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CONTESTING MONOPOLY POWER: A LOOK AT BIG TECH AND ANTITRUST LAW

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ABSTRACT

A huge revolution in market dynamics has developed as a result of capitalism's unrelenting advance and the unstoppable power of globalization, changing the conventional outlines of government control. Private companies are rapidly expanding into formerly monopolized areas, marking a new era of economic progress. Many of these companies are not only developing domestically but also worldwide, surpassing the limits of their inception. This paradigm change needs a detailed study of the conditions under which such companies operate in order to maintain a fair and competitive economy. The proliferation of private companies in various markets brings both promise and peril. In a dearth of favorable conditions, dominant companies might abuse their market position, establishing severe obstacles to entry for prospective competitors. Monopolistic tendencies limit competition, which has negative repercussions for consumers. It is imperative to nurture an optimal competitive climate in which market participants compete for dominance since this inevitably results in more substantial goods and services, greater efficacy, and a breeding ground for innovation. Perhaps most crucially, a competitive market implies considerably lower costs, which benefits every consumer. In an era marked by the ascendancy of private companies, safeguarding the principles of competition becomes paramount, ensuring that economic progress endures inclusive and accessible to all. This paper analyses the recent case against Google for abuse of dominance as a cornerstone and suggests some remedies for keeping a vigilant eye especially against the big tech companies and preventing them from abusing the competition.

Keywords: Abuse of dominant position, Unfair trade practice, Relevant Market, Google application, Consumer, Europe Economic Area, Europe Commissions, Competition Commission of India.

INTRODUCTION:

Competition is a cornerstone in the complicated fabric of market dynamics, underlying the fundamental core of economic systems. The notion of competition is not as an afterthought but rather an essential framework upon which markets thrive. Its significance extends far beyond the safeguarding and enhancement of consumer welfare, although that remains a pivotal concern. Competition acts as a catalyst for innovation, sparking a transformational chain reaction that drives companies ahead. On top of being a consumer-centric premise, the competition enables companies to constantly push their boundaries, fostering a climate where novel ideas flourish, and breakthroughs become standard. Consequently, competition fosters a virtuous cycle of development, spurring technological advancements that elevate companies and redefine market landscapes. This paper delves into the pivotal nexus between major tech companies and contraventions of competition law, dissecting the intricate interplay of these elements and their profound implications on the dynamics of contemporary markets. Overall, it boosts seller efficiency. This efficacy can be classified into three types, such as:

- Allocative efficiency: It encourages the efficient deployment of resources.
- Productive efficiency: When the cost of manufacturing is kept to the most modest attainable level.
- Dynamic efficiency: Market competition encourages innovation, which in turn fosters sellers and manufacturers to engage in research and development.[1]

As a matter of consequence, in order to regulate the market and promote fair competition, the government must enact required statutes and ordinances, for this reason, these laws are known as competition laws. Competition law encompasses the laws, rules, and regulations that the government enacts in order to improve allocative, productive, and dynamic efficiency, primarily for consumer interests.

The Competition Act of 2002 is India's primary statute governing competition. This law superseded the older Monopolies and Restrictive Trade Practices Act of 1969, also known as the Monopolies and Restrictive Trade Practices Act of 1969. As inspired by Articles 38 and 39 of the Indian Constitution, the primary objective of the Monopolies and Restrictive Trade Practices Act of 1969 is to avoid the accumulation of economic power by restraining monopolies and restrictive trade practices while promoting social justice and the welfare state. With the swift passing of time and the advent of globalization, the Raghavan Committee recommended to the government in the year 2000 that the Monopolies and Restrictive Trade Practices Act of 1969 be struck down. Following that, the Monopolies and Restrictive Trade Practices Act of 1969 was repealed, and the Competition Act took its place.

Some objectives of Competition Act of 2002 include:

[1] Competition Law Book by Dr.S.C.Tripathi

i. To promote and sustain fair competition in the market by prohibiting the trade activities which cause adverse effects to the competition
ii. To protect the interest of consumers
iii. To ensure freedom of trade and commerce in the market.
iv. To prohibit anti-competitive acts.
v. To prohibit abuse of dominant position.
vi. To regulate mergers, amalgamations and joint ventures.

