

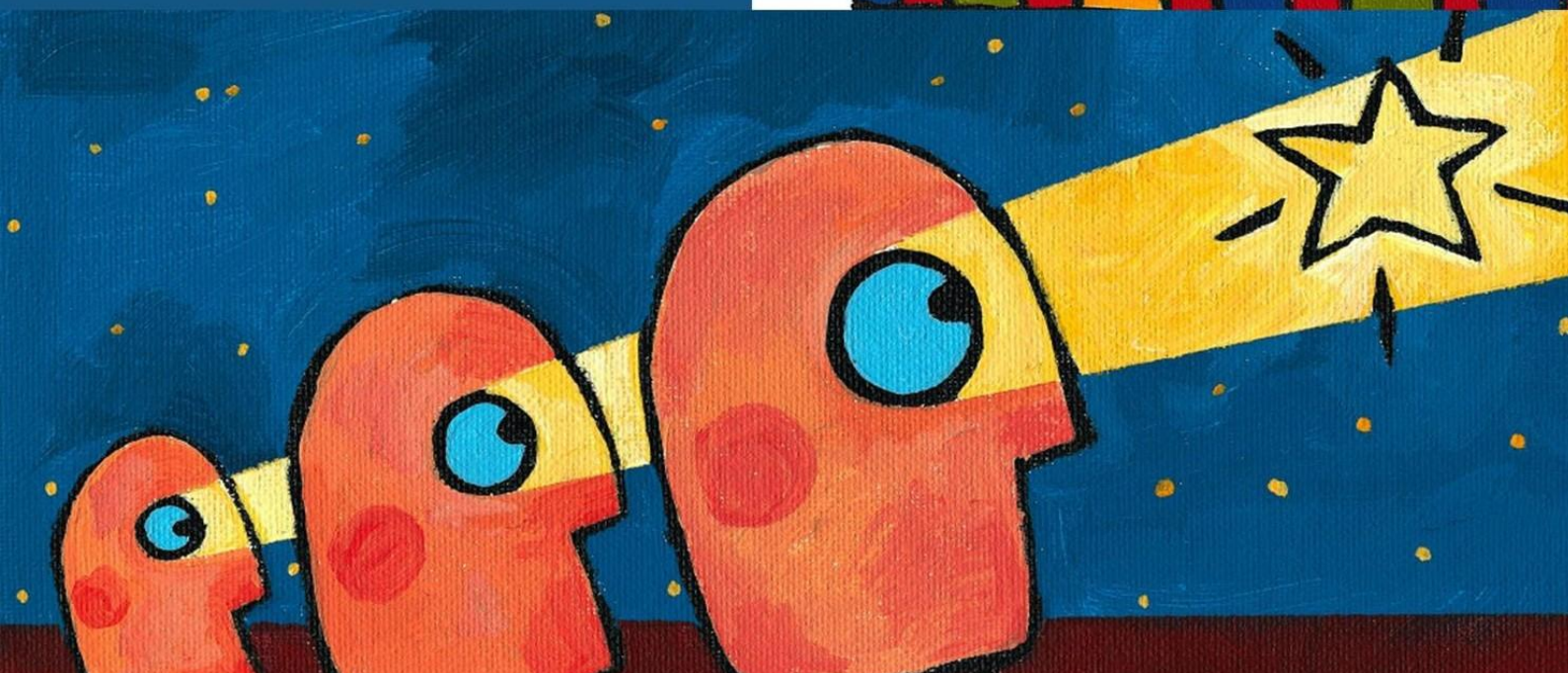


KK SHARMA  
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# State of Antitrust

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## **The Competition Commission of India Imposes Rs. 1337.76 Crores Penalty on Google for Abusing its Dominant Position**

The Competition Commission of India (**'CCI'**/ **'Commission'**), under section 27 of the Competition Act, 2002 (**'the Act'**), imposed a penalty of Rs.1337.76 Cr. on Google LLC and Google India Private Limited (**together referred as 'Google'**/ **'OPs'**) for abusing and leveraging their dominant position to enter into restrictive agreements, which are anti-competitive in nature, with Original Equipment Manufacturers (**'OEMs'**) and other market players.

