

XYZ v. Alphabet Inc. and Others¹

Through this quarterly publication, CUTS International intends to undertake an independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt with in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefits of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

¹ *XYZ v. Alphabet Inc. and Others*, Case No. 07 of 2020, <https://cci.gov.in/sites/default/files/07-of-2020.pdf>.

Introduction

The Unified Payments Interface (UPI) has been India's greatest achievement in the digital payments sector. There is a huge market for UPI applications in India and, Google Pay (GPay) is one of the most prominent payment applications in that regard. GPay was launched on September 18, 2017 which is almost a year after currency demonetisation.²

With antitrust regulators worldwide preparing to deal with digital channels, concerns related to 'self-preferencing' have come into focus. The Competition Commission of India (CCI) has also recently ordered an investigation into Google's alleged practices of favouring Google Play Store's payment system and GPay.

By a *prima facie* order of 09/11/2020, the CCI ordered the Director General (DG) to initiate an investigation against Google for possibly leveraging its dominant position in the market for licensable mobile operating systems (OS) for smartphones and the market for app stores for Android OS to secure its market position in the market for apps facilitating payment through UPIs under Section 26(1) of the Competition Act, 2002 (hereinafter referred to as 'Act').

The information filed by an anonymous Informant against Google is the third such complaint filed in India against Google,³ which had led to investigations into its alleged abuse of dominance in the identified relevant markets.

The case analysis herein analyses the conduct of Google, with a focus on the alleged self-preferencing practices which is defined as the actions of an organisation structured to benefit its goods or services over those of its rivals. This may, in some situations, amount to exclusion (possibly where the dominant entity is indispensable to the business of its competitors). However, such practices have also been contended as having the potential to boost consumer welfare.

² Pavan Vishwanath, *Google Pay Case Study and redesign*, (January 23, 2020), <https://medium.com/@v.pavansa>.

³ The first one filed by Bharat Matrimony resulting into CCI Order dated February 08, 2018 and CCI imposing penalty of Rs. 136 crores on Google; the second one being filed by three consumers resulting into CCI order dated April 16, 2019 resulting into investigation ordered against imposition of conditions for use of its Android OS by Smartphone manufacturers and the third being the present one.

It, therefore, appears that the determination whether an act of self-preferencing is anti-competitive or not, will be based on a rule of reason, case-by-case basis, depending on its ultimate effects.

Contentions by the Informant

1. The Informant defined the following three Relevant Markets (RM):
 - a. RM1 – Market for licensable mobile OS for smart mobile devices in India.
 - b. RM2 – Market for app stores for Android OS in India.
 - c. RM3 – Market for apps facilitating Payment through UPI in India.
2. Google is claimed to have a dominant position in RM1 and RM2, enabling it to operate independently of competitive forces and affect consumers, competitors and the market in its favour. With the dominant position, it has a responsibility to ensure fairness not just in markets where it is dominant (RM1 & RM2), but also in related markets, including (RM3)
3. The position of strength of Google is reinforced by:
 - a. High market share
 - b. Tremendous resources with the holding company
 - c. High barriers to entry in the form of network effects, high sunk costs and Google's access to a large installed user base
 - d. High level of vertical integration of Google's business operations
 - e. High level of dependence of mobile smartphone users, OEMs and app store developers on Google's Android which also lack any countervailing power against Google.

Thus, Informant averred that Google was an unavoidable platform for all stakeholders with a dominant position in all three markets, making Google the *de facto* gateway to Android smartphones.

4. It is also contended that EC's⁴ investigation of abuse of dominant position by Apple was similar to Google's conduct in India.

⁴ European Commission

Informant claims that Google is abusing its dominant position in RM1 and RM2 by:

5. Exclusivity Regarding Mode of Payment for Purchase of Apps and In-App Purchases

- a. If apps refuse Play Store's payment system and Google Play's In-App Billing, they lose more than 90 percent of their target users. Further, the app providers have to pay 30 percent commission to use the Play Store's payment system and Google Play In-App Billing and this is exclusive of the US\$25 which is paid for getting listed, which shows Google's "take it or leave it approach". If borne by the App provider, this extra cost lessens the expenditure on innovation. If passed on to the consumer, it results in increased price, making the end consumer suffer either way.
- b. Google restricts choice for app providers and users by only allowing its payment offering on its app store platform. This results in denial of market access to competing mobile wallets and apps facilitating Payment through UPI, tying, and leveraging its position in the RM1 and RM2 to protect its position in RM3.

