L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

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Competition & Antitrust

Lakshmikumaran & Sridharan attorneys

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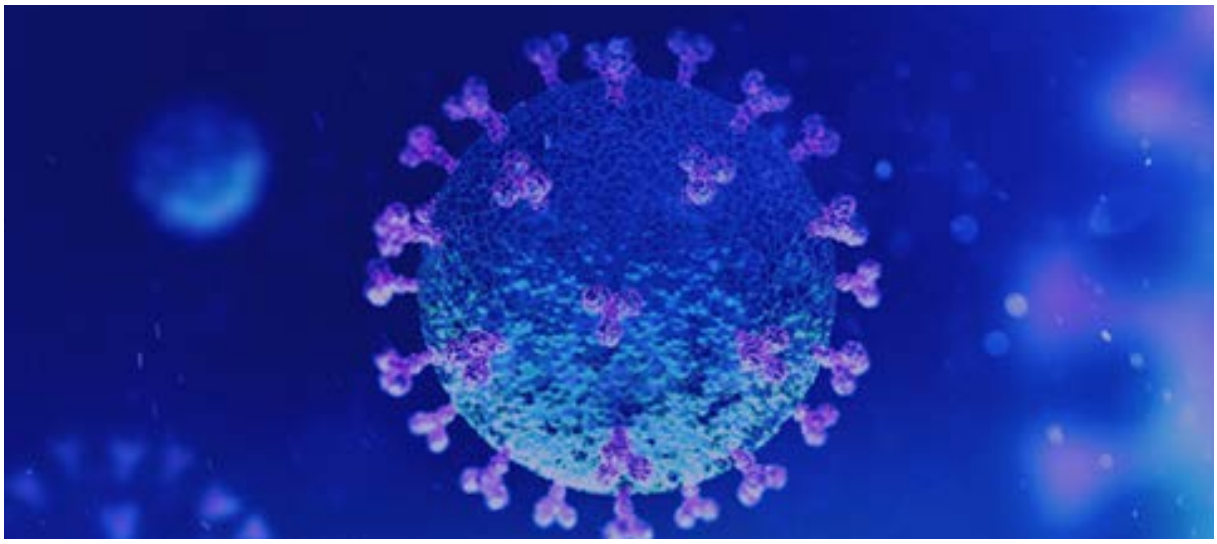
This newsletter is authored by the Competition & Antitrust team at Lakshmikumaran & Sridharan. It includes original articles and research pieces on competition law. It also reviews recent case laws and details regulatory as well as news updates on the subject.

ARTICLES



Competition Law in the time of COVID-19

Businesses across the world have been impacted by the global pandemic, COVID–19 and state measures have brought many economies to a standstill. It is inevitable that the next few months are going to present new challenges to businesses. While certain industries such as airlines, entertainment, hotels etc. will struggle to get back on their feet, essential commodities, pharmaceuticals and healthcare providers will be strained with unprecedented demand. "We are all in this together" is the message resonating across the world in the fight against the pandemic. To overcome the impending economic slump and to control demand or prices, competing businesses may also be tempted to adopt this approach. However, this approach is antithetical to the core principle of competition law – that competitors must act independently.

READ MORE

Competition Law at the NCLAT: A Three Year Round-up

The Finance Act, 2017 brought appeals filed against the orders of the Competition Commission of India (**"CCI"**) under the Competition Act, 2002 within the purview of the National Company Law Appellate Tribunal (**"NCLAT"**). Earlier last month, the first chairman of the NCLAT (post the merger of tribunals) retired and this article aims to encapsulate the competition law jurisprudence that was evolved by the NCLAT during his term. It looks at seminal cases such as the Cement Cartel case, NCLAT's recent direction to investigate Flipkart for abuse of dominant position, abuse of dominance in the gas sector by Adani Gas Limited, among others. The differences in the approach adopted by the erstwhile Competition Appellate Tribunal (**"COMPAT"**) and the NCLAT in the last three years are also highlighted.

READ MORE

RATIO DECIDENDI

Grasim Industries fined INR 302 crore for abusing its dominant position in the market for Viscose Staple Fiber ("VSF") by the CCI

KEY POINTS

A dominant entity has a special and differential obligation and ought to behave as a responsible corporate citizen. Discriminatory prices for similarly placed customers without any objective justification, opaque discount policy and supplementary conditions for purchase by a dominant entity demonstrate abusive and unilateral actions.