The main differences between Monopolies and Restrictive Trade Practices Act of 1969 and Competition Act are as follows:

i. Unlike Monopolies and Restrictive Trade Practices Act, the Competition Act does not penalize monopoly but it penalizes the abuse of Monopolistic power.
ii. Competition Act does not speak about unfair trade practices (they are covered under Consumer Protection Act of 1986)
iii. The Competition Act of 2002 can be enforced beyond Indian territory (effects doctrine)
iv. Competition Act introduced penalties for offences.

The Competition Act prohibits and regulates following issues including:

i. Anti-Competitive acts
ii. Abuse of Dominant position
iii. It also regulates merger and amalgamation and joint ventures.

Further, section 7 of the Competition Act empowers the central government to establish a body called as Competition Commission of India (C.C.I) in order to oversee, regulate and control the competition in the market.

On the 20th of October, 2022, the Competition Commission of India issued an order against Google for engaging in anti-competitive conduct in violation of the terms of the Competition Act, 2002, to the tune of 1337.78 crores (Indian rupees). In the case of Google LLC and others vs. Competition Commission of India and others[2][3], Competition Commission of India (CCI) contended that Google nearly controls 98 percent of the market and argued that it is found violating competition law. It has also accused Google of unfair trade practices by arguing that it is restricting the entry of other applications in the market where in it used some terms to define that which include five phrases like digital feudalism, digital slavery, technological captivity, chokepoint capitalism and consumer exploitation.

[2] https://www.mondaq.com/india/antitrust-eu-competition-/1326280/google-v-competition-commission-of-india--a-case-review

[3] Google LLC and Another v. Competition Commission of India Through its Secretary and Others, 2023 SCC OnLine NCLAT 147.

Competition Commission of India (CCI) further argued that Google, by abusing its dominance as a leading search engine Google is denying access to its competitors. Moreover, by making pre-installation of Google applications in android phones the incentive to develop and sell the devices operating on alternate version of android was considerably reduced. Considering all the factors in the case Competition Commission of India (CCI) is of the opinion that Google has violated section 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. By using its powers under section 27 of the Competition Act, 2002 Competition Commission of India (CCI) has ordered Google to cease and desist from indulging in anti-competitive practices. Further, by exercising its powers under section 27(b) of Competition Act, 2002 Competition Commission of India (CCI) imposed fine to the tune of 1337.78 crores.

Google argued that the findings and order of Competition Commission of India (CCI) are suffering from confirmation bias (tendency to interpret new evidence as confirmation of one's existing beliefs or theories) thereby, Google argued that there is no concrete evidence to prove the same and it is on the face of it that appears like that. It further argued that its popularity is due to effectiveness and nothing else. Mere dominance did not necessarily indicate abuse of dominance. When appealed by Google in National Company law appellate tribunal (NCLAT) the tribunal upheld the decision of Competition Commission of India (CCI) with minor modifications.[4]

Earlier in the year 2018 in European Union there has been a similar case where the European Commission handed over a penalty of 2.42 billion Euros for breaching anti-trust rules and abusing its dominant position in the market by prioritizing and giving preferential treatment to its own products over its competitors[5][6].

In its investigation European Commission has initially took stock of market share of the company in the entirety of European Economic Area (E.E.A) since the year 2008 after investigating the same it found that Google is indeed a dominant in all the countries of European Economic Area (E.E.A) but out of all these countries it has not been a dominant player in Czech Republic initially but then after 2011 it has become a dominant player in that country also. In most cases the market share of Google has been above 90% consistently from the year 2008 but mere domination is not wrong unless there is abuse of domination. The European Commission has opined that Google abused its dominance in general internet search by giving its product i.e. Google Shopping initially known as Froogle and then Google Product Search before getting renamed as Google Shopping an illegal advantage in separate comparison shopping market where Google has intentionally given an eminent position to its own comparison shopping service while demoting that of European Economic Area's (E.E.A) companies.