6. Pre-installation and prominence of Google Pay on Android Smartphones

- a. Due to encouraging pre-installation and the opting of Google Pay as the default payment on the new devices, a *status quo bias* gets generated, making it difficult to use other apps and putting competitors in a disadvantaged position. According to the informant, this is a violation of Sections 4(2)(a)(i), 4(2)(b) 4(2)(c) and 4(2)(e) of the Act.

7. Search manipulation and Bias by Google in favour of Google Pay

- a. A simple search of the word "Pay" gives GPay as the first result and no other similar platforms. It shows how google favours GPay on the platform, thereby causing an undue advantage to GPay. Due to network effects, reduced visibility of competing apps would decrease downloads, usage, revenues, and access to user data, affecting these apps' ability to innovate. It also misleads users to believe GPay as the most reliable, relevant, appropriate app for UPI.
- b. This conduct of google reduces the ability and incentives of competing app developers from improving quality, innovating, or otherwise competing viably in the market, thus limiting technical and scientific development.

8. Search advertisement manipulation on the Play Store
 - a. Google privileges GPay by displaying it as the first ad when a user searches for another UPI app. E.g: user searches for PayTM or PhonePe, GPay is displayed as an ad. Ads also appear on other Google platforms, such as Youtube, as part of organic browsing. Other competitors are charged for such services, which would further enrich Google.
9. Exclusivity requirement imposed by google resulted in unfair terms being imposed on users
 - a. Google collects enormous data from its services and devices using Android OS. GPay Terms also allows Google to collect, store, and use personal data and communications made through GPay. The consent framework is not effective as the users do not have the option to make an alternative choice for UPI apps. Thus, it forces users to use services whose data is not localised and can be shared overseas.
 - b. According to NPCI guidelines, UPI apps are not allowed to share data with third parties without special permission. However, GPay terms state that it can share data with other google group companies.
 - c. If users had an option, they might have preferred using other UPI apps that are not sharing their data. By taking away this choice, unfair conditions are imposed on the users.

Submissions by Google

1. The Informant has no *locus standi*, because no invasion of legal right or injury is claimed. Anonymity based on fear of retaliation is claimed, which has disabled the OP from making submissions on this procedural safeguard.
2. On dominance, Google submitted that it faces competition from (i) feature phone OS as they boast the functions and performance of smartphones, licensable and non-licensable OS in RM1 and if quality decreases, the consumer can shift. (ii) OEMs' pre-install rival app stores in many devices in RM2 and Google Play is also not a must-have as 40 percent of apps are downloaded from elsewhere.
3. There is supply-side substitutability among the various digital payments option like debit cards, mobile wallets, net banking, etc. The definition of RM3 by the Informant is incorrect.

4. Exclusivity Regarding Mode of Payment for Purchase of Apps and IAP
 - a. Neither GPay is the exclusive payment method on Play, nor does it disadvantage the rival Apps. GPay is integrated with UPI, enabling the “collect flow.” Thus payment on google payments can be made by any rival app, credit or debit cards, net banking, direct carrier billing, and codes/vouchers. This is done to increase interoperability and in accordance with NCPI Guidelines. Further, the billing system ensures a secure and uniform experience to the consumer throughout the world. Furthermore, no principle of law would require Play to vertically disintermediate and use a third-party payment and billing system. The 30 percent commission taken by Google is to enhance competition by spending on innovation and to cover third party fees

5. Pre-installation and prominence of Google Pay on Android Smartphones

GPay is not preinstalled on all Android devices and is not the default app. Google licenses Play to OEMs as part of a suite of apps under its Mobile Application Distribution Agreement (MADA). The MADA does not require preinstalling of GPay and GPay is not part of the suite of apps. Google gives an option to the OEMs for revenue sharing agreements for pre-installation.