BRIEF FACTS

The CCI received an information that Grasim Industries (**"Grasim"**) which is the sole manufacturer of VSF in India had engaged in arbitrary, discriminatory and abusive practices to restrict the supply of VSF, determine its price and control the market in its own favour. The following allegations were made out against Grasim; that -

(i) it charges dissimilar rates for customers in the domestic and foreign markets;
(ii) even amongst the domestic customers, the prices charged are dissimilar and not based on any objective criteria;
(iii) the discount policy is non-transparent, arbitrary and based on providing evidence of production by the customers;
(iv) while Grasim was instrumental in the imposition of anti-dumping duties on Chinese VSF manufacturers, it procures VSF from its group companies in Thailand and Indonesia; and
(v) Grasim sells VSF in the international market at much lower prices – limiting the ability of domestic yarn producers to compete in such markets.

OBSERVATIONS OF THE CCI

What is the relevant market for the purposes of assessing Grasim's dominance?

Held: The CCI held that the relevant market is *"the market for supply of VSF to*

spinners in India". The Director General (**"DG"**) and the CCI considered factors such as price, demand side substitutability, consumer preference, and physical characteristics to arrive at this definition.

Whether Grasim is a dominant entity in the relevant market for supply of VSF to spinners in India?

Held: Upon analysis of the market share of Grasim between 2012 and 2017, it was concluded that it was consistently above 87% and the remaining 7-13% demand was fulfilled by imports. Further, given the anti-dumping duties imposed on imported VSF, procuring VSF from international suppliers was not a viable option for the spinners. Accordingly, Grasim enjoyed such a position of strength in the market that it could easily operate independent of competitive forces in the relevant market and therefore is a dominant entity in the relevant market.

Whether Grasim abused its dominant position in the relevant market?

Held: Grasim was found to charge different base rate from different customers without any objective justification. Further, the base rate charged was more for larger quantities as compared to lesser quantities, resulting in comparative disadvantage to the bigger buyers and a distortion of the market. Additionally, Grasim's discount policy was opaque and discriminatory. The CCI also found that Grasim sought details regarding production and export to prevent the resale and trading of its products and thereby hindering the emergence of an alternate source of competition in the market. In view of the above, the CCI found Grasim to be in violation of the Competition Act, 2002 (**"Competition Act"**).

JUDGEMENT

The CCI directed Grasim to cease and desist such practices and imposed a penalty of INR 301.61 crore on Grasim – amounting to 5% of the average relevant turnover for three financial years. *[In re: XYZ* v. *Association of Manmade Fiber Industry of India & Ors.* Case No. 62 of 2016, Judgement dated March 16, 2020*]*

The CCI cannot take retrospective action under the Competition Act. NCLAT upholds CCI order, rejecting allegation of abuse of dominance by SFK India Limited ("SFK"), in the market for industrial bearings.

KEY POINTS

Given that the conduct related to a period prior to May 20, 2009, the CCI had no jurisdiction to investigation. Further, during the concerned period, none of the players in the relevant market enjoyed a position of strength for a long duration. Even thereafter, in 2015-16, domestic production of bearings accounted for 51.26% and imports accounted for around 44.8%. This indicated that imports were a competitive constraint on the domestic manufacturers and that the market for industrial bearings was fragmented in nature. Therefore, SFK did not enjoy a position of strength.

BRIEF FACTS

It was alleged that between 2004 to 2006, SFK made several false assurances to the Asmi Metal Products Pvt. Ltd. (**"Asmi"**), *inter alia*, asking it to upgrade its plant to get assured business along with monetary incentives. However, SFK allegedly back-tracked from its commitments which resulted in heavy losses to Asmi. It was also alleged that the clause in the memorandum of understanding which stated that SFK would not be responsible for any kind of losses or damages caused to Asmi amounted to abuse of dominant position.

The CCI noticed that a majority of the alleged instances of abuse of dominance stated by Asmi took place prior to the year 2009 and, therefore, did not fall within the purview of the Competition Act, relevant provisions of which came into effect only in May 2009. Further, the CCI held that as per 'relevant market', SKF could not be held to be dominant and therefore the question of abuse would not arise.

OBSERVATIONS OF THE NCLAT

Whether CCI was correct in observing that allegations prior to May 2009 could not be taken into consideration?

Held: CCI was correct in observing a settled position that allegations and abuse relating to the period prior to May 2009 i.e., before the Competition Act came into force, cannot be taken into consideration by the CCI in holding that an entity had abused its dominant position and contravened Section 4 of the Competition Act.

Whether CCI was correct in holding that the respondent was not in a dominant position in the relevant market?

