NOTES AND COMMENTS

GOOGLE VERSUS CCI- ADDING TEETH TO THE LAW-TECH JURISPRUDENCE IN INDIA

Abstract

Competition Commission of India (hereinafter called the CCI), by two separate orders, imposed a penalty of Rs.1337.76 crore and Rs. 936.44 crore, respectively, upon Google. The same resulted from the finding of CCI that Google abused its dominant position in the relevant market. Through these decisions CCI can legitimately be called a giant killer. Importantly through these orders passed against Google, CCI has sent a strong message that Indian digital market is all for level playing. And thus gave a big push to the growing law-tech jurisprudence in India. In this paper the author assesses the CCI decisions. This assessment is done to understand the pointers that the CCI took into account to prove the abuse. Further this assessment is also done to understand the extent to which the end consumer's perspective was factored in. Finally, the assessment is also done to understand the extent to which the CCI's order will facilitate a level playing field within the digital market. The author concludes by arguing that these decisions of the CCI establishes clear guidelines for regulating digital markets. Importantly they establish that the Competition Act 2002 (hereinafter called the Act) is dynamic enough to accommodate anti-competitive issues afflicting the digital space. Thus, all arguments favouring a specialised competition law for digital markets in India, need to be rejected.

I Introduction

COMPETITION COMMISSION of India (hereinafter called the CCI), by two separate orders, imposed a penalty of Rs.1337.76 crore and Rs. 936.44 crore, respectively, upon Google. The comparison will be with the older decisions of the CCI given against Google. The aim is also to compare the stance of the CCI, taken in these decisions with that of the European Union (EU) and the EU. Furthermore, this assessment is also done to understand the extent to which the stakeholder's perspective was factored in. Finally, the assessment tries to understand the extent to which the CCI's order will facilitate a level playing field within the digital market. The author concludes by arguing that these decisions of the CCI establishes that the Competition Act 2002 (hereinafter called the Act) is dynamic enough to accommodate anti-competitive issues afflicting the digital space. And the *ex-post* intervention is the only route in cases of abuse of dominant position. The author concludes that *ex-ante* intervention can only happen prior to the injury. Thus, the 2022 Amendments focus on assessing anti-competitive effects at the stage of merger and acquisition. However, such an *ex-ante* scrutiny has always been part of the competition law. The need of the hour is for more vigorous intervention from CCI in the digital markets. And the Act is equipped enough to facilitate such interventions.

The growth of digital market in India, over the years has led to the growth of regulatory issues.[1] From a law-tech perspective these regulatory issues have thrown up different types of challenges.[2] However, with the two orders of CCI, passed on October 20 and 25, 2022 respectively,[3] the spotlight is firmly on anti-competitive practices in digital space. Undoubtedly Google is a dominant entity within the digital space.[4] However, the CCI was not the first to take note of the same. Google has attracted scrutiny of the competition law regulators across jurisdictions.[5] There have been in the past several high-profile cases against Google in the EU and United States (US).[6] At the time of writing, another attempt to sue Google has been initiated by the US government. The US Justice Department has accused Google of abusing its dominance in the digital advertising market[7]. Hence it was a matter of time before CCI got into the action. By global standards India's digital market is one of the fastest growing in the world.[8] Thus, understandably regulatory issues are bound to crop up. And considering that Google is one of the most dominant players in this sector, regulatory scrutiny is but obvious. Against this background the next part will undertake a comparative analysis

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1 Rahul Ray, 'Competition Law in the Digital Space: A Study of Exclusionary Conduct by Tech Conglomerates,' ORF Issue Brief No. 539, May 2022, Observer Research Foundation, *available at*:https://www.orfonline.org/wp-content/uploads/2022/05/ORF_IssueBrief_539_ExclusionaryTech.pdf(last visited on Feb. 2. 2023).

2 R Chandrashekhar, 'Digital regulation: Main challenges and how India can deal with them" *The Economic Times'*(Mumbai, 12 August 2022), *available at*: https://economictimes.indiatimes.com/opinion/et-commentary/digital-regulation-main-challenges-and-how-india-can-deal-with-them/articleshow/93508018.cms?from=mdr(last visited on Feb. 2. 2023).

3 Case no. 39 of 2018 and case no. 07 of 2020.

4 Rande Price, 'Research reveals the scope of Google's digital ecosystem dominance' (*Digital Content Next*, 27 May 2020), *available at*: https://digitalcontentnext.org/blog/2020/05/27/research-reveals-the-scope-of-googles-digital-ecosystem-dominance/(last visited on Feb. 2, 2023).

5 Karin Matussek and Aggi Cantrill, 'German Google Data Probe Targets Heart Of Digital Dominance' (*Bloomberg,* Jan. 13, 2023), *available at:* https://www.bloomberg.com/news/articles/2023-01-13/german-google-data-probe-targets-heart-of-digital-dominance?leadSource=uverify%20wall (last visited on Feb. 2. 2023).

6 Shobhit Seth, 'Google: Will EU's $5B Fine Curb Its Dominance?' (*Investopedia*, Nov. 16, 2022), *available at:* https://www.investopedia.com/investing/google-will-eus-5b-fine-curb-its-dominance/ ; Lauren Feiner, "Google's Antitrust Mess: Here are all the major cases it's facing in the U.S. and Europe"(*CNBC,* Dec. 18, 2020), *available at:* https://www.cnbc.com/2020/12/18/google-antitrust-cases-in-us-and-europe-overview.html(last visited on Feb. 20, 2023).

7 Sean Whelan, "US Sues Google Over Dominance of Online Ad Market" (*RTE,* Jan. 25, 2023), *available at:* https://www.rte.ie/news/2023/0124/1351650-us-google-antitrust/(last visited on Feb. 20, 2023).

8 'E-Commerce Industry in India' (*IBEF*, 1 Dec. 1, 2022), *available at:* https://www.ibef.org/industry/ecommerce(last visited on Feb. 22, 2023).

of the decisions against Google, as given in the EU, the US and India. The same will help one to better assess the key takeways of the CCI decision. That will also help one in better conveying the common themes that the competition regulators look into for taking on tech giants like Google. Finally this comparative study will help delineate the specifics of abuse that Google has indulged in across the three jurisdictions.

II Dominance and its abuse: Allegations against Google-A comparative overview

The EU approach

Defining abuse:[9]

> The concept of the abuse of dominant position is defined in article 102 of the Treaty on the Functioning of the European Union (TFEU). As per Article 102
>
> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a)directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b)limiting production, markets or technical development to the prejudice of consumers;
>
> (c)applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d)making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This paper discusses out the proscribed acts of a dominant firm. Thus, such firms are barred from exploiting their dominant status and manipulate the markets, in any manner as listed under article 102 TFEU. Thus, dominant firms are under stringent scrutiny.

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9 Consolidated version of the Treaty on the Functioning of the European Union - Part Three: Union Policies and Internal Actions - Title VII: Common Rules On Competition, Taxation And Approximation Of Laws - Ch. s1: Rules on competition - Section 1: Rules applying to Undertakings - Art. 102 (ex Art. 82 TEC) 115 *Official Journal* 89(2008), *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102, (last visited on Feb. 22, 2023).

However, for this article to apply the primary challenge before the European Competition Commission (EC), is to determine the relevant market. It is with reference to the relevant market that the abuse has to be established. The European Court of Justice (ECJ) has, through its ruling clarified the scope, application and interpretation of this article. Thus, in *United Brands* v. *Commission*[10] explaining the concept of dominant position, the ECJ held that: [11]

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers

Thus, multiple factors are relevant to assess the dominant position of an undertaking. Accordingly, the regulators need to look into the conditions within the relevant market. Such conditions would include the extent of dominance of the concerned entity *vis-à-vis* its competitors. Hence the competitors share in the relevant market is to be taken into account. The status of the consumers within the relevant markets and finally the extent of the abuse of the dominant entity. As per the EC, the market share of the company is an important indicator to determine its dominance in the relevant market. Hence "[i]f a company has a market share of less than 40%, it is unlikely to be dominant."[12] Further per the EC, dominance becomes problematic when its abused. Hence abuse is assessed by the EC through determination of several factors *viz.,* "requiring buyers to purchase all units of a particular product only from the dominant company (exclusive purchasing); setting prices at a loss-making level (predation or predatory pricing); refusing to supply input indispensable for competition in an ancillary market, and charging excessive prices."[13]

Further, the EC's guidelines and approach to investigate abuse of dominance is based on the clarification issued by the ECJ in its decisions. Thus, in Hoffmann-La Roche and Co. AG,[14] the ECJ explained that "the concept of abuse is an objective concept". The same deals with the conduct of an undertaking in a dominant position that

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10 *United Brands Co* v. *Commission of the European Communities—Chiquita Bananas,* (C-27/76) EU.

