GOOGLE LOSES APPEAL AGAINST CCI's "ANDROID ORDER" IN INDIA -NCLAT UPHOLDS THE CCI DECISION ON GOOGLE'S ABUSE OF DOMINANCE BUT WITH SOME CAVEATS ON REMEDIES

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Google has tasted another setback in India in its fight with the Antitrust regulator, Competition Commission of India ("**CCI/Commission**"). The appeal filed by Google against the CCI last order dated 20.10.2022 has been dismissed on merits and, *except for some reliefs on some of the market correction directions issued by the CCI* in its said order, Google has lost almost on all grounds.

The National Company Law Appellate Tribunal **("NCLAT/Tribunal")** vide its Judgement dated 29.03.2023 has upheld the Commission's order dated 20.10.2022 in Case No 39 of 2018[1] ("**impugned order**) against Google LLC and Google India Private (Collectively referred as **Google**) .

For details of the impugned order or the Android Operating Software (OS) case order , please read my earlier blog dated 29.1.23 (**Google concedes defeat in India? Agrees to change India App store policy after CCI order)** made in the wake of voluntary concessions announced by Google in its App policies for OEMs, the Smartphone makers in India, by allowing them to license Applications individually, after losing its case for grant of interim stay against the slew of market corrections directed by CCI in the impugned order before the Supreme Court . [Incidentally , the Apex Court , while rejecting Google's application for interim stay had , vide its order dated 20.1.2023, directed NCLAT to dispose off Google's appeal before 31.3.2023.]

The NCLAT in the recent judgment dated 29.3.2023 , has reaffirmed the main findings of the Commission that Google has abused its dominant position in the five relevant markets , delineated in the Android OS case order and upheld that Google has contravened the provisions of Sections 4(2)(a)(i), Section 4(2)(b)(ii), Section 4(2)(c), Section 4(2)(d) and Section 4(2)(e) of the Competition Act, 2002 (" **the Act**")

[1] In Re: Mr. Umar Javeed & Ors. And Google LLC and Google India Private Limited

Google's main defense

Google in its appeal raised the fundamental question that dominance under Section 4 of the Act is not ***per se*** **violation** and "***effect bases analysis/test***" should be applied i.e., the adverse effect of the alleged anti-competitive conduct should be first proved before coming to conclusion that there is an abuse of dominant position. It was argued that the Commission had not done any 'effect analyses' as required under Section 4 of the Act.

Google had further challenged all the market correction remedies directed by the Commission; however , interestingly , it did not contest the findings of the Commission either with respect to delineation of any of the five relevant markets or the finding that Google holds dominant position in all the said relevant markets.

The Tribunal, on the basis of the submissions of the parties, had framed 14 issues for consideration in the appeal which are discussed , in brief, category wise , below.

Legal Issues framed by NCLAT.

Substantial Issues

Issue 1 : whether for proving abuse of dominant position under Section 4 of the Competition Act, 2002 any 'effect analysis' of anticompetitive conduct is required to be done? And if yes; what is the test to be employed?

The Tribunal on the issue whether "effect test" analysis is required under Section 4, accepted the arguments of Google and held that for holding any abuse of dominant position, the effect of the conduct i.e. effect being anti-competitive has to be proved. In other words, the tribunal held that

"For proving abuse of dominance under Section 4, effect analysis is required to be done and the test to be employed in the effect analysis is whether the abusive conduct is anti-competitive or not."[2]

Issue 2 : whether the order of the Commission can be said to be replete with confirmation bias?

It was alleged by Google that the finding of the Commission is replete with confirmation bias by relying on the decision of European Commission in Case No. 40099, the *Google Android case*. However , the Tribunal disagreed with the Google and held that the Commission had considered all the material on record, submissions of the parties with respect to each of the markets and then had recorded the findings and conclusions and hence arguments of confirmation bias cannot be accepted.

Procedural issues

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[2] This is a substantial decision by NCLAT , which , if upheld by the Supreme Court , is likely to change the entire legal jurisprudence on Section 4 of the Act , which , as of now , does not prescribe any effect based analysis . The 5 prohibited conducts under Section 4 of the Act are *per se* violations based on unilateral conduct by a dominant enterprise and even the CLRC Report had overruled the suggestion to make it effect based, which suggestion has been accepted in the recent Competition (Amendment) Bill, 2022 passed by the passed by the Lok Sabha on 29.3.2023. This is certainly going to be challenged by CCI in the RSA before Supreme Court.