Held: After examining all the information produced before CCI, it was held that CCI had correctly concluded that none of the top three players (on the basis of market share) could be said to enjoy a dominant position of strength for a long period in the relevant market for industrial bearings, and that the market is fragmented in nature. Since the parties were not in a dominant position, the question of abuse of dominance would not arise.

JUDGEMENT

Asmi had not been able to establish a case for interfering with the impugned order of CCI and therefore, the appeal was dismissed and the order of CCI dismissing the information was upheld. *[Asmi Metal Products Pvt. Ltd.* v. *SFK India Limited & Anr.,* Competition Appeal (AT) No. 27 of 2018, Judgement dated March 12, 2020*]*

CCI orders pharma companies – Alkem Laboratories ("Alkem") and McLeod's Pharmaceuticals ("McLeod's") and trade association to cease and desist from indulging in anti-competitive business practices.

KEY POINTS

The CCI recognised that there is rarely any direct evidence of action in cases involving concerted action. It is normal for agreements relating to such activities to be entered into in a clandestine manner. In such situations, the evidence is limited, fragmentary and sparse. Hence, it is necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement has to be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an anti-competitive agreement.

BRIEF FACTS

Multiple informations were filed by various informants against the Bengal Chemists and Druggists Association (**"BCDA"**), Alkem and McLeod's (together referred to as Opposite Parties (**"OPs"**) alleging that they were engaged in several anti-competitive activities such as mandating Product Availability Information (**"PAI"**) and Stock Availability Information (**"SAI"**).

BCDA forced its stockists to obtain no-objection certificates (**"NoC"**) before procuring any supplies from pharmaceutical companies. Such NoC was available at the cost of illegal donations which were collected through BCDA's district committees. Similarly, promotion cum distributor agents of pharma companies had to obtain PAI from BCDA after paying money to the association in the form of donations to start marketing drugs of their respective pharma companies in West Bengal.

Further, pharmaceutical companies such as Alkem and McLeod's who were also the office bearers of BCDA assisted BCDA in enforcing such conditions.

During investigation, DG found that BCDA was limiting and controlling the supply of drugs in the state by making it mandatory for all stockists to obtain the NoC.

OBSERVATIONS OF THE CCI

Whether CCI could have heard the matter in the absence of a judicial member?

Held: The Hon'ble Delhi High Court (**"HC"**) has stressed upon the need of having a judicial member present in the commission at the time of final hearings. However, the HC has also clarified that the functioning of the CCI cannot be interdicted till a judicial member is appointed. Therefore, absence of a judicial member will not bar the CCI from passing the said order.

Whether the Ops and their respective officials had engaged in a conduct violative of Section 3 of the Competition Act?

Held: CCI examined the evidence collected by the DG, such as the various instances where BCDA had issued SAI letters to prospective stockists and further, even made inquiries from such stockists. Based on such inquiries, CCI found that Alkem and Macleods would only supply their drugs to potential stockists after they had been issued SAI by BCDA. Based on examination of the evidence thus collected, CCI drew the conclusion that BDCA, its District Committees of Murshidabad and Burdwan and the pharmaceutical companies Alkem and Macleod's are guilty of violating the provisions of Section 3 (3) (b) read with Section 3 (1) of the Competition Act. The CCI also held multiple officials of BCDA, Alkem and Macleods liable in terms of Section 48 of the Competition Act.

●●●

JUDGEMENT

The CCI directed the OPs and their office bearers and officials – who were responsible for their conduct, to cease and desist in future from indulging in practices in contravention of the provisions of Section 3 of the Competition Act. The CCI refrained from imposing a penalty on the OPs because of certain mitigating factors: (a) BCDA -as the measures had been adopted by BCDA to end such practices; and (b) Alkem and McLeod's – since they pleaded that they were acting under duress/direction from the BCDA. The CCI also mandated that BCDA conducts advocacy programs to educate its district committees and office bearers and offered to also make available its own resources for such an outreach program. *[Shri Suprabhat Roy, Proprietor, M/s Suman Distributors, Murshidabad* v. *Shri Saiful Islam Biswas, District Secretary of Murshidabad District Committee of Bengal Chemists and Druggists Association & Ors.* CCI Case No. 36 of 2015 and connected matters, Judgment dated March 12, 2020*]*

NCLAT upholds CCI's orders against Verifone for abuse of dominance in the market for Point of Sale ("POS") terminals and Electronic Ticketing Machines ("ETM") in India.