11 *Id.*at 65.

12 European Competition Commission, Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, 14, *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN,(last visited on Feb. 22, 2023).

13 European Competition Commission, Procedures in art. 102 Investigations, *available at*: https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en> (last visited on April 24, 2023.

14 *Hoffman-La Roche and Co AG* v. *Commission of the European Communities* (85/76) EU.

influences the structure of the relevant market. As a result of such conduct of the dominant undertaking the degree of competition gets weakened. The methods employed to weaken the competition "has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[15] And these methods are not in consonance with those adopted in ordinary commercial transactions, maintaining normal conditions of competition in the markets of services or goods.[16] This continues to be the parameter by which EC assesses the abuse of dominant position. Further as per the EC guidelines both exclusionary and exploitative conduct of the dominant entity is regarded as abuse.[17]

However as per the said guidelines, it's the exclusionary conduct which is regarded as most detrimental to competition. The exploitative conduct, like charging excessive prices, is regarded as problematic only when it harms consumers. However exclusive conduct are regarded as most problematic. And in the context of Google too, EC applied the same parameters to assess its abuse of dominant position. The next part sums up the EC's approach *vis-à-vis* Google in the matter of abuse of dominant position in the digital sphere. The purpose will be to show that the general principles of competition law, on the issue of abuse of dominant position, are deemed to be adequate for digital space.

Determination against Google

The Google saga in Europe, comprises of three landmark decisions of the EC.[18] All of them started due to the series of complaints that the EC received against Google abusing its dominant position. The allegations pertained to abuse on the part of Google in Google Search (Shopping services),[19] in Google Android mobile operating system[20] and in online search advertisement services.[21] In the Google Search (Shopping Service), EC accused Google of abusing its dominant position by giving unfair preference to its shopping services as against third party. Consequently, consumers, using Google search engine for comparison shopping services, are primarily flooded with Google's product. The Google comparison shopping service gets displayed prominently and has the maximum hits. The rivals' or non-Google comparison shopping services were relegated to the later search pages. Hence the rivals loose out on consumers as well as are very

15 *Id.* at 91

16 *Ibid.*

17 *Supra* note 12.

18 Tânia Luísa Faria and Guilherme Neves Lima, "Abuse of a dominant position in the digital economy in the EU and the US: the Big Four and the war of the world" *E.C.L.R.* 2020, 41(3), 144-151.

19 Case at.39740 — Google Search (Shopping).

20 Case at.40099 — Google Android.

21 Case at.40411 – Google Search (AdSense).

low on visibility. EC found Google to be dominant in the general internet search market within the European Economic Area (EEA), thus enabling it to place its comparison-shopping service at the top of the search results. EC imposed fine of Euro 2.42 billion. The EC decision was upheld by the EU General Court (GC) in November 2021 though the outcome of the next round of appeal to the European Court of Justice (ECJ) is still awaited. The Google Search (Shopping Service) decision was given by the EC in 2017, and in 2018, the EC gave a decision in Google Android mobile operating system.

The EC found Google to have abused its dominant position in the android mobile operating system market. EC found that Google insists on pre-installation of its apps in all mobiles running on Android. And in case the manufacturers of mobile phones refuse, they will not be able to sell their devices with the Google apps. Considering that Google is dominant in the internet search market, non-installation of Google apps, including Chrome, will severely affect the marketability of the devices. Such mandatory tying up of the Google apps with the Android Operating System, cemented the monopoly of Google in the Mobile Appstore and Android Mobile Operating System Market. Consequently, such abuse of dominance in the relevant market has disrupted and foreclosed the development of alternative mobile operating systems and apps and search engines.[22] In the statement issued by the EC Competition Commissioner Margrethe Vestager, it was observed that:

> Google is entitled to set technical requirements to ensure that functions and apps within its own Android ecosystem run smoothly. But these technical requirements cannot serve as a smoke-screen to prevent the development of competing Android ecosystems – Google can't have its cake and eat it.

Google was fined with a penalty of Euro 4.34 billion which the GC reduced slightly to Euro 4.125 billion, though largely affirming the EC decision.[23] The last of this saga is the 2019 EC decision in which EC found that Google abuse its dominance through its advertising brokering platform AdSense for Search. EC found Google to be dominant in online advertising brokerage market. And Google entered into exclusive agreement with its partner websites, preventing them from dealing with rival ad brokers. Further,

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22 *Supra* note 20.

23 Judgment of the General Court in Case T-604/18 | *Google and Alphabet* v. *Commission (Google Android)*, Press Release No. 147/22 (Luxembourg, Sep. 14, 2022), *available at:* https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf (last visited on May, 10, 2023).Judgment of the General Court in Case T-604/18 | *Google and Alphabet* v. *Commission* (Google Android) *available at:* https://curia.europa.eu/juris/document/document.jsf;jsessionid=6BDE93E72EC15142FA30E8FF635C2876?text=&docid=265421&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2292228 (last visited on May, 10, 2023).

even when Google did not insist on exclusive dealings, it ensured that its partner websites, place ads sourced from Google at the most prominent pages. This mechanism thus disadvantaged the rival online ad brokers, since, ad sourced from the rivals will be diminished to later pages. Consequently, they will receive lesser hits. Google further controlled the manner in which the partner websites would deal with the ad sourced from its rival brokers. Hence Google's permission was *sine qua non* before these websites took any decision pertaining to the placement of the ads sourced from Google's rival.[24] Accordingly, EC found Google to be in violation of article 102 TFEU, thus imposing a fine of Euro 1.49 billion.[25] At the time of writing outcome of appeal to GC is still awaited.

These decisions of EC in context Google, has set the ball rolling for further interventions in the functioning of the tech giant. However there are key take away that are equally relevant for the CCI and the Indian policy makers. First the EC continues to apply the general principles of competition law pertaining to the abuse of dominant position within the digital eco-system. Secondly these cases are representative of the ex-post enforcement regulatory system. The same works fine in a conventional commercial eco system, however as the EU experience has shown, digital markets may be difficult to regulate *ex-post*. Primarily because, as seen in the three cases, referred to above, the timelines from investigations to the decision stage took almost a decade. And in terms of technology, that is arguably excessive delay.[26] Considering that EU has been a pioneer in taking up anti-competitive issues against the tech giants, starting with Microsoft,[27] this delay is worrying from India's perspective. For Indian competition law regime is fairly new and as noted above the interventions within digital market are also recent. Hence the challenges faced will be more considering that CCI too follows an *ex-post* regulatory framework. As is being debated within EU, there is thus a strong argument for *ex-ante* regulation of the digital markets. The third point is that despite

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24 *Supra* note 21, Summary of Commission Decision Mar. 20, 2019, (2020/C 369/04), *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AT40411(03)&from=EN (last visited on May, 10, 2023).

25 European Commission, Press Corner, "Statement by Commissioner Vestager on Commission decision to fine Google € 1.49 billion for abusive practices in online advertising" (Brussels Mar. 20, 2019), *available at:* https://ec.europa.eu/commission/presscorner/detail/en/statement_19_1774(last visited on 27 Mar. 27, 2023).

26 Cristina Caffarra, "The Eu General Court Confirms Android Abuse Of Dominance Through Tying, With The Real Legacy Of The Case Extending Far Beyond (Google Android)" (London, Sep. 14, 2022), *available at:* https://www.concurrences.com/en/bulletin/news-issues/september-2022/the-eu-general-court-confirms-android-abuse-of-dominance-through-tying-with-the (last visited on Feb. 10, 2023).

27 *Microsoft Corp.* v. *Commission of the European Communities*, Case T-201/04., *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004TJ0201&from=EN (last visited on Feb. 10, 2023).

the debate on *ex-ante* regulation, there is no movement to design a new competition law regime for digital market. Intervention through competition law principles can only be *ex-post*, after the harm is discovered. On the other hand, *ex-ante* regulation has to predict and prevent before the harm is caused. Hence debate is primarily headlined by two opposing views viz., *ex-post* regulation versus *ex-ante* regulation *vis-à-vis* digital markets. The pre-dominant understanding however is that ex-ante regulation will be a different legal frame-work.[28] Further US's approach towards Google, condition by its anti-trust framework, is analysed.