The informants, in the present case, delineated four different relevant markets as: *“(i) Licensable Smart Mobile OS; (ii) App Stores for Android Mobile OS; (iii) Online Video Hosting Platform ('OVHP'); and (iv) Online General Web Search Service”* in India and made the following allegations against the OPs: **i)** Google is abusing its dominant position by making it mandatory for OEMs to exclusively install Google's own applications/services if they want any part of Google Mobile Services (**'GMS'**) on their devices; **ii)** Google bundles certain Google applications and services with other products and services of Google. It was alleged that this conduct of the OPs illegally prevents the development and market access of rival applications and services in violation of section 4 read with section 32 of the Act.

The Commission, based on the averments made in the information, directed the Director General (**'DG'**), under section 26(1), to initiate an investigation against the OPs.

The DG in his investigation delineated 5 relevant markets: **a.** *Market for licensable OS for smart mobile devices in India;* **b.** *Market for app store for Android smart mobile OS in India;* **c.** *Market for general web search services in India;* **d.** *Market for non-OS specific mobile web browsers in India;* **e.** *Market for Online Video Hosting Platform ('OVHP') in India.* Further, the DG found Google to be Dominant and have abused its dominant position in all the 5 markets.

The Commission after examining all the evidences and averments made in the information and objections of the OPs along with the DG report, amongst others, observed the following: **i)** that the agreements, such as Mobile Application Distribution Agreement (**'MADA'**), Anti Fragmentation Agreement (**'AFA'**)/ Android Compatibility Commitment (**'ACC'**) and the Revenue Sharing Agreements (**'RSAs'**), that Google entered with OEMs cannot be considered in isolation as the interplay of all the agreements creates anti-competitive constraints on the markets; **ii)** Google imposed conditionality through anti-fragmentation agreement, which makes it mandatory for OEMs to install entire GMS suit on “ – which includes play store and other apps of GMS – ” the devices without any option to uninstall the same. Google, through these agreements, has made sure that its search tools are pre-installed on all android devices. These agreements hampered bargaining capabilities of the OEMs and were perpetuating Google's dominance over these markets; **iii)** the Commission noted that while the consumers were provided these services free of cost, it was monetized by Google through advertisement revenue which formed more than 83% of its revenue worldwide in 2020; **iv)** Google was making sure that through these anti-fragmentation agreement and revenue sharing strategies the search tools such as browsers, search widgets, Google assistance, chrome etc. are present on the device. This gave Google access to substantially large amount of data which also help it improve its user experience. Further, when it comes to the search browser, there is a significant 'status quo bias' coupled with network effects, and these factors lead to more consumer network and hence more data. This results in better quality of 'search results' or recommendations. Better search results creates positive feedback loop in favour of the Google and to the detriment of its competitors; **v)** the synergistic effect of MADA, AFA and RSA was that Google was able to oust its competitors from the market. It was further, observed that the dominant player has a special responsibility to not indulge in activities having anti-competitive effect in the market.

The Commission, based on the above observations, concluded that:

**i)** Mandatory installation of GMS suit amounted to imposition of unfair condition and imposition of supplementary obligation and was in clear violation of section 4(2) (a) (i) and 4(2) (d) of the Act; **ii)** Google's actions resulted in denial of market access to its competitors and was in contravention of section 4 (2) (c); **iii)** Google leveraged its position in app store market to leverage its standing in the general web search and online video hosting platform market thereby contravening section 4(2) (e).

The Commission, based on the above reasoning, amongst other things, directed: **i)** Google to 'cease and desist' from indulging into anti-competitive agreements and to remove all the anti-competitive clauses from their agreements; **ii)** Google not to make it mandatory for the OEMs to install all of Google's apps if they only want to install one; **iii)** Google shall allow the users the freedom to choose their default search engine and also to be able to uninstall the pre-installed Google apps from their mobile phone; **iv)** allow the developers of app stores to distribute their app stores through Play Store. The Commission gave Google 3 months' time to implement its order.

[\(Order dated 20.10.2022\)](#)



## No Penalty for Cartel Conduct by Paper Manufacturers

The Competition Commission of India ('Commission'/ 'CCI') issued a cease-and-desist order against 4 kraft paper manufacturers associations along with their 115 member paper mills (together referred as 'OPs') for violating section 3(3), read with section 3(1) of the Competition Act, 2002 ('the Act').