Issue 3 : Whether the investigation conducted by the Director General was in violation of Principles of Natural Justice? And whether the investigation conducted by the Director General is vitiated due to DG framing leading questions to elicit information?

Google had also raised objections on the procedure of investigation followed by the Director General (DG) and argued that DG had violated the principles of natural justice and had put leading questions to the third parties which were intentionally framed to obtain the desired answers from the Original Equipment Manufacturers (OEMs) and had also alleged that DG was acting with predetermined mindset and had already decided the submit the report in line with the judgement of European Commission in Android Google case.

However, the Tribunal did not agree with the Google and held that judgement relied by the Google had no application in the facts of the present case and concluded that looking at the questions framed by the DG it cannot be said that DG had pre-decided the issue. Further the notices issued by the DG were with the objective of eliciting information and there is no occasion for violating principles of natural justice when he was only to inquire and collection information. His function is only inquisitive in nature.

Issue 4 : Whether order of Commission is vitiated since the Commission did not have any Judicial Member?

The Tribunal also rejected the argument of Google that the presence of judicial member in mandatory requirement of law and the decision of Commission is liable to be set-aside on this ground alone. Google had relied on the judgement of *Mahindra Electric Mobility Limited and Anr. Vs. Competition Commission of India*[3].

The NCLAT rejected the above argument and agreed with the submissions of the Commission, following the judgment of *Amazon.com NV Investment Holdings LLC vs. Competition Commission of India*[4], held that the Order of Commission is not vitiated on the ground that Commission did not consist of a judicial member.

Issues raised on merits.

Issue 5&6: Whether pre-installation of entire GMS Suite amounts to imposing of unfair condition on OEMs which is in breach of Section 4(2)(a)(i) and 4(2)(d) and whether, while returning its finding of violation has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

On the first core issue the Tribunal after considering the relevant clauses in the Mobile Applications Distribution Agreement (MADA), Android Compatible Commitment (ACC) and Revenue Sharing Agreements signed with OEMs, agreed with the findings of the Commission and rejected the contention raised by Google that MADA is an optional and per device agreement which is voluntary and not unfair or restrict competition. The terms of MADA are not imposed on OEMs.

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3 (2019) SCC OnLine Del 8032

4 Competition Appeal (AT) No.01 of 2022

The Tribunal noted that the Commission had done an in-depth analysis and had considered the submissions of all the parties before coming to a conclusion of abuse of dominance. The Tribunal reaffirms the findings of the Commission that OEM's lack of bargaining power and lack of negotiating space with Google clearly proves harm to competition and weak countervailing buyer power restricting to bundled apps, pre-installation and premium placement are also anticompetitive. Various conditions in the MADA which include the condition under which Google retains sole discretion to change list/bundle of GMS Apps; condition that OEMs must seek approval of Google for launching devices, all this clearly prove anti-competitive practices.

Further the Tribunal also reaffirmed the finding with respect to supplementary obligations imposed through clause 4.4 of MADA. The Tribunal held that conditions which are applied on OEMs through MADA which is essentially to provide Google Applications, are in the form of "supplementary obligations" attracting Section 4(2)(d) of the Act whose contravention is evident.

Issue 7&8 : Whether Google by making pre-installation of GMS Suite conditioned upon signing of AFA/ACC for all OEMs has reduced the ability and incentive of the OEMs to develop and sell devices operating on alternative versions of Android i.e Android Fork and thereby limited technical and scientific developments , in violation of Section 4(2)(b)(ii) of the Act? And Whether the Commission while returning its finding on this breach has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

Google contended the findings of the Commission and argued that ACC does not restrict innovation and the OEMs are free to differentiate and innovate on top of minimal bases requirement and some of the OEMs (OPPO & Samsung) have actually done it. It was further contented that Google has legitimate interest in licensing its Apps only for those devices which meet the requirement set by it. Further Google also submitted that Commission in its findings had not considered the evidence on record and has selectively relied on the statements of third party like Xiaomi and Lava and had disproportionately relied on the statement of Amazon.