6. Prominent placement, search manipulation and bias by Google in favour of Google Pay

Google does not favour *G-Pay* in search rankings. It has commercial interest to give results by algorithmically identifying relevant apps in response to user queries. It is also under no obligation to be excluded from promoting its apps through Play. Google does not manipulate ads and they are solely based on the bid price, quality and relevance. The advertisers are provided with all the information for their campaigns. Google’s rivals can also appear in the *Users’ Choice*, *Editors’ Choice* and *Top Chart* Lists. Further, featuring in these lists does not define Apps’ success. Google’s services that advertise on Play compete for advertising slots with third parties and are treated as functionally separate third parties. Thus, Google’s ad service allows users choice, does not foreclose, and is non-discriminatory.

7. Exclusivity requirement imposed by Google resulted in unfair terms being imposed on users
 - a. These issues fall within the exclusive preserve of the RBI and NPCI. Allegations regarding data localisation are subject to legal proceedings before HC of Delhi

and MP. Thus, Commission does not have jurisdiction to investigate these issues at this stage. In any case, Google had complied with all the NPCI Guidelines.

- b. *G-Pay* is not 'imposed' on users or developers and users are free to use various payment methods.

Analysis by the Competition Commission of India

Locus Standi

The CCI ruled in favour of the Informant while recognising the essence of the Act i.e., ensuring economic stability and preserving competition in the market. The detailed account of Locus Standi can be found in the previous edition.⁵

Relevant Market

The CCI took into consideration the core points that were deliberated upon while determining RM1 and RM2 in its order in *Umar Javeed and Others v. Google LLC and Google India Private Limited*⁶ and thus, the Commission opined that both the RM1 and RM2 are appropriate and necessary markets for assessment of the impugned conduct.

Concerning RM3, Commission relied on its finding in *Harshita Chawla v. WhatsApp and Others* to ascertain that RM3 is a separate relevant market. The Commission also relied on the number of payments made through UPI and other mediums to ascertain a substantial increase in UPI payment than other mediums.⁷ Thus, ruling that UPI's characteristics and features make it distinct from other digital payment options.

Dominant Position

The Commission rightly upheld the contentions of the Informant in relation to the determination of the dominant position of Google's dominance in both RM1 and RM2. The Commission relied on its findings in *Umar Javeed and Others v. Google LLC and Google India Private Limited*⁸ to substantiate its above mentioned findings. It

⁵ Supra 2

⁶ Umar Javeed and Others v. Google LLC and Google India Private Limited, Case No. 39 of 2018, <https://www.cci.gov.in/sites/default/files/39-of-2018.pdf>.

⁷ <https://www.rbi.org.in/Scripts/AnnualReportPublications.aspx?Id=1293>.

⁸ Supra Note 6

further noted that sideloading *prima facie* seems to be not secure and requires more technical knowledge and thus, users ignore the same.

Abuse of Dominance

Exclusivity Regarding Mode of Payment for Purchase of Apps and In-App Purchases

Allegations are primarily two-fold:

- a. Mandatory use of Google Play's payment system for purchasing the apps & IAPs in Store
- b. Excluding mobile wallets/UPI apps as one of the effective payment options in the Google Play's payment sector.

Regarding (a), the Commission is of the *prima facie* view that mandatory use of the application store's payment system for paid apps and IAPs restricts the choice available to the app developers. Google has high market power due to its grip over the Android ecosystem and the high commission fee, which acts as a deterrent for competitors, results from the same. If application developers pass on these charges to users, it may affect user experience, cost and choice. It is also to be seen whether Google collects data from its downstream competitors to enhance its services, whereas its competitors are devoid of such data collection resulting in a competitive advantage to Google. Thus, *prima facie*, the imposition of such condition is unfair under Section 4(2) (a) of the Act.

The Commission also pointed to the EC's similar concern of the mandatory use of the app store's payment system, an excessive service fee/commission, and data accumulation.

