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## Case Commentary: Umar Javeed v Google

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### INTRODUCTION

With the growth in the digital revolution, India has witnessed a huge rise in socio-economic activity due to increasing mobile communication networks, data platforms, and smartphones. India stands at the second-largest position in terms of the telecommunication market. The gross revenue of the telecom sector stood at Rs 64,801 crore (US \$ 8.74 billion) in the first quarter of FY22.<sup>1</sup> With the expansion in networks, online platforms have flourished tremendously and have become a significant part of the Indian Digital Economy.

Online platforms such as Google not only provide services but also develops products and other services.<sup>2</sup> These platforms collect data from the users and generate revenue by offering them to advertisers. As a part of such business, digital platforms often make abusive use of their dominant position and try to create a monopoly, restraining the technical or scientific development of other goods and services. The current case involving Google LLC and Google

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<sup>1</sup> 'Largest Telecom Company in India, Top Telecom Companies in India | IBEF' (*India Brand Equity Foundation*) <<https://www.ibef.org/industry/telecommunications>> accessed 15 February 2023

<sup>2</sup> 'Digital Platforms Inquiry' (*Australian Competition and Consumer Commission*, 28 November 2017) <<https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0>> accessed 15 February 2023

India Private Limited bears some resemblance. The Competition Commission of India in its Order dated 20/10/2022 attempts to analyze whether Google is making an abuse of its dominant position instead of Section 4 of the Competition Act, 2002.

## **FACTS OF THE CASE**

Android Open Source Project is the source code developed by Google which can be used and modified by anybody and is subject to a basic license. The majority of the Original Equipment Manufacturers use Android OS in combination with Google Mobile Services (GMS). GMS is a group of Google apps such as Google Maps, Gmail, YouTube, etc. which are available only through GMS and cannot be downloaded separately. It mandates entering into certain agreements to install these applications. The Informants also stated that OEMs/device manufacturers have to sign agreements depending on the kind of “Android” device they would want.

**Android without GMS:** For this system, OEM only needs to pass technical tests and accept the License but are not allowed to install any of the GMS (Google Maps, Gmail, and YouTube).

**Android with GMS:** For this system, OEMs need to enter into two mandatory agreements with Google.

- Mobile Application Distribution Agreement (MADA) and
- Anti Fragmentation Agreement (AFA).

**The four relevant markets for the abuse of the position have been identified:**

- Licensable Smart Mobile OS;
- App Stores for Android Mobile OS;
- Online Video Hosting Platform (“OVHP”); and
- Online General Web Search Service and “India” would be the geographic market.

The Informants have claimed that Google has resorted to different kinds of anti-competitive practices and uses its dominant position in one relevant market to enter into or protect other relevant markets and have made the following allegations:

- To obtain any of the applications which are part of GMS, it needs to be pre-installed by smartphone manufacturers which leads to a violation of Section 4<sup>3</sup> read with Section 32<sup>4</sup> of the Act.
- Google ties up Google Mobile Applications with certain other applications, services, and Application Programming Interfaces (APIs) and thus prevented the development and market access of the competitors.
- Google restrains OEMs from building modified versions of Android (Android forks) which restrained smartphone manufacturers' access to develop an innovative operating system

#### **FINDINGS OF THE COMMISSION AS PER THE INVESTIGATION REPORT**

The Commission finds that the issue is concerned with the practices of Google concerning the Android system and various proprietary applications of Google. Smartphones need OS pre-installed on their phones to run applications smoothly. Android was acquired by Google in 2005 and the first public version of Android was released in 2008. Android Open Source Project provides an open-source license known as 'Apache license', which permits OEMs to use software for any purpose, make modifications, and distribute it. However, the power to develop source code relies only upon Google, which has been releasing new versions since 2011. An old version user has to keep updating to these versions.

Further, Intellectual Property Rights to the Android OS are owned by Google and its name and logo are not available through open-source code. The 'Android' trademark is available to only Android-compatible devices Anti-Fragmentation Agreement ('AFA') or Android Compatibility Commitment ('ACC). Google enters into several agreements with OEMs such as -

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<sup>3</sup> Competition Act 2002, s 4

<sup>4</sup> Competition Act 2002, s 32

**Mobile Application Distribution Agreement ('MADA'):** It grants a license to manufacturers for free distribution of GMS and mandates pre-installation of these apps any single app cannot be downloaded separately and have to be installed default on the home screen of the device.