The US approach

Defining abuse

> Section 2 of the Sherman Act is the relevant section that addresses anti-competitive practice resulting from monopoly. The Sherman Act however does not specifically use the term abuse of dominant position. Though, as will be seen hereunder, the proceedings against Google have been initiated under this section. And in the past too, all cases arising from abuse of a dominant entity, has been proceeded under this section. According to section 2 of the Sherman Act: [29]
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> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The section has been read to assess the conduct of the monopolist and not to *per se* prohibit the monopolist.[30] The scope and application of section has been conditioned by the jurisprudence, as developed by the US Supreme Court (USC).[31] Considering that the Sherman Act has been enacted in 1889, that places United States experience

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28 OECD (2021), 'Ex Ante Regulation and Competition in Digital Markets', OECD Competition Committee Discussion Paper, *available at:* https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf (last visited on Feb. 10, 2023).

29 15 U.S. Code s. 2 - Monopolizing Trade a Felony; penalty, *available at:* https://www.law.cornell.edu/uscode/text/15/2 (last visited on Feb. 10, 2023).

30 William F. Adkinson, Jr., Karen L. Grimm and Christopher N. Bryan, 'Enforcement Of Section 2 Of The Sherman Act: Theory And Practice', Working Paper: Nov. 3, 2008, *available at:* https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf (last visited on Feb. 10, 2023).

31 *Ibid.*

on the issue quite formidable.[32] However, unlike EU or even India, the Sherman Act does not specifically deal with abuse of dominance. Hence monopoly is not bad *per se* except when acts are deemed to be improper on the part of the monopolist. Hence if the monopoly is attained through efficient conduct and superior business strategy and better product and thus enhances consumer welfare, they are proper.[33]Thus, mere charging of excessive price or other activities which are due to monopolist position, will generally not be regarded as abuse. In other words, if the monopolist conduct can be proven to be the result of aggressive competition, no action is tenable.[34]

The enforcement of the Sherman Act, was further strengthened through the passage of the Federal Trade Commission Act, which established the Federal Trade Commission (FTC) and the Clayton Act, in the year 1914. Since Sherman Act has both civil and criminal aspects to it, these are enforced by the Department of Justice (DOJ). However, for abuse of monopoly, DOJ has hardly brought any criminal action.[35] The FTC has only civil mandate to proceed against "unfair methods of competition"[36] and "unfair or deceptive acts or practices".[37] Thus, it enforces the provisions of the FTC Act. However, the settled position is that the violations under Sherman Act are treated as violations of the FTC Act.[38] The Clayton Act specifically deals with issues arising due to mergers and acquisitions, "interlocking directorates and "certain discriminatory prices, services, and allowances in dealings between merchants".[39] For the enforcement of provisions of the Sherman Act and Clayton Act, private action is permitted and damages can be claimed. Hence pre-dominantly the anti-trust jurisprudence within the US is result of private enforcement accompanied by interventions by the regulators viz. DOJ.[40] The FTC intervenes and regulates within the ambit of the FTC Act. As mentioned above, since violations under FTC are equally violations under the Sherman Act, FTC's enforcement indirectly impacts the Sherman Act enforcement.[41]

Further only FTC can bring cases under the FTC Act and the same is confined to civil actions. Actions against monopolists though are confined pre-dominantly under the

32 Federal Trade Commission, 'The Antitrust Laws'., *available at:* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited on Mar. 20)

33 Verizon Communs., *Inc.* v. *Law Offices of Curtis* V. Trinko, LLP - 540 U.S. 398, 124 S. Ct. 872 (2004).

34 *Ibid.*

35 Alan B. Freedman and Molly Ma, 'The Dominance and Monopolies Review: USA', *The law Reviews* (14 July 2022), *available at*: https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/usa#footnote-105 (last visited on Feb. 10, 2023).

36 *Supra* note 32.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

Sherman Act and the FTC Act. And based on the jurisprudence developed under section 2 of the Sherman Act, FTC has framed its guidelines. Thus, FTC coordinates with the DOJ to take steps against abuse of monopoly. Based on the jurisprudence developed by the USC, to prove a violation of section 2 of the Sherman Act, two elements are essential: 1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[42] The monopoly power in the first part is the ability to charge excess price above what ought to be the price in a competitive market. The market share of the entity and the entry barriers within the relevant market is assessed under this part.[43] The second part deals with anti-competitive conduct used to sustain or acquire monopoly position. Herein the courts, have over the years deemed several acts of the enterprise as anti-competitive under section 2 of the Sherman Act *viz.*, "Bundled rebates"[44]; "Enforcing fraudulently-procured patents";[45] "Exclusionary product design";[46] "Exclusive dealing";[47] "Expanding of manufacturing capacity beyond that which a company intends to use";[48] "Patent abuse";[49] "Predatory pricing";[50] "Price discrimination";[51] "Price squeezes";[52] "Refusals to deal with competitors"; "Refusing to share essential facilities with competitors";[53] "Tying arrangements";[54] "Using a dominant position in one market to gain an uncompetitive advantage in another"[55] and "Vertical foreclosure".[56]

Further attempt to monopolise using any of the conduct specified above also is deemed an anti-competitive practice under section 2 of the Sherman Act. For assessing the

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42 *United States* v. *Grinnell Corp*., 384 U.S. 563, 570–71 (1966).

43 Herbert Hovenkamp, "The Sherman Act and Abuse of Dominance in the Age of NetworkS" *ProMarket* (Dec. 20, 2021), *available at:* https://www.promarket.org/2021/12/20/sherman-act-abuse-dominance-europe-monopolization/(last visited on Feb. 10, 2023).

44 American Economic Liberties Project, "What You Need to Know about section 2 of the Sherman Act- Anti-Monopoly Policies and Enforcement" (Oct. 28, 2020), *available at:* https://www.economicliberties.us/our-work/section2-explainer/#_ftn3 (last visited on Feb. 10, 2023).

45 *Ibid*.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

conduct leading to monopolisation or attempt to monopolise, the market power of the entity is relevant factor and the ability of the entity to exploit that market power unilaterally. The determination of market power has been stringent in the US. For courts have varied from 90 to 70 percent market share to regard the entity as monopoly or having the ability to monopolise. Consequently, the burden of proof is quite high on the plaintiff before an entity/firm can be said to be caught by the requirements of section 2 of the Sherman Act. As a result section 2 cases are far more less as compared to the EU or even India.[57] For the USC and other courts insist that "the monopolist may have a legitimate business justification for behaving in a way that prevents other firms from succeeding in the marketplace."[58] Additionally courts including the USC insist on proof of anti-competitive effects of the conduct of the monopolist or attempt to monopolise before intervention by the regulators. For, as per the USC, excessive anti-trust intervention might have a chilling effect on competition.[59] For the object of the Sherman Act, as reiterated over the years, is to protect competition and not competitors. The proof of consumer harm and not effect on competitors, leads to the determination of a unilateral conduct as anti-competitive.[60] Thus, actions against big tech firms too will be subject to this philosophy of US anti-trust regime. Against this background the next part sums up the US approach to Google's practices.

Determination against Google

At the time of writing DOJ along with several state Attorneys General, has filed two civil suits against Google alleging anti-competitive practices as a monopolist. The first civil suit was filed by the DOJ along with eleven state Attorneys General on October 20, 2020.[61] The civil anti-trust suit was filed in the district court of Columbia. In the complaint Google has been alleged to "unlawfully maintain monopolies in search and search advertising".[62] This is done by, "[forbidding] preinstallation of any competing search service; tying and other arrangements [forcing] preinstallation of its search

57 Tânia Luísa Faria and Guilherme Neves Lima, *Supra* note 18.

58 Federal Trade Commission, 'Monopolization Defined', *available at:* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited on Feb. 10, 2023).

59 Verizon Communs., Inc, *Supra* note 33.

60 The Department of Justice Archives, "Chapter 1 - Single-Firm Conduct and Section 2 of The Sherman Act: An Overview", *available at:* https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_26_(last visited on Feb. 10, 2023).

61 United States, *et al.* v. Google LLC, *available at:* https://www.justice.gov/atr/case-document/file/1536456/download (last visited on Feb. 10, 2023).