However, the Tribunal rejected the above are arguments of the Google and held that Commission had elaborately dealt with the evidence led by the OEMs and hence the argument of Google that evidence had not been considered in right perspective cannot be accepted. It was further noted that not only Amazon, but 8 other OEMs have made their submissions that various non-negotiable constraints in AFA/ACC ensures that folk developer cannot succeed. The Tribunal further noted that Commission had correctly returned the findings that AFA/ACC results in less choice of smart mobile OS and general service by consumers.

Lastly the Tribunal held that a clear finding has been recorded by the Commission in paragraph 583 of the impugned order, that restriction imposed vide various clauses in AFA/ACC are unreasonable and disproportionate in scope and has resulted in foreclosure of its competitors in OS market. Hence, the Commission conducted *effect based analysis* before coming to the conclusion that Google had breached Section 4(2)(b)(ii) of the Act.

Issue 9 & 10 : Whether the Appellant has perpetuated its dominant position in the Online Search Market resulting in denial of market access for competing Search Apps in breach of Section

4(2)(c) of the Act ? And Whether the Commission while returning its finding has not considered the evidence on record and has not returned any finding regarding the Appellant's conduct being anti-competitive?

Google had challenged the finding of the Commission that it has perpetuated its dominant position in the online search market in a way so as to result in the denial of market access for the competing search apps in violation of Section 4(2)(c) of the Act. Google had challenged this finding and argued that MADA, RSAs and AFA/ACC need not to be read together to come to conclusion that RSA precludes pre-loading of competing search Apps.

Google had further contended that the Commission had failed to consider the distinction between RSAs entered with OEMs prior to 2014 i.e. portfolio-wide RSAs and those entered subsequent to 2014 i.e. per device RSAs. It was further argued that the Commission erred in observing that if an OEM had pre-installed a competing general search service on any device within an agreed portfolio, it would have had to forego the revenue share payments not only for that particular device but also for all the other devices.

However , Tribunal after considering the relevant clauses of RSA and the submissions of the Commission rejected the arguments of Google and further relying on the judgement of Supreme Court in *Chattanatha Kurayalar v. Central Bank of India* [5]and Delhi High Court in *Mercury Travels (India) Ltd and Ors. v. Mahabir Prasad and Ors*.[6] held that all agreements in question have to be conjointly read and their cumulative effect has to be noticed especially in reference to the competition.

The Tribunal further noted that a positive finding has been recorded that that competing general search services are not able to counter the competitive edge secured by Google for itself through pre-installation which acts as an entry barrier for the competitors. On the issue of non-consideration of the evidence on record, the Tribunal categorically noted that the Commission in paragraph 410-419 had considered the evidence on record and had correctly concluded that Section 4(c) had been breached.

Issues 11 , 12 & 13 : leveraging of dominant position in Play Store market to protect its position in other related markets in violation of Section 4(2)(e)

The Commission in its order had held that Google is leveraging its dominant position in the following markets:

a. Google has leveraged its dominant position in the Play store market to protect its position in online general search.
b. Google has leveraged its dominant position in the Play store market to enter as well as protect its position in non-OS specific web browser market through Google Chrome App.

[5] (1965) 3 SCR 318
6 R.F.A. No. 680/98

c. Google has abused its dominant position by tying up of You Tube application the Play store for Android OS to enter as well as protect its position in OVHPs market through YouTube.

Google had challenged the above findings of the Commission and contended that Commission's analysis is solely based on the flawed premise that pre-installation *per se* results in foreclosure of competing apps and had also argued that MADA does not restrict OEMs from pre-installing competing search service apps on their devices.

However, the Tribunal did not concur with the arguments of Google and noted that pre-installation of Google Search engine give a *status quo* bias and further after entering RSA the OEMs are precluded from pre-installing competing search apps in particular device.

Further, considering the findings of the Commission with respect to tying of Play store with Google search (Para 410-419), importance of pre-installation as a distribution channel (paras 424-432); inability of the rival web browsers to neutralize the competitive edge secured by Google in the browser market (paras 433-434); Google setting the *de-facto* web standards due to its dominant position in the browser market (paras 435-441); impossible to uninstall Google Chrome on GMS devices (paras 442-445); and negative impact on competition in the relevant market(s) (para 446-448) concluded that finding of the Commission with respect to the above issues are based on relevant material and reason and does not warrant any interference at appellate jurisdiction.

