

Abuse of Dominant Position by Google LLC – A Case Analysis

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Abstract. Abuse of dominant position is an imperative to protect the Indian markets from the enterprises within and outside the country. The competition Act, 2002 is a superior legislation that comprehensively defined the ambit of dominant position. We find that there are frequent instances of circumventing the various provisions of the Competition Act, 2002 thereby defeating the very aim of prevention of anti-competitive practices being practices by the firms and to maintain a fair competition and to regulate market control. We present the case of Google LLC, a technology company which has misused its dominant position and distorted market. We also highlight the consequences of legal proceedings in India and some instances in EU. Even though the practices of such abuses reduce the frequency of offences, the new forms emerge. We suggest that the legislation must be dynamic enough to handle these occurrences if true benefit of legislation is to be realised.

Keywords: Abuse of Dominant Position, Unfair Practices, Competition Act, 2002, Competition Commission of India (CCI)

I. Introduction

The term “internet” which essentially is described as “the global computer network providing a variety of information and communication facilities” is replaced by the Gen Z as the “google”. No company other than Google has contributed to a transformation in the Internet life and revolutionized businesses in various forms. Google initially started with a web-based search engine in 1998 competing with well know rivals at that time like Rediff and yahoo. With the passage of time, the company acquired a giant technology status currently owning 7 major products in various sectors having captured the market of 87.35% (Statista, 2020) at all over world in the technology sector. The recognition of google roots back to the time when the world

wide web was in a development stage and started off as a search engine in the year 1999 and slowly captured the market worldwide.

The marketability of google has resulted into the embedding into the minds of the consumer as to choose the google stimulated products and proprietary applications in smartphones which had actually led to the wide demand of the its products, in reality resulted from the abuse of dominance position in the technology sector by the google. We find that in a majority of instances, google has been practicing anti-competitive practices that include pre-installation of proprietary software applications by smartphone manufacturers. These products and services are refrained from direct use by the end users, that lead to the notion of “unfair terms”. The restrictions imposed on the use of google search bar by various European companies on their websites in Europe was a clear case of abuse of dominant positions.

Interpretation of abuse of dominant position assumes a strategic importance. A narrow interpretation can mislead as to the abuse of dominant position. SS Rana & Co. (2018) argues that “The narrow interpretation of the concept of dominance would mean that an entrant armed with a new idea, a superior product or technological solution that challenges the status quo in a market and shifts a large consumer base in its favour would have to be erroneously held dominant”.

This paper is an attempt by the author to measure the magnitude of the problem of abuse of dominant position of google in the market and the need to curb the prevailing situation by the application of various anti-trust laws and highlighting the legislative measures taken and law suits against google for the abuse of dominant position exercised by google in the Indian and the European markets on various instances and the agreement which are inherently tie-in arrangements causing imposition of heavy penalty on these big tech firms like google.

II. CONCEPTUAL FRAMEWORK

After the repeal of Monopolistic and Restrictive Trade Practices Act, 1969, the notion of Dominant Position was defined in the with a focus on the dilution of the concentration of economic power¹. Thus after the promulgation of Competition Act, 2002, the concept of abuse of dominant position has been clearly recognized.

¹ The preamble of the MRTP Act 1969 stated – “An act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for the matters connected there with and incidental thereto.”

Dominant position means “the position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market” as per Vlex(2020). Under Section 4 of the Competition Act, 2002, Abuse of Dominant position is offence and is punishable. It defines dominant position as follows-

“Section 4 in the Competition Act, 2002

4. Abuse of dominant position. —

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise, —

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—

For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(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; 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. Explanation —For the purposes of this section, the expression—

(a) ‘dominant position’ means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) ‘predatory price’ means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.”

Section 4 prevents any enterprise or group from abusing its dominant position and the circumstances that warrant it. The circumstances include - unfair or excessive pricing, creation of entry barriers, refusal to deal, tying arrangements leveraging, predatory pricing. The most important aspect while considering the abuse is to take in the following factors into account which are relevant market, and by what means an enterprise is exercising its dominant position. The word enterprise has been given a wide interpretation after the amendment of section 4 in 2007 when the word “group” of enterprises is also to be included (Chadha, 2019).

– ‘Relevant market’ is defined under Section 2(r) of the Competition Act,2002 as the market, which may be determined by the Commission with reference to ‘relevant product market’ and ‘relevant geographic market or with reference to both the markets (Govindarajan, 2015).

– "relevant geographic market defined under Section 2(s) of the Act includes a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas".

– "relevant product market is defined under Section 2(t) of the Act as a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use".

The definition of both “relevant geographic market” and “relevant product market” taken together determines whether an agreement or practice is anti-competitive. The degree to which a firm or cartel controls production and supply of products and services, technology, investments etc. is to be evaluated with reference to relevant market. Also, the geographical premises of supply and distribution of products and services must be seen in examining dominance (in relation to relevant geographic market).

The judicial approach to Abuse of Dominant Position followed by Competition Commission of India within the ambit of anti-competitive practices is bases on various decided cases and experiments. This includes zero pricing issues, free services, cost competitiveness etc. The market share cannot solely determine dominance (SS Rana & Co., 2018) though frequently used

as a measure in EU Damme *et al.* (2016). As per the Competition Act, 2002, dominant player is single or one and not more than one a given context.

III. ABUSE OF DOMINANT POSITION – INDIAN CASE

Google LLC, holding the highest position in the technology sector was heavily penalised by the CCI on 16th April 2019, for the abuse of dominant position in the relevant market. GMS is a collection of google applications which includes apps such as Gmail, YouTube etc. which are only accessible through GMS and are not available for download by the manufacturers of devices. Installation and application rights requires specific agreements and such services cannot be consumed directly from the manufacturers.