62 The Department of Justice, "Justice Department Sues Monopolist Google For Violating Antitrust Laws', News", *available at:* https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws (last visited on Feb. 10, 2023).

applications in prime locations on mobile devices; Entering into long-term agreements…[requiring] Google to be the default – and de facto exclusive – general search engine....; using monopoly profits to buy preferential treatment for its search engine on devices, web browsers…"[63]

On January 24, 2023, DOJ along with eight state Attorneys General filed the second civil anti-trust suit in the district court for the Eastern district of Virginia. In this suit Google has been alleged to have unlawfully monopolizing digital advertising technology markets. The allegations point out that Google unlawfully i) acquires key digital advertising tools; ii) forces third party website to adopt Google's apps; iii) distorts ad auction competition and iv) insulates Google from competition by manipulation ad-auction. The DOJ noted digital advertising technology markets are different from the markets of search and search advertising.[64] However, the upshot is that both are alleging Google's wide-ranging actions to unlawfully maintain monopoly. As can be seen, the allegations are similar to the one made in the EU context. In addition to the suits filed by the DOJ, cases against Google have been filed the state Attorneys General of 36 states and district of Columbia, in July 2021.[65] They have alleged that Google has "unlawfully restraining trade and maintaining monopolies in the markets for Android software application ("app") distribution and for payment processing of digital content purchased within Android apps in the United States…". [66] Further 38 states led by Colorado and Nebraska, filed another antitrust case against Google, on December 17, 2020. They too have accused Google of monopolizing internet search and search advertising.[67] On the same lines another suit was filed by Texas along with nine states against Google on December 16, 2020. Allegations pertained to the unlawful monopolisation of digital advertising market.[68] As things stand the decisions are awaited and one will have to see the outcome.

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63 *Ibid.*

64 Department of Justice, 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies', News, available at:https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies (last visited on Feb. 10, 2023).

65 *Utah* v. *Google,* Case 3:21-cv-05227 Document 1 filed July 7, 2021, *available at:* https://ag.ny.gov/sites/default/files/utah_v_google.1.complaint_redacted.pdf (last visited on Feb. 10, 2023).

66 *Ibid.*

67 American Economic Liberties Project, 'Timeline on Monopoly Lawsuit Regarding Search and Search Advertising Market', *available at:* https://www.economicliberties.us/colorado-v-google/ 2023, (last visited on Feb. 10, 2023).

68 American Economic Liberties Project, 'Timeline on Internet Advertising Monopoly Lawsuit', *available at:* https://www.economicliberties.us/texas-v-google/(last visited on Feb. 10, 2023).

The eventual outcome of these litigations is crucial to feasibility of applying section 2 of the Sherman Act to digital markets.[69] Further, as noted in the case of EU, in general the standard competition law principles are not meant for any *ex-ante* intervention. Hence within the US also, the challenge is to use the existing principles of the Sherman Act, Clayton Act and the FTC to intervene within the digital markets *ex-post*. The concerns pertaining to the acts of enterprise like Google, thus has led to the debate as to extent to which anti-trust law needs to be used to regulate them. It is less about *ex-ante* intervention and more about vigorous *ex-post* interventions.[70] The debate is also whether the big-tech companies like Google needs be broken up.[71] There is also the debate whether newer legislation is needed to regulate the big-tech. Further the debate is also as to whether more powers need to be given to DOJ and FTC to intervene in the digital markets. The debate is also as to whether the digital economy does indeed harm consumers, through their monopolisation. The core of Sherman Act is being critically re-assessed.[72] Thus, the anti-trust enforcement in the digital markets, through actions against unlawful monopoly like Google, is in a flux. The unlawful monopolisation law, as given under section 2 of the Sherman Act, is being thus scrutinised by the policy makers to argue for either maximum intervention or restrained intervention in the digital markets. And the ongoing cases against Google will be crucial for the debate to swing one way or the other. The CCI decisions and its eventual outcome thus will be next analysed to asses the Indian position on the issue.

The Indian approach

Defining abuse

As per section 4 of the Act abuse of dominant position is proscribed. Further the section elaborates as to when there will be a finding of an abuse of dominant position. Accordingly unfair and discriminatory practices of a dominant enterprise in terms of conducting its business, will be regarded as an abuse. Further any practice of such enterprise which limits or restricts productions or technical or scientific developments

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69 Blair Levin and Larry Downes, 'Microsoft, Google, and a New Era of Antitrust', *Harvard Business Review* (Feb. 17, 2023), *available at* : https://hbr.org/2023/02/microsoft-google-and-a-new-era-of-antitrust accessed (last visited on Feb. 10, 2023).

70 John M. New Man, 'Antitrust in Digital Markets', *Vanderbilt Law Review* [Vol. 72:5:1497], *available at:* https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/10/11172710/Antitrust-in-Digital-Markets-1.pdf (last visited on Feb. 10, 2023).

71 Randal C. Picker, "What Should We Do About The Big Tech Monopolies?", *Techreg Chronicle* Dec. 2021, *available at:* https://www.competitionpolicyinternational.com/wp-content/uploads/2021/12/4-TECH-REG-WHAT-SHOULD-WE-DO-ABOUT-THE-BIG-TECH-MONOPOLIES-Randal-C-Picker.pdf (last visited on Feb. 10, 2023).

72 George L Paul, D Daniel Sokol and Gabriela Baca, "Key Developments in the United States", *Global Competition Review* (Nov. 25, 2022), *available at*: https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/key-developments-in-the-united-states (last visited on Feb. 10, 2023).

or denies market access are also treated as abuse. Additionally imposing unfair obligations via bundling of contracts and manipulating conditions in relevant markets, are also treated as abuse under this section.[73] The Act also defines the relevant markets *viz.*, determination in reference to either the relevant product market or geographical market or both.[74] Relevant product market under the Act is defined as:[75]

> a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use

Relevant geographical market is defined by the Act as:[76]

> a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

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73 S. 4: Prohibition of abuse of dominant position: Abuse of dominant position:
[(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) condition in purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or service.
Explanation — For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access [in any manner]; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation—For the purposes of this section, the expression— (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. (b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors [(c)"group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

74 The Competition Act 2002, s. 2 (r) ["relevant market" means the market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets]

75 *Id*., s. 2 (t).

76 *Id* s. 2(s).

Further the Act, under section 19 (4) states that:

> 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; (I) 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.

Further section 19 (5) of the Act states that:

> "For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

Section 19 (6) states that:

> "The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:— (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services."

Determination against Google

There were three instances wherein Google was accused of abuse of dominance, within India, within a span of a year *viz.,* 2022. The first of these three involved allegations filed by digital newspaper companies.[77] These companies, through three separate filings[78]

77 *Digital News Publishers Association* v. *Google, Case No.*41 of 2021.

78 *News Broadcasters and Digital Association* v. *Google, Case No. 36* of 2022; News Broadcasters and Digital Association vs. Google, Case No. 10 of 2022.

sued Google of abusing its dominance by appropriating "major share of revenue from the digital advertising space".[79] Since digital newspaper is dependent on the search engine, Google has a greater bargaining power. For being the dominant search engine, Google determines as to which news website will get the maximum hits. Accordingly, the searchability of the digital news also determines the volume of advertisement. Thus, Google's conduct directly impacts the financial stakes of the digital news companies. For these companies are largely dependent, on the revenue generated from the advertisement. Further Google also determines the "the amount to be paid to the publishers for the content created by them, as well as the terms on which the aforesaid amounts have to be paid."[80]

Interestingly the same issue did come up before CCI in 2018, wherein Google was accused of abusing its dominance in online search advertising services.[81] In that case CCI found that Google was dominant in "[o]nline [g]eneral [w]eb [s]earch and [w]eb [s]earch [a]dvertising [s]ervices markets in India."[82] Accordingly, it was also held that these two were completely distinct relevant product markets. In the digital news companies' case, too the CCI reiterated the afore stated position. Based on the assertion of the complainants, CCI found a *prima facie* case of abuse of dominance on the part of Google. And accordingly, the CCI directed the Director General (hereinafter called DG) to conduct investigations into these allegations.[83]

The second of the three cases, was filed by three individuals, in their capacity as consumers of "Android based smartphones".[84] In this case once again allegations were made against Google for abusing its dominant position. As per the assertion of the complainants Google: abuses its dominant position by forcing the mobile phone/ tablet manufacturers to mandatorily install Google's applications and services; abuses its dominant position by tying in and bundling its products and services with its other products; abuses its dominant position to prevent and disincentivise the development and marketing of alternative versions of Android.[85] Based on these assertions the CCI directed the DG to investigate the matter, which report was duly submitted. It was based on this report that the arguments and final order of CCI was delivered. The same will be assessed later.

