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GOOGLE VS CCI: A SHORT ANALYSIS

~Rohan Dey

In the case of Google Vs CCI¹, CCI imposed a fine of Rs 1337.7 Crore on Google, citing violations of Anti Trust to its Android Mobile Operating Systems. Supreme Court then commenced hearing of the appeal from the decision of NCLAT, upholding Rs 1338 Crore levied by the CCI².

Both Google and CCI contested the order of the NCLAT on various grounds and each party required four days for presenting their argument, the hearing's commencement got delayed by the Courts due to the Court's busy schedule in hearing Constitution Bench Matters.

After an investigation, the CCI found that Android device manufacturers were being forced to pre-install Google's services and called for equitable access for all market players. CCI underscored the obligations of Dominant companies like Google to avoid actions that could undermine fair competition. The regulator specifically pointed out how Google's dominance in online search has restricted market entry for competing applications. Further, CCI also discovered that Google had abused its dominant position in the Android App Store to reinforce its dominance in online general search, thereby contravening competition law. Investigation revealed that Google's Agreements with mobile manufacturers imposed restrictions favouring its services at the expenses of competitors.

In March 2023, the NCLAT partially confirmed the CCI's ruling upholding Rs 1338 penalty holding that CCI's decision was not influenced by any confirmation Bias. NCLAT also

¹ Google Inc. v. Competition Commission of India & Ors., 2020 SCC OnLine NCLAT 248.

² Inc42, <https://inc42.com/buzz/google-vs-cci-third-antitrust-probe-likely-to-take-another-year/> (last visited 6 May 2024)

acknowledged that the requirement of Google for OEM's to preload the entire suite of Google App was unfair, yet it overturned some of the directions of the CCI which the regulator is challenging in the Supreme Court. NCLAT in its 189 page order upheld the direction of CCI, which included one in which Google was asked to allow users during the initial setup of a device to choose their search engine which would later become their default search engine, and COMPAT (NCLAT) also made it clear that OEMs cannot be forced to pre-install a bouquet of apps, and asked Google to implement the direction in a period of 30 days.

CCI directed DG to conduct an investigation, where the following issues³ were framed-

1. Whether mandatory pre-installation of the GMS Suite under Mobile Applications Distribution Agreement amounts to unfair condition on the device manufacturers and thereby infract provisions of Section 4(2)(a)(i) and Section 4(2)(d)
2. Whether Google has perpetuated its dominant positions in the market of online search resulting in denial of Market access for competing search apps in contravention of Section 4(2)(c).
3. Whether Google has abused its dominant position in Playstore to protect its dominant position in online general search in violation of Section 4(2)(e) of the Act
4. Whether Google had abused its dominant position by typing up of Youtube with Play Store and thereby violated provisions of Section 4(2)(e)
5. Whether Google has abused its dominant position in Play Store by imposing unfair terms and conditions on App Developers in violation of Section 4.

The DG then concluded that Google play store's policies are ambiguous, biased, vague, arbitrary and one-sided. The unilateral decision to modify developer terms i.e. Opp and DOA by google, suspension from the Play Store without any cogent reason, losses suffered by third party app developers due to arbitrary conduct of the Google appears to be that Op's aforesaid behaviours including the terms and conditions discussed above amounts to imposition of an unfair and discriminatory conditions, limiting and restricting the technical and scientific development of apps to the prejudice of users and in denial of market access by Google.

The CCI delineated five relevant markets⁴ in the impugned order-

³ Google Inc. v. Competition Commission of India & Ors., 2020 SCC OnLine NCLAT 248.

1. Market for licensable OS for smart mobile devices in India
2. Market for App Stores of Android Smart Mobile OS in India
3. Market for general web search services in India
4. Market for Non-OS specific mobile web browsers in India
5. Market for Online Video Hosting Platform (OVHP) in India

CCI help Google to be dominant in all Relevant Markets. Accordingly in terms of provisions of Section 27 of the Competition Act, CCI directed Google to cease and desist from indulging in Anti-Competitive Practises and found to be in violation of Section 4.