**Anti-Fragmentation Agreement (AFA):** The smartphone manufacturers are not allowed to build hardware for themselves or for third-party which are not Android Compatible.

**Android Compatibility Commitment Agreement (ACC):** It is similar to AFA however exception lies where the non-compatible Android Devices are marketed under a third-party brand and not by OEM.

**Revenue Sharing Agreement (RSA):** This agreement doesn't permit the manufacturers to pre-load any third-party application which is a substitute for Google Search and Google Assistant. If a manufacturer does so, it loses its revenue on all the devices even if a substitute application is not pre-installed there.<sup>5</sup>

## LEGAL ISSUES

- Whether mandatory pre-installation of the entire GMS suite under MADA amounts to imposition of an unfair condition on the device manufacturers and thereby infract provisions of Section 4(2)(a)(i)<sup>6</sup> and Section 4(2)(d)<sup>7</sup> of the Competition Act 2002.
- Whether Google has perpetuated its dominant position in the online search market resulting in a denial of market access for competing search apps in contravention of Section 4(2)(c)<sup>8</sup> of the Competition Act 2002.
- Whether Google has leveraged its dominant position in Play Store to protect its dominant position in online general search in contravention of Section 4(2)(e)<sup>9</sup> of the Competition Act 2002.

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<sup>5</sup> *Mr. Umar Javeed & Ors v Google LLC and Anr* Case No 39/2018

<sup>6</sup> Competition Act 2002, s 4(2)(a)(i)

<sup>7</sup> Competition Act 2002, s 4(2)(d)

<sup>8</sup> Competition Act 2002, s 4(2)(c)

<sup>9</sup> Competition Act 2002, s 4(2)(e)

- Whether Google has abused its dominant position by tying up Google Chrome App with Play Store and thereby violated provisions of Section 4(2)(e)<sup>10</sup> of the Competition Act.

## OBSERVATIONS OF CCI

The Commission noted that earlier MADA mandated Google search as default through which it gained a competitive edge in the market. Now, this is fulfilled by the RSA agreement and so all the agreements i.e. AFA, ACC, RSA, and MADA have to be read together. It also notes that OEMs consider Google's version of Android as a 'must-have' product for their devices. Google's Play store is the largest distributor of applications. Many of these applications require Application Programming Interface for their constant updates and these APIs are available only in Google Play Services and not in AOSP. Further, Google Play Services can be accessed along with Play Store only and Play store is a part of GMS which needs to be pre-installed to avail it as per MADA. Moreover, OEMs do not have a choice to install only a few of the Google applications, all Google-mandated apps have to be pre-loaded by them. OEMs can also not negotiate on the terms of MADA. Thus, restraining the user's choice, the commission concludes that the MADA is like imposing unfair conditions on OEMs.

Google mandates pre-installation of a group of applications through GMS which includes the Google search engine as being default on the home screen. It does not permit the other competing search engine to become the default. Search access points help browsers in entering smartphone devices. Pre-installation makes the likelihood of the consumer sideloading other apps go down. Thus, it has been concluded that Google has made the wrong use of its dominant position in the online search market violating Section 4(2)(c)<sup>11</sup> of the Competition Act, 2002. Further, by tying Google Play Store with Google Search in the GMS, it has tried to leverage its dominant position in the market of app stores to protect its search market violating Section 4(2)(e)<sup>12</sup> of the Act. As per this provision, two markets need to be identified, first one is the relevant market where the enterprise or business has the dominant position and the other is the

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<sup>10</sup> *Ibid*

<sup>11</sup> Competition Act 2002, s 4(2)(c)

<sup>12</sup> Competition Act 2002, s 4(2)(e)

market into which the enterprise is trying to enter. Here Google Play store is a different market than Google Search Services. Google Play store has a market with its competitors being all other app stores from where the applications can be downloaded. Here the agreement RSA has a huge role to play. It forbids smartphone manufacturers from the installation of any third-party product, service, icon, or application that works as a substitute for Google Search and Google Assistant and if they do it will stop sharing the advertising revenues with the OEMs. Under MADA, OEMs can pre-install Google Mobile Services (GMS) on either all or none of their devices and AFA/ACC read with MADA says that on the installation of GMS, OEMs cannot further download Android Forks on other smart devices too. Thus, on this interplay between MADA, RSA, AND AFA/ACC, it can be concluded that Google leveraged its position in the app store market to protect its search engine market.