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79 *Supra* note 77, para 6.

80 *Id.,* para 7.

81 *Matrimony.Com Limited* v. *Google, Case Nos.* 7 and 30 of 2012.

82 *Id.*, para 420.

83 *Supra* note 9 at para 42-43.

84 *Umar Javeed, Sukarma Thapar* , *Aaqib Javeed* v. *Google*, Case No. 39 of 2018, *available at:* https://www.cci.gov.in/images/antitrustorder/en/3920181652264686.pdf (last visited on May 1, 2023).

85 Umar Javeed *et al*, para 8.

In the third and the final case in this series,[86] the complainant's allegations was that Google abuses its dominant position by "(a) mandating apps to use Play Store's payment system and Google Play In-App Billing for charging their users…"; "(b) unfairly privileging Google Pay inter-alia by pre-installing and prominently placing Google Pay on Android smartphones…".[87] Herein too CCI ordered the DG to undertake investigations into these allegations. And the said report was duly submitted. In this matter too the CCI, upon hearing the relevant arguments delivered its order. As will be seen hereinbelow, Google tried to refute each of the finding of the DG in the cases. Of the three cases, as mentioned above, no order as to the abuse by Google in the online search advertising services, has been rendered so far. Hence the present article deals with the findings of CCI in the remaining two cases viz the smartphone case and the Unified Payment Interface case.[88]

In the two cases CCI had to see whether the findings of the DG satisfied all the criterion of dominance and abuse. The DG, in the course of its investigations looked through two agreements that Google forms with the smartphone/tablet manufacturers. These are Mobile Application Distribution Agreement (hereinafter called MADA) and (ii) Anti Fragmentation Agreement (hereinafter called AFA). The AFA was later succeeded by the Android Compatibility Commitment agreement (hereinafter called ACC), since 2017. As per the finding of the DG through these agreements *viz.,* MADA, AFA and ACC, Google has been able to abuse its dominant position in the relevant market. Google through these agreements has compelled the smart phone mobile/ tablet manufacturers to pre-install Google Mobile Services (hereinafter called the GMS). Further it also forces the manufacturers to sign the MADA and AFA/ACC as a condition precedent for accessing Google play store. DG found that this restricts the ability of the manufacturers to develop alternative versions to Android. DG also found that Google was dominant in the online search market.[89]

Consequently, Google abused its dominance in the online search market to strengthen its strong hold in the app market. Further the DG also found Google to abuse its dominance by tying Google Chrome with the Playstore. Similarly, DG also found Google to abuse its dominance by tying up YouTube with Google Playstore. The DG thus found that Google has violated section "4(2)(a)(i); Section 4(2)(b); Section 4(2)(c); Section 4(2)(d) and Section 4(2)(e) of the Act."[90] Similarly, DG found Google to have used the Google Play Billing System (GPBS) for "mandatory and exclusive processing of payments for apps and in-app purchases for the apps downloaded from Google

86 *XYZ (Confidential)* v. *Google,* Case No. 07 of 2020

87 *Id.*, para 17.

88 Umar Javeed., *supra* note 84.

89 Umar Javeed, para 13-14.

90 *Ibid.*

Play Store."[91] However, Google did not mandate GBPS for purchasing its own apps viz. You Tube. Google was also found to charge excessively higher fees "to the App developers for same kind of services as provided by"[92] other payment aggregators. Thus, DG found Google to follow discriminatory and unfair practices in the market of UPI apps and payment aggregators.

DG found that "mandatory imposition of GPBS also discourages app developers from developing its own in-app payment processor."[93] Thus, DG found Google in violation Section 4(2)(a)(ii); 4(2)(b)(ii); 4(2)(c); 4(2)(e); 4(2)(a)(i).[94] CCI thus took into account the DG reports in the matter to determine the extent of abuse on the part of Google. Expectedly though Google tried to counter all the findings. As will be seen next these counters were on expected lines and did not throw up any concrete evidence to the contrary. On the other hand, the arguments of Google appear to re-affirm the impression of abuse of its dominant position. The CCI was thus tasked to analyse the DG findings in order to affirm or reject it. Consequently, CCI delineated the steps that are required under the Act to prove the abuse of dominant position.

Determining relevant market: The CCI notes

Herein it is important to note that the CCI did not develop any new principle specific to assess abuse of dominance in the digital market. It relied on the settled jurisprudence of assessing dominance and its abuse. Thus, CCI referred to the interpretation given by the Supreme Court to the definition of the market, as given in the Act.[95] Accordingly it reiterated that the purpose of defining relevant markets is to identify "in a systematic way the competitive constraints that the undertakings involved face."[96]

In the given cases, the CCI concurred with the DG and identified the following relevant product markets: [97]

i. Market for licensable OS for smart mobile devices in India

ii. Market for app store for Android smart mobile OS in India

iii. Market for general web search services in India

iv. Market for non-OS specific mobile web browsers in India

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91 *Supra* note 86, para 26.

92 *Id.,* para 27.

93 *Id.,* para 28.

94 *Ibid.*

95 Competition Commission of India v. Co-ordination Committee of Artists and Technicians of WB. Film and Television and Ors, CIVIL APPEAL NO. 6691 OF 2014, *available at*: http://cja.gov.in/Latest%20Judgement/6691%20OF%202014.pdf> accessed 31 March 2023 (last visited on May10, 2023).

96 Umar Javeed at, 55.

97 See *Supra* note 84 and 86.

v. Market for online video hosting platform (OVHP) in India

vi. Market for apps facilitating payment through UPI in India

In determining the same the CCI relied on the definition of relevant product market under the Act and read the same along with section 19 (7)[98] of the Act. Similarly, the CCI referred to the definition of relevant geographic market under the Act along with section 19 (6)[99] of the Act. Accordingly, the CCI held India as the relevant geographical market. Further taking into the parameters given under section 19 (4)[100] of the Act, the CCI concurred with the DG that Google is dominant in all the above mentioned product markets within India.[101] For each of the markets DG gave clear reasons to justify the categorisation.

Thus, DG proved that Operating System (OS) for personal computers (PC), "feature phone or basic phone, as well as non-licensable smart phone OS are distinct products as compared to licensable OS for smart mobile devices and thus, do not belong to the same relevant market."[102] Hence the licensable OS for smart mobile devices including smartphones and tablets, is determined as the relevant product market. And the India is the relevant geographical market. The CCI assessed that from demand side

98 The Competition Act, 2002 , s. 19(7) [The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:— (a) physical characteristics or end-use of goods; (b) price of goods or service (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.]

99 *Id.*, s.19 (6) [The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:— (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services.

100 *Id.*, s. 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; (I) 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.]

101 See *supra* note 84 and 86.

102 Umar Javeed, para 63.

perspective, manufacturers cannot substitute OS for smart mobile devices with OS for personal computer or non-licensable smart phone OS. It was factually proven that Google does not license "Chrome OS for smartphones.".[103] And that was the key feature which CCI pointed to *viz.,* the lack of substitutability and switching costs. As noted by CCI, from the supply side perspective the switching cost are excessively high. Hence a developer of PC OS may switch to smart phone and tablet OS upon excessively investing in research and development. Based on the same reasoning smart phone and tablet OS are regarded as part of the same product market. Similarly for basic phones also the CCI applied the substitutability test. It held that both from demand side and supply side, OS of basic feature phones are not substitutable with smart phones OS.[104]

Further non-licensable OS like Apple iOS are different from and non-substitutable with licensable OS. And this holds true from both the demand side and supply side perspectives. The licensable smart phone OS are part of a different product market as compared to non-licensable smart phone OS. Since the non-licensable OS are not available to third party developers or manufacturers. And CCI agreed that the relevant geographic market is India since "the conditions for supply and demand of smart mobile OS are homogenous and distinct in 'India'."[105] On mobile App store, CCI concurred with the DG that Android App store is part of different product market, than the App store for other OS. Further the CCI agreed that an App store is non-substitutable with a standalone app. Since through the app store multiple apps can be accessed and downloaded. The single app does not and cannot serve that purpose. Further distinction was made between Android OS App store and other OS App store.[106] The CCI concurred with DG that the test is substitutability and switching cost. Both from demand side and supply side, non-Android OS App store is not a viable alternative for Android OS App store. Hence the Android OS App store was held to be a separate product market. In this case also CCI concurred that India is the relevant geographic market.[107] Similarly with respect to general web search services, CCI concurred with the DG findings, that they are not substitutable with specialised search services. For the general search enables the user to search from wide range of sources as against the specialised search which is limited in terms of resources as well the search query. And largely the companies offering specialised search services do not offer general search services. Thus, one cannot be a substitute of the other. Further the switching costs are high from both the perspective of the demand side and supply side. Since the requirements fulfilled through a general search service cannot be fulfilled

103 *Ibid.*

104 *Id.* at 80-84.