KEY POINTS

Verifone abused its position of dominance in the market for POS and ETM by imposing restrictive conditions within the agreements for the Software Development Kit (**"SDK"**) provided with the POS terminals and ETMs. This forced buyers to avail value added services for the customization of POS terminals and ETMs solely from Verifone, thereby foreclosing the market from Value Added Service (**"VAS"**) providers. NCLAT found that CCI had correctly held that, with an 80% share in the relevant market for POS terminals and ETMs, such restrictive conditions by Verifone led to abuse of its dominant position in violation of Sections 4(2)(a)(i), 4(2)(b)(i) and 4(2)(e) of the Competition Act.

BRIEF FACTS

Verifone, is a supplier of POS terminals, its core applications and SDK. Such POS terminals are used by banks/retail outlets or third-party processors acting on behalf of banks and developing and integrating VAS into the POS terminals. Verifone in 2012 imposed certain restrictive conditions without any business justification in its SDK agreement and made the same non-negotiable. This act on the part of Verifone allegedly foreclosed the market for VAS, restricted technological development in the VAS market and resulted in Verifone abusing its dominance in the POS terminal market to dominate the market for VAS as alleged by Atos Worldline. A similar allegation was levelled in relation to the SDK agreement for use of ETM.

Verifone contended that the SDK agreement was a draft agreement and as such not in force.

The CCI held Verifone in violation of the abuse of dominance provisions under the Competition Act, as a result of its dominant position in the market (80% market share, size, resources and economic power, dependence of consumers on the appellant) and the abusive conduct resulting from the restrictive and arbitrary conditions in its SDK agreements with its customers.

Accordingly, in the case of Atos Worldline, CCI imposed a penalty @ 5% of turnover, amounting to INR 4,48,40,236. Whereas, in the case of Three D Integrated Solutions, it took a lenient view since a penalty had already been imposed in the earlier decision.

Further, the CCI directed Verifone's officials to file their income statements/income tax returns, with the view of passing an order on the same at a separate occasion.

OBSERVATIONS OF THE NCLAT

Whether CCI was correct in holding that the impugned agreement was in force and acted upon by the parties and not merely a draft agreement as contended by Verifone?

Held: NCLAT accepted the view taken by CCI that the agreement was not merely a draft agreement in view of the language used in the agreement, and the subsequent communication between the parties, wherein Verifone had informed Atos Worldline and Three D Integrated Solutions that the agreement was non-negotiable and had practically asked them to sign on the agreement.

Whether CCI was correct in holding that Verifone had abused its dominant position in the relevant market?

Held: Verifone was dominant in the markets for POS terminals and ETM and held such position of strength in the relevant market during the period of investigation. Verifone abused its dominant position in the market by forcing the informant and other parties to sign the impugned SDK agreements, which were meant to restrict service providers from entering the relevant market. These agreements were not as per the prevailing norms entered into by other parties in the relevant market and were a clear abuse of dominance by Verifone.

JUDGEMENT

The NCLAT found no reason to interfere with the judgements in both the cases and upheld the findings of the CCI as well as the penalty imposed. *[Verifone India Sales Pvt. Ltd.* v. *CCI & Atos Worldline India Pvt. Ltd.*, TA (AT) (Competition) No. 01 of 2017, Judgement dated March 13, 2020]

NCLAT upholds CCI's orders against the Association of Malayalam Movie Artists ("AMMA"), the Film Employees Federation of Kerala ("FEFKA"), FEFKA Director's Union, FEFKA Production Executive's Union and a few of their executives for violating provisions of Section 3 of the Competition Act.

KEY POINTS

While there was no explicit agreement produced before CCI showing concerted actions by AMMA and FEFKA to ban Malayalam Artists and Cine Technicians Association' (**"MACTA"**) Federation, the CCI relied upon documents, witness-statements and market analysis to show that AMMA and FEFKA had acted in concert and forced artists, technicians and producers to refuse working with MACTA Federation.

BRIEF FACTS

The MACTA Federation started an initiative called 'cinema forum' which envisaged collaboration between film makers and distributors to make low budget movies with new actors. AMMA and its prominent members/actors used their clout to reduce the strength of MACTA Federation and forced its members to split and form an alternative association by the name FEFKA.

MACTA alleged that AMMA and FEFKA violated Section 3(3) of the Competition Act, by forcing various actors, technicians, producers and financiers to not work or associate with MACTA. Parties not complying with the requests of AMMA and FEFKA were threatened with show-cause notices and bans.

