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## **UNCOVERING THE HIDDEN DOMAINS OF ABUSE OF THE DOMINANT POSITION LEGISLATION**

### **ABSTRACT:**

The famous Stan Lee adage, "With great power comes great responsibility," which is sometimes referred to as the Peter Parker principle, aptly captures the idea of market dominance. This fundamental idea serves as the foundation for Section 4 of the Indian Competition Act of 2002, and it is echoed in most significant competition law statutes around the world.

Since a productive market environment depends on healthy competition, it makes sense that the Act does not prohibit a firm from enjoying market domination, monopoly, or a position of strength. A dominant firm may engage in anticompetitive business practices to maintain or increase its position in the market; these practices, albeit controversial, may be considered as "abusive or improper exploitation" of monopolistic control of a market with the intention of restricting competition. Nevertheless, the goal of this law, like that of all other laws, is to create a level playing field by limiting the abuse, or rather misuse, of such dominance to the detriment of a non-dominant market player.

Holding a company responsible for the "abuse of dominance" comes with its own set of difficulties; regulatory bodies must proceed cautiously lest they become a growth inhibitor.

### **INTRODUCTION:**

A business enterprise must, in the strictest meaning of the word, be profit oriented. No corporation can exist for the primary purpose of achieving altruism, as that would be the antithesis of what is meant to be commercial. But there is a thin line that separates maximizing

profits from becoming mercenary and acquisitive, and it is this unethical crossing of boundaries that makes a company liable for actions that violate anti-competitive laws, whether intentional or not. This is especially true when it comes to the thin line that separates dominance from abuse, where the dominant party frequently bears the brunt of being abusive. In acknowledging this conundrum, the US Supreme Court said in the Verizon case that "business acumen" is first drawn to the possibility of charging monopolistic pricing, at least temporarily, because it encourages risk-taking, which leads to innovation and economic progress."

As per the Competition Act, an analysis of the investigations held by CCI in landmark cases involving e-commerce (Flipkart case and Amazon case) makes it crucial to comprehend how CCI determines liability under Section 4 of the Competition Act. The Competition Commission of India (CCI) is responsible for regulating competition in India. It has also been entrusted with wide investigative and quasi-judicial functions.

#### IS SECTION 4 A LAW GOVERNING STRICT LIABILITY?

Since law is not an isolated entity but rather the result of a number of interrelated elements, what may seem "unfair" may not always be "illegal," which leads us to the concept of "objective justification". Though widely acknowledged in the European Union, the idea of objective justification is somewhat murky in Indian competition law. It states that a dominating firm will not be abusing its dominant position if it can show a reason for its action.

The Indian legal community argues that an abuse of dominance must be treated as a per se violation under statute. They base this argument on the CCI's ruling in the BCCI case, where the CCI found that the BCCI had breached a media rights agreement by allegedly denying market access for the organization of professional domestic cricket leagues or events in India. The argument over "objective justification theory" in the Indian context highlights the gaps in our knowledge of the underlying principles of Section 4 of the Act. An explicit limited "objective justification" doctrine is established by the Act's Explanation to Section 4 (2) (a), which states that "for the purposes of the clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub clause (i) and the unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub clause (ii) shall not include discriminatory condition or price which may be adopted to meet the competition..."

In view of this significant ruling by the CCI and the Supreme Court, the statute's interpretation makes the most sense:

**Indian National Ship Association vs ONGC:**

*This case serves as a prime illustration of CCI's acceptance of the "objective justification doctrine," as it acknowledged its jurisdiction over the dispute and determined ONGC's liability under Section 4: "The Commission believes it is reasonable to assume that the termination clause was invoked in response to an extraordinary change in circumstances rather than in bad faith. In summary, clause 14.2 of the SCC, which grants ONGC the unilateral right to terminate without providing a reason, is not deemed abusive in and of itself, considering the disproportionate risk that ONGC assumes in the event that the OSVs exercise this right. This is particularly true when the Commission determines, based on the facts and circumstances, that the invocation of this clause was not made in bad faith. The evidence on file unequivocally establishes that ONGC's actions were motivated exclusively by an extraordinary shift in market conditions. In addition, ONGC exercised its right to terminate for convenience for the first time in the thirty years that the CHA's termination for convenience clause had been in place, and there is no proof that any party had objected to the clause's existence during that time. There does not seem to be a situation where the Commission would have looked at this case differently if it had been determined that ONGC had arbitrarily and/or frequently invoked this clause in order to make illegitimate gains at the expense of the other contracting party. Hence, the Commission believes that, for the purposes of this Act, ONGC's actions in this instance do not amount to an abuse of a dominant position.*

The position under Indian law is outlined by an analysis of the aforementioned cases. The Supreme Court, while acknowledging the doctrine of objective justification, did not rely on it as a suitable defence to absolve liability under Section 4. The CCI and the Court appear to have interpreted Section 4 in adjacent but differing lights.