Some of the important measures⁵ were-

1. OEMs shall not be restrained from choosing from Google's proprietary applications to be pre-install and also should not be forced to pre-install a bouquet of applications and deciding the placement of pre-installed apps on their smart devices.
2. Licensing of Play Store to OEMs shall not be linked with the requirement of pre-installing Google Search service, Gmail, Youtube, and other application of Google
3. Google cannot deny any access to its playstore services ADI's to put OEMs, app developers and its potential or existing competitors in their disadvantage, where this would confirm the inter-operability of the Apps between Android OS which complies of this remedy. The developers of the app will be able to port their apps into the Android Forks easily.
4. Google shall not incentivise or obligate OEMs for not selling smart devices based on Android Forks.
5. Google shall not impose anti fragmentation obligations on OEMs a being done presently under ACC/AFA.
6. Google shall not offer any Monetary/ other incentives to, or enter into arrangements with OEM's for ensuring the exclusivity for its search services.
7. Google shall not restrict uninstalling of tis preinstalled apps by the users
8. Google shall allow the users to choose their default search engine during the initial device setup for all search entry points, giving users flexibility.

⁴ Google Inc. v. Competition Commission of India & Ors., 2020 SCC OnLine NCLAT 248.

⁵ Google Inc. v. Competition Commission of India & Ors., 2020 SCC OnLine NCLAT 248.

9. Google should allow App Store Developers to use Play Store to distribute their app Stores through Play Store.
10. Google shall not restrict the ability of the developers of the app in a manner which would distribute their apps through side loading.

Some Important Arguments⁶ of Appellant⁷

1. The Arguments of the Ld. Council for the appellant in support of the appeal raised various submissions, that for holding abuse of dominant position, effect of conduct being anti-competitive has to be proved.
2. Dominant position, is not prohibited but CCI must prove abuse of such dominant position.
3. CCI did not conduct any analysis as required under Section 4 in the impugned order.
4. CCI has come to the conclusion that MADA contains unfair conditions which is incorrect which is incorrect, as MADA is not imposed on OEM, the concept of imposition contains a compulsion and there is no compulsion on OEMs to enter into any MADA agreement with Google, making MADA an optional agreement.
5. Manufacturers were not prohibited from pre-installing other Non-Google Apps by Google, including those Apps which are competing with Apps of that of Google.
6. Under MADA OEM's can have several non-Google apps on their devices.
7. Google's requirements of placement and preinstallation donot give unfairness as MADA does not curtail the freedom of manufacturers to pre-install alternative apps and place them prominently.
8. Entering into a standard form of contract cannot be held to be putting any imposition which has unfair conditions, and as MADA is a standard form of contract, CCI's view that OEM's have no choice and that they have to preinstall all apps made by Google is not correct.
9. No OEM has submitted that they did not want to enter into MADA agreement, which explains that there was no compulsion on them, and it was the willingness of the

⁶ Indiankanoon, <https://indiankanoon.org/doc/190415917/> (last visited 7 May 2024)

⁷ Indiankanoon, <https://indiankanoon.org/doc/190415917/> (last visited 7 May 2024)

Device Manufacturers to sign the MADA by their desire to access Google's Proprietary apps and services on their devices.

10. It was also submitted that sideloading is not prohibited by Google. It only issues warnings, to save the user from harm and Malware.

Submission⁸ on behalf of CCI⁹

1. ASG submits that effect of Abuse does not have to be proved within the Scheme of Section 4(2), adding that the appellant is not only dominant but super-dominant in the Relevant Market.
2. The mandatory bundling of pre installation of 11 Crore applications, and premium placement of the same violates Section 4 (2)(a)(i) and Section 4(2)(d) of the Act.
3. Reducing the incentive and ability of OEM to develop devices that can operate on Android forks violates Section 4(2)(b)(ii) of the Act.
4. ASG also submitted that under the MADA agreement, MADA devices are those that can run only on Android OS and are also the ones that have been approved by Google. Coming to the Revenue Sharing Agreement (RSA) , Ld ASG also submitted that all the agreements like MADA, AFA/ACC, and RSA have to be read together to understand the cumulative effect the agreement had on an OEM.
5. MADA clauses bundle Google's 11 core Apps, some of which are Chrome, Search, Gmail, Maps, Youtube, Play Store, Duo, and Play Music, which are bundled as must-have apps for every OEM using Google Android OS.

⁸ Indiankanoon, <https://indiankanoon.org/doc/190415917/> (last visited 7 May 2024)

⁹ Google Inc. v. Competition Commission of India & Ors., 2020 SCC OnLine NCLAT 248.