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*Analysing developments impacting business*

### INDIAN APPELLATE TRIBUNAL CONFIRMS ABUSE OF DOMINANCE BY GOOGLE

29 March 2023

On 20 October 2022, the Competition Commission of India (CCI) had imposed a penalty of INR 1,337.76 crore (~USD 162 million) on Google for abusing its dominant position in multiple markets by mandating original equipment manufacturers (OEM) to pre-install Google's suite of applications (GMS Suite) as a pre-requisite for accessing the Android Operating System (OS).<sup>1</sup> The CCI had also directed Google to adopt certain corrective measures to mitigate the impact of its anti-competitive conduct. Our detailed analysis of the CCI decision is available [here](#).

Google subsequently challenged the CCI's order before the National Company Law Appellate Tribunal (NCLAT). On 29 March 2023, the NCLAT confirmed the CCI's finding of contravention and the quantum of penalty imposed on Google. However, the NCLAT set aside a few remedial directions prescribed in the CCI's decision.

#### A. Key Findings

Briefly, the NCLAT affirmed the following:

- Google abused its dominance in the various relevant markets by effectively mandating OEMs to pre-install the GMS Suite on their devices by bundling the GMS Suite with the OEM's access to Android OS;
- Google, through a host of agreements with the OEMs, curtailed the developments of Android OS alternatives (i.e., Android Forks) which resulted in the restriction of scientific and technical development, and foreclosure in the OS market; and
- Google, through the pre-installation of (i) its own online general search application and (ii) video streaming application (i.e., YouTube) within the GMS Suite denied market access to competing applications. Accordingly, Google leveraged its dominance in the market for licensable OS to protect its position in the online general search market and YouTube.

Google further averred that the CCI violated established principles of penalty imposition based on "relevant turnover". Once again, the NCLAT disagreed with Google while noting that Google had failed to provide precise financial information to the CCI,

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<sup>1</sup> Case no. 39 of 2018.

and in fact recognised that the CCI had demonstrated prudence by considering the lower of the two possible turnover figures (both of which were provided by Google) to arrive at the quantum of penalty.

B. Modifications in remedial directives

As stated above, while the NCLAT affirmed six out of ten directions, it concurred with four of Google's contentions against the CCI's directives. These directives were resultantly set aside and are discussed below:

- Compulsory access to Google's Play Store for distribution of third-party app stores: The CCI had directed Google to allow developers of third-party app stores to distribute such stores to users through Google's *Play Store*. Noting that the CCI did not find abuse in the *Play Store* market, the NCLAT quashed the CCI's direction to Google to list third party app stores which do not conform to Google's terms and conditions.
- Sideloading of applications: The CCI had directed Google to allow installation of applications not downloaded through its *Play Store* (i.e., Sideloaded). This direction too was overturned by the NCLAT which observed that such direction was not required as Sideloaded, by users, is already possible on Android OS through a change in the device settings. The NCLAT noted that prior to sideloading an application, users simply get a warning display which informs users about the risks of sideloading. Google's contention resonated with the NCLAT which found that "warning displays" prior to sideloading (through changes in settings) are in accordance with certain statutory requirements and therefore, cannot be considered problematic.
- Access to Play Service APIs: The CCI had directed Google to share its Play Service APIs with third party app developers to enable such developers to port their apps to Android Forks. Agreeing with Google's arguments, the NCLAT set aside this direction noting that unhindered access to such APIs cannot be allowed as the APIs are proprietary software and Google should be permitted to monetise them to retain the incentive to innovate further.
- Uninstallation of GMS Suite: The CCI had directed Google to not restrict the uninstallation of GMS Suite applications by end users. While quashing this direction, the NCLAT reasoned that the GMS Suite can be disabled by end users such that the applications cease to be displayed on the device and cease to have any function.

C. Miscellaneous issues

The NCLAT also clarified the following noteworthy jurisprudential issues:

- In order to establish a violation of abuse of dominance, the CCI must demonstrate that the allegedly abusive conduct had the actual effect of causing appreciable adverse effect on competition in India.
- The NCLAT also addressed the controversial and sensational issue of the CCI extensively relying on the findings of the European Commission in its order. The NCLAT noted that the DG's extensive collation of data, the appreciation of such data by the CCI and the detailed assessment of relevant data and submissions made before it clearly demonstrated that the CCI did not fall victim to any

confirmation bias and concluded that its order is based on independent application of mind.

- The NCLAT also addressed whether the DG investigation could be said to be tainted as “pre-decided” owing to its extensive use of leading questions in the investigative process. The NCLAT clearly established that DG’s function is merely inquisitive in nature to elicit information. Given that the DG was relying on leading questions to merely elicit relevant information and the DG report otherwise is neither lacking objectivity nor *ex facie* erroneous, the DG vitiating or said to be violative of the principles of natural justice.

### *Comment:*

The NCLAT decision and the entire lifecycle of the proceedings has been nothing short of a roller coaster ride. For instance, when admitting Google’s appeal, while the NCLAT had granted a stay on the entire penalty, it was not applicable to the corrective measures directed by the CCI. Google’s appeal to the Supreme Court of India (SC) also failed to increase the coverage of the stay order to include the CCI directions.

As ironic as it can be, while pursuing the appeal on merits, Google had already implemented certain business policy alterations to effectuate the CCI’s corrective remedies. Now that a few such measures have been annulled by the NCLAT, it will be interesting to see if Google decides to roll-back such policy changes.

Another noteworthy facet is the NCLAT’s acceptance of intervention applications and submissions. A number of third-parties such as Epic Games, MapmyIndia, etc. were allowed to present their views during the NCLAT hearings – a development that is not commonplace.

Overall, the NCLAT decision provides a well-reasoned and robust analysis of each substantive and procedural issue raised in the proceedings. By striking down a few of the directions of the CCI, the decision also provides a semblance of a balanced and objective judicial review by implicitly calling out such directions to be disproportionate and not relatable to a clear finding of abuse.

Finally, the NCLAT has efficiently concluded the proceedings within the timeline of 31 March 2023 which was allotted to the NCLAT by the SC – this is commendable and reinforces the popular belief that competition enforcement in digital markets warrant prioritisation for markets to remain contestable.

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