105 *Id.* at 86.

106 *Id.* at 142-143.

107 Umar Javeed at 151-153.

through any other search service *viz.,* either specialised or social networking sites.[108] Further since general search provide localised content, confined to the specific region, in this case too India would be regarded as the relevant geographic market.[109]

Non-substitutability and switching costs also were proven by the DG to establish that non-OS specific web browser are different product market. DG proved that web-browsers developed for PC is technologically different from web browsers for mobiles. Further web browsers for mobiles are different from other mobile apps. For web-browsers are used to surf online and access varied content. On the other hand, mobile apps are used to access specific content pertaining to that app/web-page. Further web browsers for a particular OS is not substitutable with web browser of another OS. For a web browser for Apple will not work on Android. However, a generic web browser, which not specific to any OS is easily loaded to mobile phones across board. Hence non-OS specific web browser was clearly a different product market. And the reasons, as noted above, to identify India as the geographical market. The analysis to determine the market of non-OS web browser was done from both supply and demand side.[110] The fifth product market proven by the DG and accepted by the CCI, was the market for online video hosting platform (OVHP) like YouTube. They were identified as non-substitutable with video on demand service (VODS). Both have a completely different business model For OVHP like You Tube monetises the ads that appear with online videos. VODS like Netflix, Amazon Prime are all subscription based. In the same way OVHP are different from video apps like Tik Tok, which are exclusively for short video format service. Hence OVHP are separate product market and relevant to the assessment of Google's dominance and abuse. In the same manner, as indicated above, India is regarded as the relevant geographical market.[111]

In addition to the above, it was also held by the CCI, based on the findings of the DG, that app store for non-licensable OS cannot be substituted with app store for licensable OS. Thus, app store for Apple cannot be substituted with app store for Android.[112] Further, CCI also concurred with the findings of DG, that sideloading apps is an excessively cumbersome process. Consequently, from an users perspective its not viable to download an app through sideloading as against using the app store. Since that requires repeatedly changing the settings and manually updating the same. From the developer perspective investment is needed to develop one's own app platform to enable smooth sideloading and also constantly work on the updates. Hence app store provides far smoother operations and automatic update. For app developers as

108 *Id.* at 214-220.

109 *Ibid.*

110 *Id.*at 271-281.

111 *Id.*at 297-306.

112 See *supra* note 84 at 126-128.

well as users, sideloading app is not substitutable with app store.[113] Similarly, web apps are held to be not substitutable with app store. Since web apps are accessible via internet and need not be downloaded. And they are not technologically enabled to work on smart phones and their content is static. Finally, they have no central location and are not easily discoverable hence are not user friendly.[114]

App store on the other hand give far more user-friendly experiences. Their content is dynamic and the developers specifically integrate with the smart phone's hardware. Neither is pre-installed apps regarded as viable alternative and thus not substitutable with the app store. Since smart phone manufacturers tend to pre-install only popular apps. Further the app developer has to pull in huge number of resources to convince the manufacturers to pre-install their apps. And that involves signing up such contracts with large number of mobile manufacturers and proving their app to be viable and user friendly. The sunk costs thus are quite high for the developers and there is essentially no incentive for the smart phone manufacturers to pre-install third party apps. On the other hand, app store, provide a single window solution, since it's the user who can use it to download the app they want. For developer also, placing an app in the Appstore takes care of visibility as well as accessibility by the user.[115] Finally different app store developed for Android OS are all part of the same relevant product market. Since smart phone manufacturer can choose any one to be installed in their phone using Android OS.[116]

The last relevant market that was determined by the DG and concurred with by CCI was that of the "apps facilitating payments through the Unified Payment Interface (UPI)."[117] UPI involves real time settlement of payment as against ordinary bank transfers. UPI thus is more user friendly as compared to the different modes of money transfer though net banking. Consequently, the unique nature of UPI renders it non-substitutable with transfer of money through net banking (RTGS, NEFT and IMPS). UPI can be used across different banks, where as net banking is confined to the specific bank. Similarly mobile wallets are also not substitutable with UPI. Since UPI is more secure and are inter-operable, they provide the user more choices. On the other hand, mobile wallet is not inter-operable and also involves pre-loading of the money in the wallet. UPI is about direct transfer to the recipient. Based on the technological difference between UPI and other digital payment methods, CCI concurred with DG that apps facilitating payment through UPI is a relevant product market within India. Since India

113 *Id.* at 132-137.

114 XYZ at 143-144.

115 *Id.* at 149-150.

116 *Id.* at 152-159

117 *Id.* at 206.

was proven to be the relevant geographic market based on the condition unique and homogenous across the country.[118]

The abuse-assessing CCI's findings against Google

The CCI next went into the discussion as to the abuse of dominance by Google. For assessing the same the following issues were framed viz;[119]

i. Whether mandatory pre-installation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and thereby infract provisions of Section 4(2)(a)(i) and Section 4(2)(d) of the Act?

ii. "Whether Google has perpetuated its dominant position in the online search market resulting in denial of market access for competing search apps in contravention of Section 4(2)(c) of the Act?

iii. "Whether Google has leveraged its dominant position in Play Store to protect its dominant position in online general search in contravention of Section 4(2)(e) of the Act?

iv. "Whether Google has abused its dominant position by tying up of Google Chrome App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act?

v. "Whether Google has abused its dominant position by tying up of YouTube App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act?

vi. "Whether making the use of Google Play's billing system (GPBS), exclusive and mandatory by Google for App developers/owners for processing of payments for App and in-app purchases and charging 15-30% commission is violative of Section 4(2) of the Act?

vii. "Whether exclusion of other UPI apps/mobile wallets as effective payment options on Play Store is unfair and/or discriminatory as per Section 4(2) of the Act?

viii. "Whether pre-installation and prominence of Google Pay UPI App (GPay) by Google is in violation of Section 4(2) of the Act?

On all the issues the CCI found Google to have abused its dominant position. The CCI held that mandating the pre-installation of the GMS through MADA and forcing the manufacturers to prominently display the Google apps, is unfair and discriminatory. Accordingly, it violates section 4(2)(a)(i) of the Act. Further the arrangements *via* MADA

118 *Id* at. 228-232.

119 Umar Javeed and XYZ.

also amounts to imposing ancillary obligations on the manufacturers and violates section 4(2) (d) of the Act. Since the CCI found Google to be dominant in the online search market, its abuse was also delineated. Thus, the CCI held that Google abused its dominance in the online search market to foreclose market access for other competing search engines. This it did by raising cost for the manufacturers to shift to alternate OS and search engine. Thus, Google was found to contravene section 4(2)(c) of the Act.[120]

The CCI also found that Google abuses its dominance in the app store market designed for the Android OS to cement its dominance in the online general search market. Thus, Google is in contravention of section 4(2)(e). Similarly, Google's dominance in the app store market is also abused by it to cement its dominance in the "non-OS specific web browser market through Google Chrome App…".[121] The CCI found Google to be in violation of Section 4(2)(e) of the Act. Similarly, Google has abused its domination in the app store market to gain dominance in the market of Online Video Hosting Platform (hereinafter called OVHP'). This it is able to do via its OVHP app You Tube. Accordingly, the CCI held Google to be in contravention of section 4(2)(e) of the Act.[122]

The CCI also found that mandating signing of the AFA/ACC as a condition precedent to allowing the manufacturers to pre-install Google apps, was in contravention of Section 4(2)(b)(ii) of the Act. By such practices Google disincentivises the manufacturers of smart phones/tablets to invest in research and development of devices that can operate on alternative versions of Androids. This kills scientific and technological developments and leads to injury to the customers in general.[123] The CCI also found Google to indulge in discriminatory practice vis-à-vis third-party UPI apps. Google has been found to have created technological barrier for the third-party UPI apps leading to "distortionary implications for competition within Play Store, which is the largest app marketplace on Android ecosystem."[124]