**OUTLINING SECTION 4 OF THE COMPETITION ACT OF 2002: Establishing and abusing existing dominance in the relevant market.**

A market is considered to function freely and fairly when there is competition among the suppliers in a given market. However, when one producer attempts to employ strategies that

reduce market competition and drive out other producers, this is referred to as having a "Appreciable Adverse Effect on the Competition" and can lead to the emergence of an anti-competitive market.

The sorts of anti-competitive agreements are covered in Section 3 of the Competition Act, while the abuse of dominance in the market is covered in Section 4 of the same legislation. The same can be found in the *Google LLC v. CCI* case. In the *Google LLC v. CCI* case, Google was accused of abusing its market dominance by forcing users to install Google apps ahead of time and of fostering an anti-competitive environment.

A)Case Caption–

Google LLC and Another.....Appellant

Competition Commission Of India.....Respondent

B)Case Number–

Civil Appeal Number 229 of 2023

C)Case Citation–

2023 SC 88

D)Bench–

Hon'ble Chief Justice D.Y. Chandrachud, Justice Narsimha and Justice J.J. Pardiwala.

E)Introduction–

Google was fined Rs. 1337.76 crores by the Competition Commission of India (CCI) on October 20, 2022, for violating Section 27 of the Competition Act, 2002 by abusing its dominant position in multiple markets within the Android mobile device ecosystem. The case involves Mr. Umar Javeed and others (Informants) v. Google LLC and Another (Opposite Parties). Google, hurt by this order, applied to the NCLAT for a stay on the CCI's order; however, the NCLAT rejected the stay plea on the CCI's judgment that fined Google Rs. 1,337.76 crores for engaging in anti-competitive behavior with regard to Android mobile devices. As a result, the tech giant appealed to the Supreme Court in this case. In addition to a monetary fine, the CCI also issued a "Cease and Desist" order mandating Google to alter its behavior within a specified amount of time.

F)Facts of the case–

1)In conformity with Section 19(1)(a) of the Competition Act, 2002 (the "Act"), Google LLC<sup>1</sup> and Google India Private Limited (collectively, the "Opposite Parties" or "Google") were sued by the informants for allegedly abusing their dominant market position in the mobile operating system market, in violation of Section 4 of the Competition Act. Google LLC (formerly known as Google Inc.), a wholly owned subsidiary of holding company Alphabet Inc. (Alphabet), is characterized as a Delaware limited liability company. Google provides a variety of IT-related services, primarily focusing on search, advertising, operating systems, platforms, and enterprise.

2)Google offers advertising services to help businesses promote and advertise their products. In addition, Google offers a web search function. Applications, partner websites that use Google search technology, and websites such as [www.google.com](http://www.google.com) can access Google's search engine. Among Google's principal commercial endeavors are Chrome, Gmail, Google Drive, Google Maps, Android, Google Play, Search, and YouTube. Moreover, Google LLC and Google India Private Limited (often referred to as "Google India") are fully owned indirect subsidiaries of Alphabet Inc.

3)According to the informants in this case, Google exploits its dominating market share since it mandates that tablet and smartphone manufacturers preinstall only Google apps or services in order for Google to place any GMS component in devices that are manufactured, sold, shipped to, or marketed in India. By preventing the creation and market access of rival mobile

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<sup>1</sup> ICSI.EDU. *CCI Imposed penalty on google for abusing dominant position- A case analysis*. November 2022. [https://www.icsi.edu/media/webmodules/01122022\\_CCIIMPOSEDPENALTYONGOOGLEFORABUSINGDOMINANTPOSITION.pdf](https://www.icsi.edu/media/webmodules/01122022_CCIIMPOSEDPENALTYONGOOGLEFORABUSINGDOMINANTPOSITION.pdf)

applications or services, such behavior was alleged to have breached Section 4<sup>2</sup> read with Section 32[iii]<sup>3</sup> of the Act.

4)Google links or bundles particular Google applications and services (e.g., Google Chrome, YouTube, Google Search, etc.) offered on Android smartphones in India with extra Google applications, services, and/or Application Programming Interfaces (APIs). This conduct contravenes Sections 4 and 32 of the Act by coercively impeding the creation and introduction of rival applications and services into the market.

5)Google prohibits Indian manufacturers of smartphones and tablets from developing and disseminating modified, potentially competitive versions of Android (also referred to as "Android forks") on other hardware. This conduct contravenes Section 4 read with Section 32 of the Act by restricting the availability of state-of-the-art smart mobile devices running alternative, potentially superior versions of the Android operating system.

