

## Penalising Google for Anti-competitive Behaviour: Domino Effect

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Google has been hauled by India's competition watchdog. So, what happened and what lies ahead : read on.

The Competition Commission of India ("CCI") has imposed a [penalty of INR 936.44 Crore](#) (Equivalent of USD 110 million approximately) upon Alphabet Inc., Google LLC, Google Ireland Limited, Google India Private Limited and Google India Digital Services Private Limited (jointly referred to as "Google"), by its order dated 25<sup>th</sup> October 2022, for violating [Section 4](#) of the Competition Act, 2002 ("Act").

### What is Section 4:

Section 4 of the Act provides for prohibition of abuse of dominant position. That no enterprise or group shall abuse its dominant position. There are two important elements:

- (i) There must be a dominant position; and
- (ii) There is abuse of the dominant position.

The dominant position can be determined in the context of the relevant market and on the basis of any of the thirteen factors enlisted under clauses (a) to (m) of section 19(4)[\[1\]](#) of the Act.

The abuse of dominant position impedes fair competition between the enterprises / firms, exploits consumers, and makes it difficult for other players to compete with the dominant enterprise on merit.

### Brief factual background:

Certain consumers of android-based smartphones had filed information before the CCI against Google, alleging abuse of dominant position, in the following relevant markets:

- (i) market for licensable mobile OS for smart mobile devices;
- (ii) market for app stores for Android OS; and
- (iii) market for apps facilitating payment through Unified Payments Interface ("UPI"), a means of making payments using mobile devices.

From the order, it appears that CCI took into account the market dynamics in licensable mobile operating system in India and submission of various third parties like Apple, Xiaomi, Amazon, Samsung, Vivo, PhonePe *inter alia*, and observed the below:

### Findings and Conclusions of CCI:

#### **1) Market for licensable OS for smart mobile devices in India**

(a) Google's Android OS had successfully reaped the indirect network effects that characterize the market of operating systems, which essentially are multi-sided platforms. With its large user base, Android OS is the most preferred licensable OS for app developers and with a large universe of apps developed for the platform, it is the most valued licensable operating system for any new smartphone manufacturers/ Original Equipment Manufacturers ("OEM");

(b) All relevant factors that define competition landscape indicated that the relevant market of licensable mobile operating systems in India has tipped in favour of Google Android OS; and

(c) CCI concluded that Android OS and thereby, Google, enjoys a dominant position in the relevant market of licensable operating systems for smart mobile devices in India.

#### **2) Market for app stores for Android OS in India**

(a) Play Store is by far the most important app marketplace on the Android ecosystem, especially from the point of view of smart mobile device users who consider this as a 'must have' app;

(b) The dominance of Play Store *inter alia* stems from the strong indirect network effects that work in its favour, with its large user base on one side and a large number of app developers on the other side. Further, the app developers depend on Play Store to gain access to these users and maximise their reach and revenue potential; and

(c) CCI concluded that these factors, in conjunction with Play Store's automatic update functionalities, its close integration with Google Play Services, lack of substitutability between android app store and other OS app stores, and high entry barriers lead to a reasonable conclusion that Google Play Store occupies a dominant position in the relevant market of app stores for Android OS in India.

#### **3) Market for apps facilitating payments through UPI in India**

(a) The competitive advantage secured by Google for its UPI app is evidenced from the fact that Google Pay UPI app has a higher market share than PhonePe in the UPI transactions on Play Store as compared to overall UPI market where PhonePe has a higher market presence. Thus, the market outcome has evidenced the effect of the conduct on the part of; and

(b) The Investigation confirms the discriminatory treatment that is meted out by Google to its competing UPI apps for making payments on Play Store and its distortionary implications for competition within Play Store, which is the largest app marketplace on Android ecosystem.

**4)** CCI found Google to have abused its dominant position in contravention of the provisions of Sections 4(2)(a)(i)<sup>[2]</sup>, 4(2)(c)<sup>[3]</sup> and 4(2)(e)<sup>[4]</sup> of the Act and *inter alia* directed it to cease and desist from indulging in anti-competitive practices.

CCI observed that anti-competitive clauses of different policies of Google, as identified, shall not be enforced by Google, with immediate effect. Google has been allowed three months' time from the date of receipt of this order, to implement necessary changes in its practices and/or modify the applicable agreements/ policies and to submit a compliance report to the Commission in this regard.

#### **The after-effects:**

The Government of India and the Alliance of Digital India Foundation, a group of 350 start-ups, founders and investors, have lauded the CCI Order.

Google has issued a statement stating that *"Android has created more choices for everyone and supports thousands of successful businesses in India and around the world. The CCI's decision is a major setback for Indian consumers and businesses, opening serious security risks for Indians who trust Android's security features and raising the cost of mobile devices for Indians."*

Following the order, Google has also paused enforcement of the requirement for developers to use Google Play's billing system for the purchase of digital goods and services for transactions by users in India, while it reviews legal options and evaluates the next steps.

The order of the CCI is just the most recent regulatory attention that Google has faced. Prior to this, it has already faced inquiries in the US, EU, Indonesia, *inter alia* over its alleged antitrust practices.

When the European Commission had imposed penalty on Google for abuse of dominant position, Google had filed appeal against the said order, which was eventually largely dismissed by the General Court of the European Union, in 2021.

#### **What Next:**

1) In all likelihood, an appeal by Google against the order of the CCI is to be filed. If news accounts are to be believed, the appeal may be filed on *inter alia* the following grounds:

(a) Users of the Google products and services are stakeholders and their views being crucial in nature, ought to also have been considered by the CCI;

(b) Android being a patented product, Google is entitled to set boundaries on the usage of open-source version of Android, to ensure the universal security of users; and

(c) Nature and quantum of the fine imposed upon Google.

2) While the directives / remedies imposed by CCI raise significant challenges for Google and impact its motivation to revolutionize, a lot more clarity and certainty, may be required for Google, from CCI, to comply with the same.

3) It is still debatable whether the order by the CCI will become a cautionary take for big tech companies, and for that matter, will result in a level playing field.

4) Whether market dominance in one area translating into an unfair advantage in adjacent markets can be pushed back is still to be demonstrated.

5) Whether there needs to be a balance between safeguarding a competitive landscape and nudging the tech companies to not indulge in anti-competitive practices.

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<sup>[1]</sup> 19 (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) countervailing buying power;
- (j) market structure and size of market;
- (k) social obligations and social costs; and
- (l) relative advantage by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- (m) any other factor which the Commission may consider relevant for the inquiry.

[\[2\]](#) 4.(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group]-

(a) directly or indirectly, imposes unfair or discriminatory-

(i) ...xxx....; or

(ii) price in purchase or sale (including predatory price) of goods or service.

[\[3\]](#) 4. (1) ...xxx...

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].

(a) ...xxx...

(b) ...xxx...

(c) indulges in practice or practices resulting in denial of market access in any manner.

[\[4\]](#) 4. (1) ...xxx...

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].

(a) ...xxx...

(b) ...xxx...

(c) ...xxx...

(d) ...xxx---

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.