European Commission did not object to Google's generic search algorithms however, it is of the opinion that it becomes problematic when Google uses its dominance in general search engine market to promote its own

[4] https://www.mondaq.com/india/antitrust-eu-competition-/1326280/google-v-competition-commission-of-india--a-case-review
[5] https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784
[6] https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785

comparison shopping service at the cost of its rivals in an unfair manner where the competition gets hampered which obviously is not fair competition and illegal according to Europe's anti-trust rules. Such practices are not definitely in-line with the norms of European Union's anti-trust rules and regulations. Appearing in top of Google search results paves the way to get more attention of users and thereby more traffic for websites. People generally tend to open the results that are on the top in this case it helped Google's shopping service to get more traffic which in-turn generated more revenue while decreasing that of its rivals in the market. This helped Google to capture large market share at the expense of its competitors.

Considering the gravity of the predicament, the European Commission imposed a fine of 2.45 billion Euros. The fine has been calculated based on Google's revenue from 13 European Economic Area (E.E.A) countries of Google's comparison shopping service. According to the European Commission, Google must uphold the concept of equal treatment for rival products, for which Google is wholly accountable, and it is up to Google to ensure compliance. In the event of non-compliance, Google will be subject to a separate lawsuit, and a daily penalty payment of up to 5% of Alphabet's average turnover will be collected, with any payment backdated to when the violation commenced.

In relation to this case, initial proceedings against Google has begun in 2010 after many complaints by its European and American competitors after which Google has tried to address these issues by making up with three promises, however, it has been evident that the promises made were not enforced correctly in order to address the concerns of European Commission. In addition to that Google also failed to submit a revised proposal not only this there are also other cases where European Commission came to a preliminary conclusion that Google has abused its dominance which resulted in stifling of competition and innovation in the market to protect and expand its dominant position in general internet search there are also cases where Google is trying to prevent third party websites from sourcing ads from its competitors.

Just like in this case Competition Commission of India (CCI) has opined that Google has abused its dominant position in android mobile ecosystem and imposed a penalty of 1337.76 crores. In addition to that Competition Commission of India (CCI) has also issued a cease and desist order while directing Google to rectify its conduct within a specific timeline. Competition Commission of India in this case examined various practices followed by Google with respect to licensing of android operating system and its applications. In order to investigate this matter Competition Commission of India (CCI) Market for licensable Operating System (O.S) for smart mobile devices in India.

i. Market for licensable Operating system (O.S) for smart mobile devices in India
ii. Market for app store for android smart mobile Operating system (O.S) in India
iii. Market for general web search services in India
iv. Market for Non- Operating system (O.S) specific mobile web browsers in India
v. Market for online video hosting platforms in India

During inquiry Google spoke about the competitive constraints that it is facing from Apple. But the difference in two business models are enormous Apple's business model is based on vertically integrated smart device eco-system while Google's business model is driven by reaching out to maximum people so it can interact with more people which generates more revenue from services if it interacts with more people. Competition Commission of India (CCI) further noted that there is no question as to substitutability between Google's play store and Apple's app store. Competition Commission of India (CCI) further noted that there is no question as to substitutability between Google's play store and Apple's apps store. Its assessment revealed that Google is dominant in all the above mentioned markets. It is well known fact that Google owns and operates Android Operating system (O.S) to mobile Original Equipment Manufacturers (O.E.M) to use them in their smart mobile devices. So Google and such Original Equipment Manufacturers (O.E.M) enter into various agreements namely Mobile Application Distribution Agreement (M.A.D.A), Anti-Fragmentation Agreement (A.F.A)/Android Compatibility Commitment (A.C.C) and Revenue Sharing Agreement (R.S.A).

Competition Commission of India (CCI) has opined that Mobile Application Distribution Agreement (M.A.D.A) assures prominent search entry points like home screen etc which will accord significant competitive edge to Google over other players which the competitors could never avail the same level of market access like what Google has done by Mobile Application Distribution Agreement (M.A.D.A). Meanwhile, Anti-Fragmentation Agreement (A.F.A) and Android Compatibility Commitment (A.C.C) assured that the distribution channels for competing search services is killed by prohibiting Original Equipment Manufacturers (O.E.M) from offering devices based on android forks (which means an alternate version of android that has been modified from the open source version of the android source code that has not been approved as android compatible by Google) which ensured that Original Equipment Manufacturers (O.E.M) will not develop devices based on forks which are outside the purview and control of Google. If such rules are not enforced Original Equipment Manufacturers (O.E.M) could have availed the facility to sufficient distribution channels offering device based on forks even android developers cannot find sufficient distribution channels as most Original Equipment Manufacturers (O.E.M) are tied to Google.