It was further alleged that AMMA and FEFKA sought to control the Malayalam film industry by virtue of their dominant position in the market, which was abused by them within the meaning of Section 4 of the Competition Act.

CCI relied on various evidence collected by the DG, such as statements by informants and witnesses and took note of the different occasions on which artists removed themselves or were removed from a film at the request of AMMA and FEFKA, therefore, came to the conclusion that AMMA and FEFKA had acted in concert to prevent MACTA from working in the Malayalam film industry, which was in violation of Section 3 of the Competition Act.

OBSERVATIONS OF THE NCLAT

Whether the actions of AMMA and FEFKA have caused an adverse effect on MACTA?

Held: As long as there is evidence to suggest the existence of an anti-competitive agreement, there is a presumption that it has had an 'appreciable adverse effect on competition'. Therefore, there was no need to establish any adverse effect on MACTA.

The DG has not included the complete minutes of the meetings produced before it by the parties. Whether this would amount to the DG prejudging the issue?

Held: The DG's report is supposed to contain all the evidence, documents, statements and analysis produced before it. However, in the present case, the omission of the entire minutes for the relevant extracts was inconsequential and did not cause any prejudice.

Whether the appellant is correct in contending that CCI has merely relied on the observations made by the DG and not examined the evidence collected to reach its own conclusion?

Held: NCLAT took into consideration the entirety of the record placed before CCI, including statements of multiple witnesses demonstrating the concerted actions of AMMA and FEFKA and the impact that it had on the informant and the artists who did not comply with the wishes of AMMA and FEFKA. After examining the entire record, NCLAT accepted that the DG and CCI had come to a definite conclusion that AMMA and FEFKA had indulged in anti-competitive conduct in violation of Section 3 of the Competition Act.

JUDGEMENT

CCI relied on a large amount of evidence to come to a definite conclusion, holding AMMA, FEFKA, FEFKA Director's Union, FEFKA Production Executive's Union and their respective office bearers liable under Section 48 of the Competition Act. Accordingly, NCLAT found no reason to interfere with the judgement and the appeal was dismissed. *[Association of Malayalam Movie Artists.* v. *Competition Commission of India & Ors.,* Competition Appeal (AT) No. 05 of 2017, Judgement dated March 13, 2020]

NOTIFICATION

Exemption from CCI notification to banks under moratorium

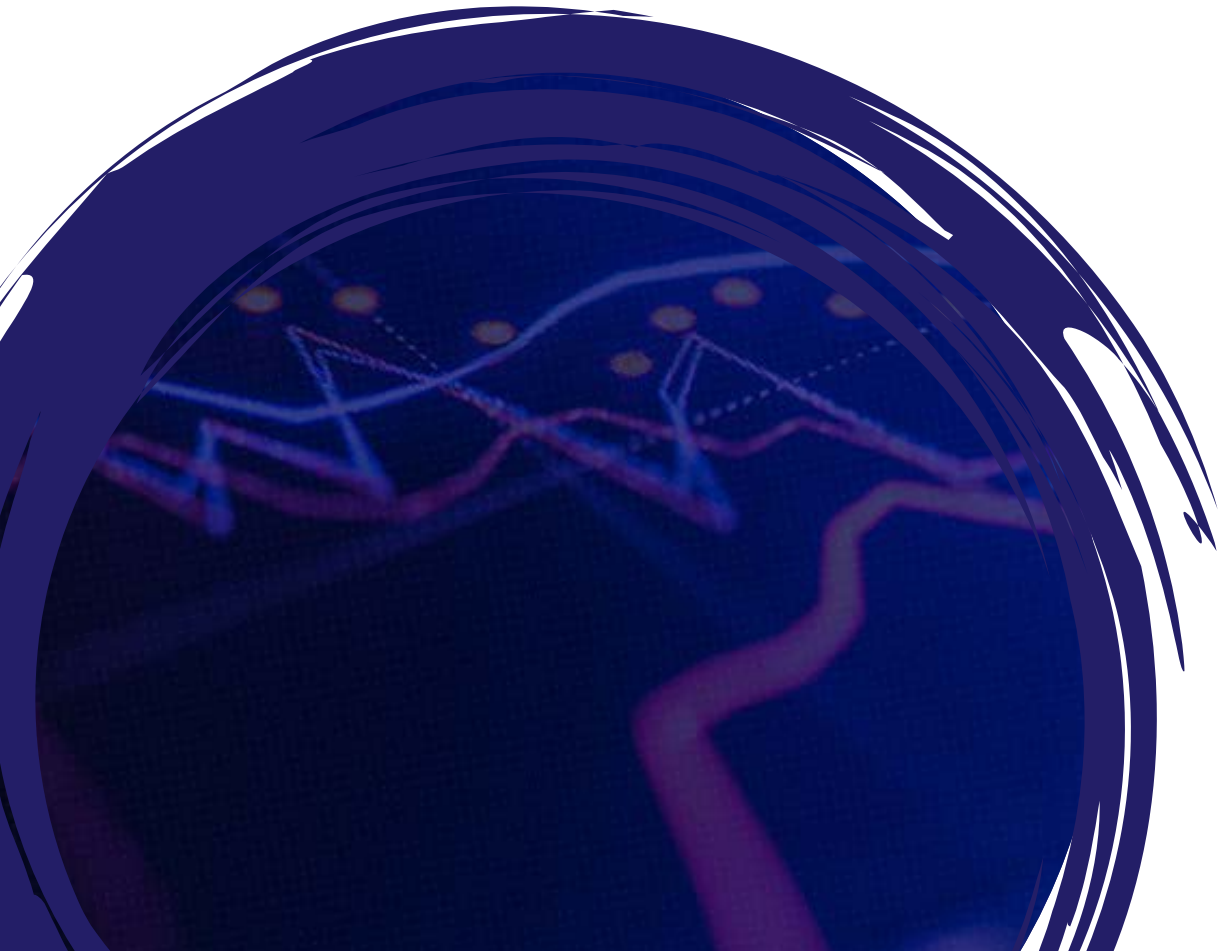
The Ministry of Corporate Affairs (**"MCA"**) by way of its notification dated March 11, 2020 [F. No. Comp – 05/06/2020 – Comp – MCA] has exempted banks placed under moratorium under Section 45 of the *Banking Regulation Act, 1949* from the application of the merger control provisions of the Competition Act. This exemption will continue to stay in force for a period of 5 years.