Regarding (b) The Commission examined that GPay has been integrated with the *intent flow* (automated transition from Play to UPI and back). In contrast, other UPI is integrated through the *collect flow* (manual transition). Thus, *prima facie* it appears that using GPay will be more convenient, thus increasing users' inclination and preference to user GPay over other UPI applications. What is important to examine, is that whether this difference puts competitors in a disadvantageous position and whether Google allows competitors to be integrated with the intent flow or not. Furthermore, one of the support pages of Google Play also mentions that GPay is the only accepted UPI app to make payments. This, *prima facie* amounts to unfair and

discriminatory conduct, denial of market access and leveraging by Google, thus contravening various provisions of Section 4(2) of the Act.

Pre-installation and Prominence of Google Pay on Android Smartphones

The Commission observed that GPay may create exclusivity and users may not download competitors app if one is already installed. Google has a significant market share in the UPI applications market and smartphone OS market; thus, even though the pre-installation is done on a contractual basis, it may disturb the level playing field. Therefore, *prima facie*, the nature of such a contract and its effect on competition need detailed investigation

Prominent Placement Search Manipulation and Bias by Google in Favour of Google Pay

The Commission noted that an app's prominent placement would attract maximum user attention and clicks and thus diversion of traffic away from competitors. GPay being positioned favourably may lead to the above-said results. If the favourably positioned app is of inferior quality, then the users may be potentially misled resulting in an unfair imposition on users. Thus, if GPay is favourably positioned on Google Play Store, it would mean that Google is leveraging its dominant position in RM2 to enter RM3. However, the screenshots presented by the Informant and the OP showed different results. Thus, the Commission opined that search rankings are dynamic in nature, and the evidences are scant to form a *prima facie* order of investigation.

Search Advertisement Manipulation on the Play Store

Self-preferencing in search advertisements by a dominant app store can violate provisions of Section 4 in the Act, if found to be providing undue advantage to a specific app relative to other competing apps. However, Commission was of the view that the Informant has not placed any concrete evidence to substantiate the same, which could warrant an investigation into such practices.

Exclusivity Requirement Imposed by Google Resulted in Unfair Terms Being Imposed on Users

In *Abhijit Mishra v. Reserve Bank of India*,⁹ the Delhi High Court stated that Google is a Third Party App Provider (TPAP) and is not a system-provider. The onus of storing the payment-related data only in India is upon the system provider (NPCI) for UPI applications. Further, GPay was launched, complying with all the NPCI requirements and have the permission of NPCI to share data with Google Group Co. and NPCI has affirmed these facts in an affidavit to RBI. Further other sectoral compliances have to be examined by the concerned sectoral regulator.

Analysis

This case adds as the third entry in the list of CCI probes into conduct by Google. It is pertinent to note that CCI has directed investigation only in two significant allegations: (i) exclusivity regarding the mode of payment for the purchase of apps and in-app purchases, and (ii) pre-installation and prominence of GPay on Android smartphones. It dismissed the other four allegations of favouritism, search manipulations, etc., for lack of any tangible or conclusive evidence brought on record by the Informant.

Even though the Commission recognised that actions like prominent placement and biased search results might interfere with the competition on the merits, the Commission believed that no investigation could be ordered merely based on non-corroborated or otherwise unsubstantiated assertions of the Informant.

An order under Section 26(1) of the Act, marks the initiation of an inquiry by the Commission into the alleged anti-competitive conduct. Thus, when such orders do not find a *prima facie* contravention of the law and do not order for a further investigation, despite existing recognisable apprehensions, it could be said that the CCI is taking a very liberal approach – one which might not bear sweet fruits in the near future.

As the determination of a *prima facie* case is primarily determined based on the limited details and evidence provided by the Informant gathered by him in his restricted capacity, it is often insufficient to give a holistic understanding of the

⁹ *Abhijit Mishra v. Reserve Bank of India* W.P. (C) 3693 of 2019

alleged conduct. The consequence of such an order would be that since the Commission's final assessment would be significantly affected by the DG investigation results, limiting the scope of DG might result in specific anti-competitive actions going unaddressed.

Even though the DG is empowered to investigate contraventions of provisions under the Act, the same depends on whether the CCI finds a *prima facie* contravention. However, during the investigation, if any information comes to DG's notice which reflects a violation of any other provision, it would be treated as 'information' under Section 19 of the Act. The CCI would then be required to pass a separate *prima facie* order directing the DG to investigate. Despite the powers given to the DG, the same will lengthen the litigation.

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