An information before the Commission was filed by 3 corrugated box makers' federations/associations alleging that various Kraft Paper manufacturers associations, through periodic meetings and correspondences, directed their members (i.e., Kraft Paper Mills) to: a) drastically raise the price of kraft paper which were to be sold to corrugated box manufacturers. Kraft paper is considered to be the main ingredient of their product; b) collectively shut down the operation of the paper mills in the region.

The Commission based on the averments made in the information formed a prima facie view and directed the Director General ('DG') to initiate an investigation. During the investigation, a number of the OPs filed for leniency applications under section 46 of the Act, accepting contravening the provisions of the Act, and thereafter, cooperated with the DG investigation. The DG, therefore, after investigation found all 119 OPs in violation of the provision of section 3 of the Act.

The Commission, after going through the leniency applications, objections & suggestions made by the OPs and DG report, which included minutes of the meeting, e-mail communications, WhatsApp messages, and oral depositions of various representatives of the OPs, found all 119 OPs, including four regional associations of kraft paper manufacturers, in contravention of the provisions of section 3 of the Act.

Based on the findings, the Commission ordered the OPs to cease and desist from the cartel conduct. However, the Commission, taking into account the fact that a large number of OPs were Micro Small and Medium Enterprises ('MSMEs') and were going through an

economic turmoil due to the COVID-19 pandemic and decreasing demand of papers in the market, did not impose any penalty.

*(Order dated 12.10.22)*

## CCI Imposes a Penalty of Rs. 936.44 Crores on Google for Abuse of Dominant Position

The Commission, finding Alphabet Inc., Google LLC, Google Ireland Limited, Google India Private Limited, Google India Digital Services Private Limited (together referred as 'Google'/ 'OPs') in contravention of section 4 of the Act imposed a penalty of Rs. 936.44 Crores on them.

The information filed before the Commission delineated three relevant markets: i) The market for licensable mobile Operating System ('OS') for smart mobile devices in India; ii) The market for app stores for Android OS in India; and iii) The market for apps facilitating Payment through UPI in India. It was averred that Google, being dominant in these relevant markets, have abused its dominance. Amongst other things, it was alleged that Google is abusing its dominant position by: a) *"mandating apps to use Play Store's payment system and Google Play In-App Billing for charging their users for the purchase of apps on Play Store and In-App purchases (which privileges Google Pay over other apps facilitating payment through UPI and mobile wallets) if they want to be listed on the Play Store; b) Unfairly privileging Google Pay inter-alia by pre-installing and prominently placing Google Pay on Android Smartphone at the time of initial setup resulting in a "status-quo bias" to the detriment of other apps facilitating payments through UPI as well as other methods of payment, etc."*

Based on the material available on record, the Commission formed a prima facie view that the OPs have contravened various provisions of a section 4 of the Act. Accordingly, the Commission directed the Director General ('DG'), to cause an investigation into the matter. Subsequently, two other information were filed on similar grounds. The Commission, after considering them,



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directed the DG to investigate by passing two Orders under Section 26(1) and clubbing all the three cases. The Commission after considering the DG report and the replies of the OPs held that: i) acceptance of Google Play Billing System ('GBPS') was mandatory to gain access to the Play Store, and this amounted to the following effects: a) imposition of unfair conditions on app developers; b) Limiting technical development in the market for in-app payment processing services; c) Denial of market access to payment aggregators and app developers.

Therefore, the Commission held that Google has violated section 4(2) (a) (i), 4(2)(b)(ii) and section 4(2)(c). ii) Google's operations result in abusing its dominance in the market for licensable mobile OS and app stores for Android OS to secure its position in downstream markets, and, therefore, is in contravention of Section 4(2) (e) of the Act. iii) Google's integration of its own UPI app vis-à-vis other rival UPI apps with the Play Store results in violation of Sections 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act.