6)To preserve its leading position in online general web search services and online video hosting platforms (via YouTube), Google participated in a range of anti-competitive practices, either within its monopolistic market or in other domains.<sup>4</sup>

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<sup>2</sup> Section 4: (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. (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 5 [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

<sup>3</sup> Section 32: The Commission shall, notwithstanding that,— (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire 56[in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India 57[and pass such orders as it may deem fit in accordance with the provisions of this Act.

<sup>4</sup> PIB Delhi. *CCI imposes a monetary penalty of Rs. 1337.76 crore on Google for anti-competitive practices in relation to Android mobile devices.* 20 OCT 2022 8:57PM.  
<https://pib.gov.in/PressReleseDetailm.aspx?PRID=1869748>

## G) ISSUES—

ISSUE I: Whether the MADA's requirement for the whole GMS suite to be installed beforehand constitute an unfair contract for device manufacturers, violating Sections 4(2)(a)(i) and 4(2)(d) of the Act?

ISSUE II: Whether Google's continued dominance in the online search market means that rival search apps are not allowed access to the market, which is against Section 4(2)(c) of the Act?

ISSUE III: In violation of Section 4(2)(e) of the Act, has Google used its hegemonic position in the Play Store to defend its position in online general search?

ISSUE IV: Is it possible that Google breached Section 4(2)(e) of the Act by linking the Google Chrome App to the Play Store, abusing its dominant position?

ISSUE V: Is there a possibility that Google violated Section 4(2)(e) of the Act by abusing its dominant position and linking the YouTube app to the Play Store?<sup>5</sup>

## H) JUDGEMENT—

### COMPETITION COMMISSION OF INDIA:

Consequently, the CCI has penalized Google and issued a cease and desist order to cease engaging in practices that have been found to be in breach of Section 4 of the Act, in compliance with the requirements of Section 27 of the Act.

The assessment framework outlined in Section 4 must be used to identify the relevant market(s) in which the concerned entity operates in order to prove the same. Following this, the entity's market power—that is, whether it holds a dominant position—must be evaluated. Lastly, the dominating entity's behaviour must be examined to see if it is abusive in nature and in violation of any of the provisions of Section 4(2) of the Act.

(i) Determination of Relevant Market: *BCCI* case

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<sup>5</sup> Mr. Umar Javeed &Ors. v. Google LLC &Anr. Case no.29 of 2018

When the BCCI case happened, CCI had difficulties to determine Relevant Product Market<sup>6</sup>. In the said circumstances, CCI looked into the Television Rating Point of various T.V. Programmes such as 3 idiots, other cricket games such as one day cricket, test cricket, etc. BCCI found the Relevant Product Market to be the Indian Premier League only. The viewers of IPL as the viewers of the Indian Premier League will neither watch any other movies, nor will they watch test cricket or one day cricket. The Television Rating Point of Indian Premier League was so high that the concerned channel charged more than ₹ 10 Lakhs for an advertisement the length of which was around 1 minute. As the BCCI could only broadcast the IPL matches, it was proved to be dominant by the CCI.

Determination of Relevant Geographic Market: *DLF* Case

The CCI found Gurgaon to be the only Relevant Geographic Market<sup>7</sup> and no other areas of Delhi since the demand for flats and apartments in Gurgaon is particularly distinct from other areas. The flats of Gurgaon are particularly chosen by the working people or the working couples. The demand of such flats in Gurgaon on a rental basis is also quite high. Consequently, the rent of the premises is also quite high.

**In kolkata, the same example may become applicable in respect of newtown or areas where there are multiple hospitals. Naturally, the demand for these flats is also quite high.**

Relevant Product Market: *United Brands v. Commission* (1976)

United Brands Commission was the main supplier of bananas in Europe using mainly the chiquita brand. The United Brands Commission forbade its distributors to sell bananas which the United Brands Commission did not supply. The United Brands Commission also fixed the pricing each week, charging a higher price in different member states and imposed unfair prices. **They had customers in Belgo-Luxembourg Economic Union, Denmark, Netherland and Germany.**<sup>8</sup>

The commission held that the banana fruit to be the Relevant Product Market and not all the fruits in general such as Apple, Grapes, Kiwi, Papaya, etc.

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<sup>6</sup> “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;

<sup>7</sup> Section 19: 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.

<sup>8</sup> *Competition Commission of India v. Co-ordination Committee of Artists and Technicians of WB*. Civil Appeal No. 6691 of 2014



Banana comes cheap and it can be prescribed to an individual of any age. Therefore, bananas have a distinct demand, different from the rest of the Fruits. Banana is a Relevant Product Market.

ii) As to Section 4 of the Act, the subsequent course of action for assessing the purported misuse of a dominant position is to ascertain if the corporation in question holds a dominant position in the specified relevant market or markets. The term "dominant position" as defined in Section 4 of the Act refers to an enterprise's strength in the relevant market that enables it to function independently of the forces of competition or to sway the relevant market, its clients, or its rivals to its advantage. Furthermore, while determining whether a company meets the requirements of Section 4 of the Act for holding a dominant position, Section 19(4)[1] lists several attributes that must be considered. Due to the mandatory pre-installation of the entire Google Mobile Suite (GMS) under MADA, the device manufacturers' prominent location, and the inability to delete the GMS, they are thus subjected to an unfair condition.