The CCI noted that Google has the power of a platform gatekeeper since it operates within multiple ecosystems. Accordingly, it leverages that power to deny market access the third-party UPI apps. Further it ensures advantageous position to its own UPI app viz. G-Pay. And this was in clear violation of Section 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act. The CCI also noted that Google has an enormous bargaining power *vis-à-vis* App developers within India. And consequently, the App developers have no option but to accept to Google's payment terms, in order to survive. This in turn is good enough to increase the App developer's operational cost and numbs any legitimate

120 *Ibid.*

121 See *Supra* note 84.

122 *Ibid.*

123 *Ibid.*

124 See *Supra* note 86, para 358.

competition. As a result, the only apps that are by default largely used by consumers will be those developed by Google. And that in turn will continue to further strengthen the bargaining power of Google and distort competition.[125]

In this context CCI found Google to indulge in discriminatory practices by mandating GBPS exclusively for processing payments for purchasing third party apps within the play store. In contrast however no such mandate is there for purchasing its own app within the store. Thus, the CCI held Google to impose unfair and discriminatory practices upon rival third party apps. And this tantamount to clear violation of Section 4(2)(a)(i) and (ii) of the Act. The CCI further held that such unfair and discriminatory practices hinder development of technology and harms consumer, thus violating section 4(2)(b)(ii) of the Act. The CCI also found Google to have violated section 4(2)(c) and Section 4(2)(e) of the Act, based on such discriminatory practices.[126] In this context the CCI also noted that there is potential of abuse by Google, wherein it mandates pre-installation of G-Pay as the default UPI app. However due to lack of evidence on the issue the CCI refrained from giving any findings.[127]

Google's abuse of its dominant position, as discussed above, is the natural outcome of its excessive dominance and clear technological advantage. The scale at which Google operates, there is hardly any chance of any other company to match it. The CCI agreed with DG that Google's immense investment capability and R and D power, creates entry barrier in all the relevant markets, referred to above, for any competitor. Further being the most popular choice amongst the licensable OS, Android OS, as controlled by Google, deprives the smart phone manufacturers of any countervailing power. And because of the clout of Google as a gatekeeper has in multiple ecosystems, CCI clearly highlighted the indirect network effect. Google's dominance in each of the market, ensures that all the relevant products are the most popular choice. And developers, investors, venture capitalists and smartphone manufacturer therefore cater to the popular demands. And accordingly the cycle of demand and supply through the indirect network effect, continues to sustain Google's dominance.

And consequently, the various instances of abuse, as explained above are the outcome of this incontrovertible power of Google. CCI, through the two decision elaborated primarily on the network effects. Considering CCI was applying the traditional test for abuse, the assessment based on network effect was primarily inspired by the EU jurisprudence. And DG's report did prove the indirect network effects of Google's dominance. The other important aspect of the CCI's determination pertaining to Google's abuse, was the clear identification of the smart mobile phone manufacturer as one of the affected parties. Hence, it's focus in these decisions has not only been

125 *Ibid.*

126 *Id.,* para 392.

127 *Id.,* para 367.

the end users but also the intermediaries like app developers and the smart mobile manufacturers. This enable CCI to dismiss the argument that Apple iOS can counter the dominance of Google. As per CCI, smart phone manufacturers, especially the small one, cannot switch from one to another. The other aspect that comes through is that CCI recognises the power of big data in sustaining Google's dominance. While this paper is confined to the decisions and its unique aspects, each of the point listed above can lead to several academic writings. Finally, CCI's approach follows the trend as witnessed in EU, wherein it's been about ex-post intervention through competition law. And as will be seen below, all ex-ante interventions, sought for the digital markets are outside the scope of the core principles of competition law.

III The fallout and the way forward- India going the EU way!

Having thus established that Google did abuse its dominance position across the online search market and app store market as well as UPI payments through apps, the CCI passed cease and desist order under section 27 of the Act. The CCI directed that:

i. "OEMs shall not be restrained from (a) choosing from amongst Google's proprietary applications to be pre-installed and should not be forced to preinstall a bouquet of applications, and (b) deciding the placement of preinstalled apps, on their smart devices

ii. Licensing of Play Store (including Google Play Services) to OEMs shall not be linked with the requirement of pre-installing Google search services, Chrome browser, YouTube, Google Maps, Gmail or any other application of Google. 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.

Google shall not offer any monetary/other incentives to, or enter into any arrangement with, OEMs for ensuring exclusivity for its search services.

iii. Google shall not impose anti-fragmentation obligations on OEMs, as presently being done under AFA/ ACC. For devices that do not have Google's proprietary applications pre-installed, OEMs should be permitted to manufacture/ develop Android forks based smart devices for themselves.

iv. Google shall not incentivise or otherwise obligate OEMs for not selling smart devices based on Android forks.

v. Google shall not restrict un-installing of its pre-installed apps by the users.

vi. Google shall allow the users, during the initial device setup, to choose their default search engine for all search entry points. Users should have the flexibility

to easily set as well as easily change the default settings in their devices, in minimum steps possible.

vii. Google shall allow the developers of app stores to distribute their app stores through Play Store.

viii. Google shall not restrict the ability of app developers, in any manner, to distribute their apps through side-loading.

ix. Google is restrained from enforcing the anti-competitive clauses of the different agreements viz. MADA/AFA/ACC as formed with the smart phone manufacturers/tablet.

x. Google shall allow, and not restrict app developers from using any third-party billing/ payment processing services, either for in-app purchases or for purchasing apps. Google shall also not discriminate or otherwise take any adverse measures against such apps using third party billing/ payment processing services, in any manner.

xi. Google shall not impose any Anti-steering Provisions on app developers and shall not restrict them from communicating with their users to promote their apps and offerings, in any manner.

xii. Google shall not restrict end users, in any manner, to access and use within apps, the features and services offered by app developers.

xiii. Google shall set out a clear and transparent policy on data that is collected on its platform, use of such data by the platform and also the potential and actual sharing of such data with app developers or other entities, including related entities.

xiv. The competitively relevant transaction/ consumer data of apps generated and acquired through GPBS, shall not be leveraged by Google to further its competitive advantage.

xv. Google shall also provide access to the app developer of the data that has been generated through the concerned app, subject to adequate safeguards, as highlighted in this order.

xvi. Google shall not impose any condition (including price related condition) on app developers, which is unfair, unreasonable, discriminatory or disproportionate to the services provided to the app developers.

xvii. Google shall ensure complete transparency in communicating to app developers, services provided, and corresponding fee charged.

xviii. Google shall also publish in an unambiguous manner the payment policy and criteria for applicability of the fee(s).

xix. Google shall not discriminate against other apps facilitating payment through UPI in India *vis-à-vis* its own UPI app, in any manner."[128]

Apart from these directions the CCI, through the two orders, imposed a penalty of Rs. 1,337.76 crore and Rs. 936.44 crore respectively, as per Section 27 (b) of the Act. Thus, the cases, as decided by the CCI, has firmly placed the spotlight on Google. In the Indian context Google has been forced to be accountable and be responsible as a dominant entity.[129] This order however does not address issues pertaining to the abuse of dominant position by Google in "web search advertising service", as was contended in the 2018 case.[130] It though affirms that decision to the extent that Google was found to abuse its position in the market of "online general web search". Further through the 2018 order, CCI required Google to issue disclaimers "in the commercial flight unit box indicating clearly that the "search flights" link placed at the bottom leads to Google's Flights page" only.[131] Further Google was directed to refrain from enforcing the "restrictive clauses with immediate effect, as is found in the order, in its negotiated direct search intermediation agreements with Indian partners.".[132] Though the fine imposed therein was substantial *viz.*, Rs. 135.86 Crore,[133] it did not impact Google, as is evident from the subsequent cases and decisions. The two CCI orders[134], as assessed above, have shaken Google and forced it undertake structural changes. In that sense these orders are unprecedented. Google did challenge the order of the CCI, imposing the fine of Rs. 1,337.76 crore, before the National Company Law Appellate Tribunal ('NCLAT'). However, NCLAT refused to stay the order of CCI, as prayed by Google. On the contrary Google was directed to deposit 10% of the penalty within three weeks.[135] In addition, NCLAT listed the appeal for hearing on April 3, 2023. Google, aggrieved by this order of NCLAT dated 4th January 2023, appealed to the Supreme Court of India ('SC'). NCLAT justified their stance by observing that Google showed no urgency in getting the order of CCI stayed. This was so because Google

128 See *supra* note 84, para 617 and See *supra* note 86, para 395.

129 *Ibid*

130 *Supra* note 81.

131 *Supra* note 81, para 422.

132 *Id*., para 423.

133 *Id*., para 439.