Issues 14 -on monetary penalty – On the issue of monetary penalty , Google challenged the findings on the following ground:

a. The penalty has not been imposed in accordance with the judgement of *Excel Crop Care Limited vs. CCI.* CCI had held that the revenue of Google pertaining to India in relation to its apps and services shall be taken into account for computing the relevant turn over and the penalty levied on Google by the Impugned Order which is not correct.
b. Revenue from non-MADA devices is not subject of abuse of dominance and yet such revenue has also been considered in imposition of penalty on Google.
c. Penalty should be imposed in 'one go' and there is no provision to impose penalty on *provisional* basis with the possibility of its revision later.

The Tribunal held that *three agreements, namely, MADA, AFA/ACC and RSA, are not mutually exclusive but are in the nature of inter-related, inter-woven agreements that should be read together while examining the anti-competitive effects of these agreements, Moreover , the multiple Google apps and Google online search drive the business of Google based on traffic and data generated from innumerable users . Thus, the entire ecosystem of Google sitting on Android OS in the mobile device becomes the source of revenue to Google services. and, therefore, the total revenue from all the apps and services in the device becomes the 'relevant turnover".*

Based on the above observation the Tribunal noted that Google has not provided the financial information as sought by the CCI, this inadequacy has been specifically mentioned in the order and , therefore , under such situation, CCI has carried out the "best estimation" on the basis of a

financial statements and information submitted by Google. The Tribunal, therefore, agreed with the CCI's decision to quantify the monetary penalties on the basis of data presented by Google.

However, **on the issue of "provisional penalty" , the Tribunal agreed with Google's submissions** and held that once the CCI has derived the "best estimate" of the relevant turnover for the last three preceding financial years and imposed a penalty of 10% of the average of such turnover, further revision of this penalty based on financial information or data that may come to light in future will not be in keeping with law. NCLAT, thus deleted the word '*provisional'* used in imposition of penalty in para 650 and elsewhere in the Impugned Order and held that this penalty imposed is final and would not be subject to any revision upon Google furnishing any further financial details and supporting documents, as sought by CCI vide its order dated 19.9.2022.

Relief on market correctional directions

NCLAT, after considering Google's submissions and rebuttal by the CCI , however, did not agree with *four market correction related remedies*[7] directed by the . NCLAT has accordingly, set aside the following directions passed in the impugned order:

a. *Google shall allow the developers of app stores to distribute their app stores through Play Store*.
b. *Google shall not restrict the ability of app developers, in any manner, to distribute their apps through side-loading*.
c. *Google shall not deny access to its Play Services APIs to disadvantage OEMs, app developers and its existing or potential competitors. This would ensure interoperability of apps between Android OS which complies with compatibility requirements of Google and Android Forks. By virtue of this remedy, the app developers would be able to port their apps easily onto Android forks*.
d. *Google shall not restrict un-installing of its pre-installed apps by the users.*

COMMENT: The NCLAT decision, passed in a hurried and time bound manner to comply with the Supreme Court's directions passed vide order dated 20.1 23 , while upholding the substantive decision of CCI on Google's abusing its dominant position in the Android OS market and Play store market for Android OS based Smartphones and leveraging the same to protect its market power in the other related markets , is although on expected lines but by upholding Google's main defense on the application of "effect based analysis " for Section 4 of the Act, has opened a pandora's box and is debatable being not in sync with the existing statutory position on the interpretation of Section 4 on abuse of dominant position . Though , the Tribunal has confirmed and upheld CCI's decision (primarily because it was uncontested by Google either on determination of the relevant markets or on the position of dominance held by Google in each market) yet by laying down the effect based analysis test for Section 4 ,the Tribunal has unsettled the existing jurisprudence on the topic of abuse of dominance , which has not been changed even in the recent Competition (Amendment) Bill, 2022, passed by the Lok Sabha on 29.3.2023 . In my view, CCI is most likely to challenge the decision in appeal before the Supreme Court on this issue.

#Google #Abuseofdominance #Antitrust #Competitionact #competitionlaw # Android #YouTube

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[7] Directions in Paragraphs 617.3, 617.7, 617.9 & 616.10 in the impugned order

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