the quality of products going downhill or the range on offer being reduced" said Kate Collyer.

VTech was asked to make their submission regarding the concerns held by CMA over reduced market competition by 25th August. In case CMA declines the submissions made by VTech , CMA will move onto the "Phase II" of the investigation in order to make in-depth analysis of the proposed merger.

(Source- CMA)

Merger of Equals May Lead to Dominance in the Relevant Market: A \$130 billion merger in making

The European Union's antitrust regulator in August opened an in-depth investigation of the proposed merger between Dow Chemical Co. And DuPont Co., which might end up requiring the companies to make some serious concessions in order to facilitate their blockbuster deal.

Dow and DuPont notified about their transaction to the European Commission (EC) on 22 June 2016 and later on 20 July 2016, they submitted a package of concessions to the European Union antitrust regulator. However, in a press release, dated 11 August 2016, the EC declined to accept the terms of the concessions submitted by Dow and DuPont, thus strongly suggesting that an in-depth enquiry in the companies' plan to merge very much appears to be a possibility.

Commissioner Margrethe Vestager, in charge of competition policy in EU, said: *"The livelihood of farmers depends on access to seeds and crop protection at competitive prices. We need to make sure that the proposed merger does not lead to higher prices or less innovation for these products."*

Under Article 1 of the merger regulation, the EC has the duty investigate mergers that involve companies with a turnover above a certain thresholds, in order to prevent combinations that would significantly impede the effective competition in the market.

The EC's decision to probe an in-depth investigation seeks to assess whether the proposed deal would reduce competition in areas such as seeds, petrochemicals and crop protection. The following deal would lead to world's largest integrated crop protection and seeds company. It would unite two competitors with similar kind of products, such as herbicides and pesticides, plus with a solid reputation of bringing innovative crop protection and seeds product to the market. The merger will take place in an industry which is already globally quite concentrated.

The primary concern of EC relating to the proposed merger is that the merger could lead to possible distortion of competition in the market of products that helps in crop protection, such as herbicides and pesticides. Further, the merger might lead to reduction of innovation in the field of crop protection as a whole.

However, the proposed merger is seemingly attracting a lot of positive reviews as well, The National Corn Growers Association said, *"the Dow-DuPont merger will lead to increased concentration in the corn seed market, but will also create a competitor that is large and powerful enough to take on industry leader Monsanto in seeds and Syngenta and Bayer in crop protection"*.

Until very recently, China's largest chemical company, ChemChina, offered \$43 billion to take over Swiss agrochemicals company Syngenta. Monsanto has also been discussion an acquisition of Bayer and BASF's crop units. Such huge mergers could lead to reduction in the number of big biotechnology players in the US from six to as few as 3-4. Hence, the question around which the EU needs to work around is whether such a huge M&A would lead to distortion of the competition in the agrochemical sector in its wake.

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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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