Earlier, the MCA had granted a similar exemption to regional rural banks and nationalised banks.

The immediate beneficiary of the above exemption will be the currently distressed private lender Yes Bank, which is proposed to be bailed out by the State Bank of India.

AVAILABLE AT:

http://www.mca.gov.in/Ministry/pdf/BankingNotification_11032020.pdf



NEWS

The French antitrust regulator levies its highest ever fine of USD 1.2 billion for anti-competitive behavior by Apple

On March 16, 2020, the French competition authority (*Autorité de la Concurrence*) found Apple guilty of engaging in anti-competitive behavior towards its distribution and retail network in the electronics sector. The regulator held that Apple had unfairly divided products and customers between two wholesalers, Tech Data and Ingram Micro. The regulator also held that Apple had abused its broad economic power over other firms by making its wholesalers charge the same prices for products offered in Apple's own retail stores. Therefore, the regulator found Apple guilty of antitrust infringements involving restriction of intra-brand competition, resale price maintenance and the rarely-used French law concept of abuse of economic dependency. Tech Data and Ingram Micro were also fined EUR 76 million and EUR 63 million respectively. In an official statement, Apple said that it was considering an appeal against the watchdog's ruling which "relates to practices from over a decade ago".

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Charanya has over a decade of experience working in the fields of intellectual property, taxation and regulatory litigation. She is an Advocate-on-Record designated by the Supreme Court and was a former associate in the chambers of the Attorney General of India. Charanya regularly appears before the Supreme Court and focuses on competition and regulatory litigation before the NCLT and the NCLAT.

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Neelambera advises on the full range of competition law matters including cartel enforcement, abuse of dominance, leniency applications, merger control, audits and compliance. She appears before the CCI, NCLAT and various High Courts. Neelambera has represented clients in high-profile, precedent setting behavioral cases (Cement Cartel case) and advised on complex M&A transactions. She has previously worked at the WTO in Geneva.

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Badri specialises in Corporate, Competition and Regulatory matters. He is qualified to practice as a lawyer in India and New York. He advises on various issues involving consortiums and joint ventures such as contract manufacturing scenarios, valuation, secondment, royalties and license fee arrangements. He has represented parties before various fora in tax and commercial disputes. He practiced as a patent attorney in the United States before moving to L&S.

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Aditya has worked with L&S since 2010 and regularly appears before the Supreme Court of India, various High Courts, the Competition Commission, NCLT and the NCLAT. His practice is focused on litigation emanating from the manufacturing sector, including matters of taxation, competition and regulatory issues.

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