Google Chrome has a dominant position in the market for web browsers in India. The same is due to the pre-installation policy of Google due to which the rival competitors are at a huge disadvantage. The other competitors' reach has become limited as they are present only in their own OEMs' browsers as against Google Chrome. Secondly, to overcome this, web browsers are required to enter into a different agreement with all OEMs which becomes very expensive and thus not viable. Google Chrome has become dominant to an extent that web browsers have started building devices keeping in mind the compatibility of Google Chrome. By tying Play Store with Google Chrome, it has made itself the highest number in the market of non-OS specific web browsers in India. This way rivals are restrained which deters them to build new and innovative products. Moreover, Google Search is the default search engine in Google Chrome which cannot be changed due to the pre-signed agreements. Moreover, Google iOS users can install Google Applications afterward and the same is not permitted in Android OS which shows its strategy to create a monopoly and tries to enter into all the market web-browser through Play Store.

## **ORDER**

The Commission has declared Google to be making abuse of its dominant position in all the relevant markets in contravention of the provisions of Sections 4(2)(a)(i)<sup>13</sup>, Section 4(2)(b)(ii)<sup>14</sup>, Section 4(2)(c)<sup>15</sup>, Section 4(2)(d)<sup>16</sup> and Section 4(2)(e)<sup>17</sup> of the Act, and directed Google to cease from indulging into anti-competitive practices as per Section 27<sup>18</sup> of the Act. Some of the measures taken are as follows –

- OEMs shall have the discretion to choose proprietary applications and not be forced to install all the applications.
- Play Store should not be linked with the entire group of Google Mobile Services.
- Access to Google Play Services and its APIs should not be conditional on installing Play Store and should be made available easily to OEMs and app developers.
- The option to uninstall pre-installed apps should be there.
- The ability of app developers to distribute their apps through side-loading should not be restrained.

Finally, the Commission has imposed a penalty of Rs. One Thousand Three Hundred Thirty-Seven crore and Seventy-Six lakhs only upon Google in contravention with Section 4 of the Act and asked to deposit it within 60 days.

## **ANALYSIS AND CONCLUSION**

This case has turned out to be a landmark judgment in the digital sector. Technology has become a huge contributor to India's economy. After this order, it will open the doors for the Original Equipment Manufacturers and app developers to innovate and play parallel to Google. Unless a global player comes at the terms of a local player, the latter cannot compete. This order brings across all the chicanery tricks adopted by Google before ordinary consumers. Ordinary consumers' life has been revolving around Android OS so much that they failed to notice that

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<sup>13</sup> Competition Act 2002, s 4(2)(a)(i)

<sup>14</sup> Competition Act 2002, s 4(2)(b)(ii)

<sup>15</sup> Competition Act 2002, s 4(2)(c)

<sup>16</sup> Competition Act 2002, s 4(2)(d)

<sup>17</sup> Competition Act 2002, s 4(2)(e)

<sup>18</sup> Competition Act 2002, s 27

there are no other alternatives. This order will boost innovation in the sector and will provide an opportunity for rivals to develop not only better Operating Systems but also better apps, and freedom for users to choose the apps at their discretion.

As much as we are celebrating the future growth in the sector, we are forgetting the position that Google has created for itself in the market over all these years. This order will have an impact, both in negative and positive terms on the market. Not only ordinary consumers but also giant tycoons are a part of this now at national and international levels. As much as we want substitute products, we cannot leave behind all the benefits that it has given to us. This is not going to be easy compliance. Not only this will impact the technology but it will hurt employment too. With this heavy fine levied on Google, the primary risk will fall on its employees to get fired. However, while doing this Competition Commission also needs to create a balance between the economic analysis and its intervention in the digital sector.

Concluding with what a huge role has been played by Competition Commission in delivering such a landmark judgment. With this, we are also looking at the advancement that the competition law jurisprudence has made by connecting data and making such a brilliant analysis. The commission is constantly working towards bringing healthy competition in the market and removing monopolies. With this, it has also succeeded in gaining the trust of the Consumers.