134 *Umar Javeed* and XYZ.

135 Agencies, 'Google-CCI case: NCLAT directs Google to deposit 10% of 1,337.76 cr penalty' (*Mint*, 4 January 2023) , *available at*: https://www.livemint.com/companies/news/googlecci-case-nclat-directs-google-to-deposit-10-of-rs-1-337-76-cr-penalty-refuses-interim-relief-11672812217744.html> accessed 1 February 2023; Pallavi Mishra, 'Google V Competition Commision: NCLAT Directs Google To Deposit 10% Of Penalty As Interim Measure' (*Live Law,* Jan. 6, 2023), *available at:* https://www.livelaw.in/news-updates/google-v-competition-commision-nclat-delhi-directs-google-to-deposit-10-of-rs-133776-crores-penalty-as-interim-measure-218226(last visited on May 20, 2023).

filed its appeal nearly two months after the order of the CCI dated October 20 2022, was passed. By an order dated January 19, 2023, the SC refused to interfere with the NCLAT order.[136]

As per the Supreme Court, since the appeal is pending before the NCLAT, any observations by it on the merit of the case, would prejudice the proceedings before NCLAT. The Supreme Court clarified that "the findings which have been arrived at by the CCI cannot be held at the interlocutory stage to be either without jurisdiction or suffering from a manifest error which would have necessitated interference in appeal."[137] The Supreme Court, while disposing of the appeal requested the NCLAT to dispose of the matter by March 31, 2023.[138] And thus on March 29, 2023, NCLAT upheld the decision of CCI imposing the fine of Rs. 1,337.76 crore. The only relief Google got was in terms of slight modification of the CCI order, as amended by NCLAT. Accordingly, NCLAT "directed for deletion of directions at paragraph 617.3, 617.9, 617.10 and 617.7 while upholding other directions in paragraph 617 stated in the order passed by CCI."[139] Accordingly CCI's directions pertaining to allowing app developers inter-operability inter se Google and Android forks, have been deleted. Further direction of CCI pertaining to allowing un-installation of pre-installed app has been deleted. Similarly, CCI's direction pertaining to allowing usage of Google play store for distribution of third- party app store, has been deleted. And the order of CCI pertaining to allowing sideloading of apps has been deleted, *via* the order of NCLAT. Only to that extent the CCI order was modified. The battle, though is far from over, since this order can be further appealed to Supreme Court. The core of the CCI's analysis and determination based on network effects, thus has been affirmed by the NCLAT. And that can be argued to be an addition to the existing jurisprudence pertaining to analysis of abuse of dominance under the Act, in digital market.[140]

The indirect network effect, as shown by the CCI, and upheld by NCLAT, is due to the position of Google as the gatekeeper within digital world. Thus, the indirect network effects test will henceforth be key to determining the dominance of an entity within

136 *Google LLC* v. *Competition Commission of India* ,Civil Appeal No 229 OF 2023.

137 *Id*., para 12.

138 *Ibid.*

139 Simran, "[Google-CCI Case] |NCLAT upholds Rs1,337 crore penalty on google for abuse of dominant position in Android Mobile Device Ecosystem", *SCC Online Blog* (Mar. 29, 2023), *available at:* https://www.scconline.com/blog/post/2023/03/29/penalty-on-google-nclat-sets-aside-certain-directions-by-cci-but-upholds-inr-1337-crore-penalty-on-google-for-abuse-of-dominant-position-in-android-mobile-device-ecosystem-legal-news-legal-researc-up/ (last visited on Apr. 10, 2023).

140 Vaish Associate Advocates, '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', *Lexology* (3 April 2023), *available at:* https://www.lexology.com/library/detail.aspx?g=9e0b0ef2-47be-4b90-a4ed-99fd10963ef8(last visited on Apr. 10, 2023).

the markets. And this is an expansion of the provision of section 4 (2) (e) of the Act. Since the same recognise an act as abuse wherein the undertaking "uses its dominant position in one relevant market to enter into, or protect, other relevant market."[141] And the passage of the Competition Amendment Bill, 2022, does not change the position.[142] The amendment made to section 4 of the Act is confined to its explanation. Further the Bill does not specifically mention digital markets. However, the Bill aims to regulate the merger and acquisition of companies based on transaction value exceeding two thousand crore. This will thus include merger and acquisition by digital companies, whose transaction value is primarily due to data acquisition. Further acquisition of business using innovative technologies and methods are more prevalent is digital markets.[143] However, this regulation is ex-ante vis-à-vis mergers and acquisition. For determining abuse of dominant position, it will continue to be ex-post. This is in tune with the trend as seen in the EU where the enactment of special legislation for digital market are ex-ante. However, in so far as intervention through competition law is concerned it is *ex-post*.

The EU passed the Digital Service Act[144] and the Digital Market Act[145], were passed in 2022 by the EU Parliament. They both are concerned with safeguarding user's right within digital space as well as ensuring level playing field for players in digital market. These Acts are designed to continuously monitor the players within the digital space. However, they are not based on principles governing competition law. Hence, they are outside the ambit of the EU competition law. They complement but do not supplant the EU competition law. And they also prove that to regulate digital space, it's important to vigorously monitor their activity so that they do not indulge in anti-competitive activity. However, such a monitoring is under a different regulatory framework and not under competition law. In so far as competition law is concerned, barring merger and acquisition, all other anti-competitive acts are intervened with ex-post.[146] Hence

141 *Supra* note 74, s.4.

142 The Competition (Amendment) Bill, 2022, Bill No. 185 of 2022., *available at:* https://prsindia.org/files/bills_acts/bills_parliament/2022/Competition%20(Amendment)%20Bill,%202022.pdf(last visited on May 2, 2023).

143 Ministry, Finance, The Competition (Amendment) Bill, 2022, *available at:* https://prsindia.org/billtrack/the-competition-amendment-bill-2022 2023 (last visited on Apr. 20, 2023).

144 European Commission, 'The Digital Services Act: ensuring a safe and accountable online environment'. , *available at:* https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en (last visited on Apr. 20, 2023).

145 European Commission, 'The Digital Markets Act: ensuring fair and open digital markets', *available at:* https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited on Apr. 20, 2023).

146 European Commission, 'The Digital Services Act package', *available at:* https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (last visited on Apr. 20, 2023).

abuse of dominant position within digital markets are to be dealt with ex-post. For regulating digital space, a la EU, India needs a separate regulatory framework.

IV Conclusion

Through these orders CCI has brought law-tech jurisprudence in India at par with the global trend. Taking on a giant like Google takes a lot and the CCI has proved that it is equipped to do so. Importantly, the orders reveal that the Act is dynamic enough to address anti-competitive issues within the digital space. The analyses undertaken by the CCI explains in detail the ecosystem of the digital space. The delineation of the relevant product markets as well as relevant geographic markets within the digital space is conveniently done through the lenses of the Act. These orders as well as the CCI's attempt in the past to hold Google accountable, all prove the effectiveness of the Act. The CCI's orders also prove that anti-competitive practices within the digital space needs to be dealt with strongly in the interest of consumers. Through the *Google* v. *CCI* tussle, India's law-tech jurisprudence has gained gravitas. The CCI orders holding Google liable for abuse of dominant position thus has added teeth to the existing law-tech jurisprudence in India. Notwithstanding the final outcome of this tussle in the coming months, CCI's orders shall hold an important place in the law-tech discussion. As has been shown above, a more vigilant and pro-active CCI is the need of the hour to monitor and resist all abuse of dominance in the digital space. Further, as the 2022 Amendment to the Act establishes, ex-ante intervention can only be at the stage of merger and acquisition. Within the four corners of the Act, abuse-of dominance can only be intervened ex-post. That equally hold true for other anti-competitive agreements. For regulating the big tech from abusing their dominance in digital space, a separate regulatory framework, akin to EU, is needed. Hence the ongoing discussions on having a Digital Competition Act, need to factor in the kind of regulatory framework that is suited for ex-ante intervention. The same emanates from the recommendation of the Parliament Standing Committee on Finance, dated December 22, 2022.[147] However as the EU example shows, it has to be separate regulatory framework for the core of the competition law rules, like abuse of dominance, do not allow *ex-post* intervention.

Lovely Das Gupta[*]

147 'Anti-Competitive Practices by Big Tech Companies' (*PRS*, Dec. 22, 2022), *available at*: https://prsindia.org/policy/report-summaries/anti-competitive-practices-by-big-tech-companies (last visited on Feb. 10, 2023).

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