Similarly, Revenue Sharing Agreement (R.S.A) helped Google to be assured of its exclusivity in the smart devices while totally excluding its competitors. Competition Commission of India (CCI) is of the opinion that the markets should be allowed to function based on the merits of competition and onus is on the dominant player to ensure the same but in contrary by using these agreements Google ensures continuous and uninterrupted growth of Google at the expense of competition and improving itself while not allowing others.

Competition Commission of India (CCI) said that pre-installation of Google mobile suite with no option to uninstall as per Mobile Application Distribution Agreement (M.A.D.A) and their prominent placement is imposing unfair conditions on device manufacturers contravening section 4(2)(a)(i) of the Competition Act. These are like supplementary obligations imposed by Google on Original Equipment Manufacturers (O.E.M) in contravention of

section 4(2)(d), Google has used its online search market by denying access for competing search apps contravening section 4(2)(c) of the Competition Act,2002. Google used its position of dominant player in app store market for android Operating system (O.S) to enter and protect its position in Non-Operating system (O.S) specific web browser market through chrome thereby contravening section 4(2)(e) of the Competition Act, 2002. By mandating Original Equipment Manufacturers (O.E.M) to sign Anti-Fragmentation Agreement (A.F.A)/ Android Compatibility Commitment (A.C.C) it has limited the incentive to develop android forks limiting scientific development and also in contravention of section 4(2)(b)(ii) of Competition Act, 2002.[7]

ANALYSIS:

From our analysis we have observed that there are few contractual provisions contained in Mobile Application Distribution Agreement (M.A.D.A) that is available online especially section 2.1 along with section 3.4 and 3.6 respectively[8,9]. We have made remarks under section 4 of the Competition Act, 2002, which deals with the foremost phrase Abuse of Dominant Position, in addition to the provisions under the Mobile Application Distribution Agreement (M.A.D.A).

Under the Mobile Application Distribution Agreement (M.A.D.A) the company is granted by google a non-transferable, non-sub-licensable, non-exclusive license to reproduce and distribute Google Applications to end users in authorized territories as specified by Google. But these applications licensed by the Google to the company can be sub-licensed to telecom operators, resellers, and distributors for distribution purposes, but they must be pre-installed on devices as specified by Google, and in each territory the initial distribution needs approval by the Google. The applications licensed by the Google to the company can be sublicensed by the company to the third parties only for development and testing purposes only, which is clearly mention in the section 2.1 of the Mobile Application Distribution Agreement (M.A.D.A).Unless Google approves, Google applications placement on devices includes preloading them and also placing these applications on default home screen and also making the Google application as the default search engine as mentioned under Section 3.4 of the Mobile Application Distribution Agreement (M.A.D.A). Exceptions granted before the agreement's effective date still apply.

As per the placement requirements the company should preload the Google applications on the devices, this preloading includes installation only, not launching. When an end user selects an icon representing a preloaded Google Application, it will launch that application as observed under section 3.6 of the Mobile Application Distribution Agreement (M.A.D.A). Whereas, Under Section 4 Competition Act, 2002, contains various provisions to define what constitutes abuse of dominance in the market. When we take a closer look at section 4(2)(a)(i) which runs as "There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—

[7] https://www.cci.gov.in/antitrust/press-release/details/261/0
[8] https://www.sec.gov/Archives/edgar/containers/fix380/1495569/000119312510271362/dex1012.htm
[9] https://mspoweruser.com/mobile-application-distribution-agreement/

(a) Directly or indirectly, imposes unfair or discriminatory—

(i) Condition in purchase or sale of goods or service." [10]

Under section 4(2) (d) which states as "There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].— 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."[11]

After reviewing the preceding sections, it is evident that Google, by compelled Original Equipment Manufacturers (O.E.M) to enter into Mobile Application Distribution Agreement (M.A.D.A) which imposes unfair and discriminatory conditions like pre-installation of Google mobile suite with no option to uninstall the same in smart mobile device while also deciding the placement of such applications as a condition for licensing android under android compatibility commitment is a violation of section 4(2)(a)(i). It is also in contravention of section 4(2)(d) as it subjects parties i.e. Original Equipment Manufacturers (O.E.M) in this case to supplementary conditions which have nothing to do with licensing of android. In a hypothetical situation if these pre-installed applications when used in conjuncture with android Operating system (O.S) improves overall functionality, efficiency and security it might be fair for Google to mandate the same but in all the other cases it cannot be considered to be fair as it stifles the competition as the end user will not download and use any applications of similar functionality and use purpose if Google applications are pre-installed which will stifle the competition in the market where all the other players will become non-existent in the market.