The CCI found the plea of not having any anti-competitive intent, made by Google, to be without any merit. Therefore, CCI imposed a penalty on Google @ 7 % of the average of relevant turnover for the last three preceding financial years 2018-19, 2019-20 and 2020-21 amounting to Rs. 936.44 Crores for violating Section 4 of the Act.

*(Order dated 25.10.22)*

### **Prominent OTAs penalized for Violation of Section 3 & 4 of the Act**

The CCI imposed a penalty of Rs. 392.36 Crores on prominent Online Travel Agents ('OTAs') for entering into agreements adversely affecting competition in the Indian market of "Online intermediation services for booking hotels in India".

Informants, a restaurant association, in their information had alleged that: Make My Trip & Go Ibibo ('MMT-GO') have been indulging in predatory pricing, charging excessive commission from the hotel aggregators coupled with exclusive agreement between Oravel Stays Private Limited ('OYO') and MMT-GO, inter-alia, imposing price parity and room parity conditions on the hotel partners. The Commission, based on the information filed, formed a prima facie opinion and ordered DG investigation under section 26 (1) of the Act. After investigation, the DG in his report opined that the market practices of MMT-GO like rate parity/room parity, deep discounting, not delisting the hotels in case of a delisting request, were in clear contravention of section 3 & 4 of the Act.

The Commission, after analysing the averments made in the information, the replies submitted by MMT-GO & OYO and the DG report, observed that: **i)** interchangeability and substitutability is the key for assessment of relevant market and held that the search engine is not a substitute for the OTAs; **ii)** OTAs are an important platform for the hotels to enhance their visibility online which they would not have, even if they are present on the internet with their own websites; **iii)** OTAs constitute major chunk of online booking and even booking on the websites of the hotels depended upon the presence of these hotels on the OTA platform. Based on these and some other factors, the Commission concluded that MMT-GO is dominant in the relevant market of "Online intermediation services for booking hotels in India".

The Commission, on the basis of above observations, concluded that: **a)** while rate parity is a general practice in the relevant market, it has to be narrowly tailored. Broad based rate parity coupled with heavy discounts and exclusivity conditions are detrimental to the competition. Since MMT-GO was found to be indulging in these practices, Commission found it to be abusing its dominant position under Section 4(2) (a) (i) and Section 4(2) (c) r/w Section 4(1) of the Act; **b)** the action of MMT-GO to not delist the hotel partner when requested and showing them to be sold off was detrimental to the business of such hotel partners; **c)** the exclusive agreement between the OYO and MMT-GO that resulted in the delisting of OYO's competitor from the platform of MMT-GO eventually led to foreclosure of competition in the market for the competitors of OYO which was in violation of section 3(4) r/w section 3(1) of the Act. Commission, therefore, imposed a penalty of 5 % of relevant turnover for the 3 financial years 2017-18, 18-19, 19-20, on both MMT-GO & OYO along with a direction to remove clauses having adverse effect on competition and to not enter into such agreements in future.

[\(Order dated 19.10.22\)](#)

### **US Pharmaceutical Company Slapped with a Penalty of € 39 Million by Spanish Competition Watchdog**

Merck & Co., Inc. ('MSD'), a United States ('US') based pharmaceutical corporation, was fined € 39 million by the Spanish Competition Authority 'Comisión Nacional de los Mercados y la Competencia' ('CNMC') for abusing its dominant position in the market.


MSD in the present case launched legal action against its rival Insud Phrama S.L.U. ('Insud Pharma'), a Spanish pharmaceutical company, in Spain under the false premise of defending its patent. The CNMC, however, asserted that MSD intended to unfairly postpone the product launch of its Spanish rival.

In Spain, MSD had a monopoly on contraceptive products from 2002 until 2018. In 2017, Insud Pharma introduced a rival contraception product. The MSD filed a lawsuit against the Insud Pharma alleging patent infringement and asked the Spanish Courts for an injunction to stop Insud Pharma from marketing its rival contraception product. The CNMC noted that this was a well thought out strategy by MSD to delay the launch of its rival's product. Further, as a dominant entity it has special responsibility to not indulge in practices which could have anti-competitive implication. Therefore, CNMC imposed a penalty of € 39 million on MSD.

[\(Press release dated 25.10.22\)](#)

### **KK Sharma Law Offices**

**An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax**



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