In the interest of justice and to ensure the quickest possible market correction, the CCI quantified the interim monetary penalties based on the information provided by Google, despite the fact that the company presented multiple revenue data points with obvious errors and lengthy disclaimers regarding the determination of the penalty. Thus, for violating Section 4 of the Act, Google was fined Rs. 1,337.76 crores on a provisional basis by the CCI, and the business was directed to pay the fine within 60 days of the order's issuance. Google has been granted 30 days to provide the required financial information and supporting documentation.

#### NATIONAL COMPANY LAW APPELLATE TRIBUNAL

In response to the NCLAT ruling<sup>9</sup>, Google filed a petition challenging the CCI's decision that the tech giant had abused its dominant position in several markets within the Android mobile device ecosystem. Google claimed that the decision was unjust to Indian users and would drive up the price of such devices in that country.

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<sup>9</sup> Business Standards. *NCLAT refuses to stay CCI's order of Rs 936 crore penalty on Google*. January 28 2023. [https://www.business-standard.com/article/companies/nclat-refuses-to-stay-cci-s-penalty-on-google-for-its-playstore-policies-123011101370\\_1.html](https://www.business-standard.com/article/companies/nclat-refuses-to-stay-cci-s-penalty-on-google-for-its-playstore-policies-123011101370_1.html)

Nevertheless, the Hon'ble Tribunal ordered Google to pay 10% of the penalty and declined to grant a stay of execution of the Competition Commission of India (CCI) penalty. The Tribunal further declared that it would only issue an order following hearings from all parties.

## SUPREME COURT

Google filed a challenge against NCLAT's order in the Hon'ble Supreme Court, arguing that by prolonging the decision-making process, we are unable to evaluate the merits of the opposing parties' arguments while the appeal is still pending before NCLAT<sup>10</sup>. Whatever view this Court may have on the merits would affect the NCLAT's current proceedings. It would be sufficient to state that the CCI's conclusions cannot be regarded as being without jurisdiction or as having been the product of a glaring error that would have necessitated interlocutory interference in the appeal<sup>11</sup> and ordered the NCLAT to conclude the case by March 31, 2023.

## **CONCLUSION:**

Today, some companies are controlling the public's choices on the internet, which has the effect of influencing society because market dominance is acceptable as long as it is not abused. However, the internet was once a free and open platform for people to come together and exchange ideas. You can see how Google misused its position only by using this example: let us say you own a smartphone, and the application you use the most on it was probably developed by Google. You paid for it. Now suppose A was a firm that needed to promote its goods, it would go to the company with the most market reach, which in this case would be Google.<sup>12</sup> As a result, Google has benefited by just installing an app on your phone that you can not remove. By denying you the option to customize your own Android device, which you paid for with your own hard-earned money, Google has further exploited its position. Imagine that your own phone is tracking everything you do, or that you are using out-of-date apps or

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<sup>10</sup> Padmakshi Sharma. Live Law. Will Same Steps Taken In Europe Be Followed In India?': Supreme Court Asks Google In Challenge To CCI Order Over Android Dominance. 16 January 2023. <https://www.livelaw.in/top-stories/android-dominance-supreme-court-asks-google-if-it-will-follow-in-india-the-same-steps-taken-in-europe-219081>

<sup>11</sup> Padmakshi Sharma. Live Law. 'No Manifest Error In CCI Findings Against Google' : Supreme Court Affirms NCLAT Order Refusing To Stay CCI Order In Android Dominance Matter. 19 January 2023 <https://www.livelaw.in/top-stories/no-manifest-error-in-cci-findings-against-google-supreme-court-affirms-nclat-order-refusing-to-stay-219404>

<sup>12</sup> <https://cbcl.nliu.ac.in/competition-law/abuse-of-dominance-an-analysis-of-cci-order-in-google-case/>

services. There probably used to be better apps and services than the ones you are using, but they will never be released because of Google's app development embargo and the GMS suite installation requirement.

Due to the fact that Google's entire rationale for abusing its dominance was flawed, the Competition Commission of India's ruling, which accurately recognized and penalized this abuse, is crucial. With this CCI decision, a positive step toward a less bleak future, the movement known as "Right to the Internet"—which essentially says that people should have freedom to use the internet as they deem fit and should not be forced to see or use things that big businesses want them to—will hopefully continue.