Similarly, Anti-Fragmentation Agreement (A.F.A)/ Android Compatibility Commitment (A.C.C) is meant to stop its partners and competitors from forking android and going alone. The members of the android community more than agreeing to ship android compatible devices they have agreed not to ship incompatible devices those are devices based on android forks similar view has been expressed by European Commission also Anti-Fragmentation Agreement (A.F.A) prevents new scientific advancements and innovation in the field by signing Anti-Fragmentation Agreement (A.F.A) with Google it disincentivize software developers and as the case may be device manufacturers to develop and sell alternate versions of android thereby preventing scientific advancements and innovation in that field that will ultimately go against interests of consumers[12]. Whereas section 4(2)(b)(ii) of Competition Act, 2002 provides that limiting or restricting technical and scientific developments in relation to either goods or services that is prejudicial for interests of consumers is nothing but abuse of dominance. Also, with such pre-installation of Google apps along with Google's own browser chrome it has perpetuated its dominance over online search market considering Google is a dominant player it resulted in denial of market access for competing search applications in

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[10] Section 4 of Competition Act, 2002.

[11] Section 4(2)(d) of Competition Act, 2002.

[12] https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf

contravention of section 4(2)(c) which speaks about practices that resulting in denial of market access in any manner to the competitors. Clearly, here Google has foreclosed the market considering mandatory pre-installation of certain applications like chrome which is used for general online search and considering its dominance in the relevant market.

Lastly, Through the Google Chrome App, Google has taken advantage of its monopoly in the Android OS app store market to enter and defend its position in the non-OS specific web browser market, in violation of Section 4(2) (e) of the Act.

CONCLUSION:

The big tech companies like Google, Meta, Microsoft, Apple, X formerly known as Twitter etc play a significant role in everyday life of a common man. Today in most cases we cannot imagine our lives without the services provided by these companies and also with more and more people getting access to internet every day for example in the countries like India where due to its tremendous economic progress made over last few decades and millions of people being lifted from poverty all that time which is not going to stop for another few decades to come the number of internet users are only going to increase as the days pass by which in-turn means more and more users on these big tech platforms these big tech companies hold significant market share in the markets they operate and in some cases tend to abuse their dominance in the market just like we have seen in the above case. Nowadays, domination and monopoly are not wrong but abuse of such monopolistic power is problematic. Being dominant players in their relevant market does not necessarily grant them the blanket permission to abuse the same and prevent competition in the market. The competition must only be on merits but not on unfair and discriminatory agreements which stifles the competition in an unfair manner as it might ultimately in the due course of time harm the interests of consumers. In developing countries with huge populations like India it is even more important as many companies mainly multi-national companies and Big-techs think that the regulators will be lenient on them considering the investments they made in such cash hungry developing nations. In this aspect the decision taken by Competition Commission of India (CCI) in order to curtail the abuse of dominance in this case by Google is a much required one although the fine is not so high when compared to that of European Commission's judgment it will have a deterrent effect on the companies. But levying fine would not be enough it requires strict over-sight by the regulators on such anti-competitive practices and agreements that companies get into with each other. The governments must mandate the companies especially Big-tech companies to hire a person in order to oversee the agreements that the companies are entered into and flag any such anti-competitive arrangements on top of that such agreements must be sent to relevant regulators like Competition Commission of India (CCI) in this case if the party which entered into such agreement is a dominant player the agreements must also be sent for scrutiny of Competition Commission of India (CCI) if the value of any agreement crosses a threshold limit. Competition Commission of India (CCI) should also check the records of companies periodically to ensure everything is fair and transparent by such measures we will be able to check anti- competitive practices by the companies.