Thus, the manufacturers were required to enter into an agreement with google to obtain rights over these applications termed as Mobile Application Distribution Agreement (“MADA”) and Anti Fragmentation Agreement (“AFA”) as observed by Aggarwal *et al.* (2019).

Relevant market for such determination includes both the product and geographical market where products compete. CCI has laid down the following factors for the determination of a relevant product market that inter-alia includes “physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products” (cci.gov.in) according to the provisions contained of Section 19(7) of the Competition Act, 2002.

For the determination of relevant market in the googles case, CCI observed that the primary market will be the market for licensable smart mobile devices OS. The distinction between the computer OS (operating system) and mobile OS are different as there many supplementary features added to the mobile devices OS. Thus, the primary relevant market for this prima facie assessment will be “market for licensable smart mobile device operating systems in India” and google appears to be on a dominant position in 2017 as Android accounted for 80% of India’s mobile OS market (Statista, 2020).

MADA agreement compulsorily requires that Google Apps whole suite needs to be pre-installed which imply that this condition has practically reduced the ability of manufacturers of devices to compete and develop alternatives that are viable thus attracting Section 4(2) of the Competition Act, 2002 in terms of unfair practice.

Google has been able to strengthen its dominant position by this mandatory installation and has been inherently eliminating competition from the market. This practice is bundling of services resulting in coercion. CCI quotes that “*The Commission notes that there may be equally efficient websites/ specialised search service providers, but due to reduced visibility, they may not be able to sustain and survive in the market for flight search services.*”²

CCI found that the dominance of Google on the basis of allegations raised by Consumer Unity and Trust Society and Matrimony.com Limited (Muralidharan *et al.* , 2018) there is substance in the argument of google abusing the dominant position also in the market of Operating System provider of smart mobile phones. However, the true test of abuse of dominant position is “Rule of Reason test” which implicate to compare the anti-competitive effects with the pro-competitive effects.

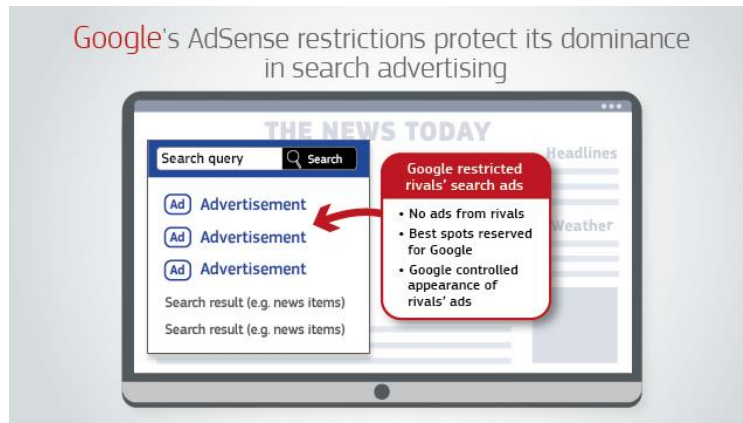
The competition commission imposed a penalty on google worth 1.36 billion rupees (\$21.17 million) i.e. fine at the rate of 5 percent of the average total revenue generated by the company from its Indian operations (Partners A., 2019). The ruling was based on the findings that Google was exercising “search bias” and abuse of its dominant position in India and was leveraging its dominance in the market for online general web search, to strengthen its position in the market for online syndicate search services.

IV. PREVENTION OF COMEPTITION - EUROPEAN CASE

The classic case of Google abuse of dominant position is in the EU in the year 2016 where the Google followed a classic strategy of online advertising intermediation. The facts of the case are as follows. In various websites of travel companies, newspapers etc., when the search is made, the website delivers both the results of search and the advertisements. The “**AdSense for Search**” of Google providers the searches of advertisements to the “owners of publisher websites” acting as online search advertising intermediation platform (Figure 1). The google exclusivity clause restricts other companies to sell the advertising space in Google's own search engine results pages even the players like Microsoft and Yahoo. In 2009, Google required the publishers to take written approval from google before placing any advertisement (EU, 2019).

² Competition Commission of India, Cases Nos. 7 and 30 of 2012, Matrimony.com Limited v. Google, 8 February 2018, available at <http://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>.

Figure 1- Google Ad Sense Restrictions



Source: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770

The Google activity, therefore, implied an “imposition of exclusive **supply obligation**” that **prevents the competition in the sense that competitors can’t place advertisements on the “commercially most significant websites”**. Such practices enabled Google to grab huge market share since either the competitors cannot place their ads or the most valuable commercial space is already bought by Google.

According to the EU antitrust rules, market dominance is not viewed as illegal. But, the practices by the dominant companies must not result in prevention of competition in their own market or other related markets. The dominance of Google existed since 2006 where on the date of hearing of the case find that it holds 86% of the market share. After examining many evidences, the charges of stifling innovation and harming consumers were established against Google.

Because of Google, the website owners had limited alternatives to sell space on the website forcing them to trade with Google. A fine to the tune of €1.49 Billion was imposed that equated to 1.28% of the Google's turnover in FY 2018. The practices after the decision were discontinued by Google. However, the civil actions for damages were also imposed. Google could not establish that its practices brought any kind of efficiencies. The Antitrust Damages Directive (Directive 2014/104/EU) entitled the aggrieved party to claim compensation for infringement of the competition law well considering the national rules in the applicable jurisdiction (Rodger, 2019).

In June 2018, the Google was also fined to the tune of €4.32 Billion for abusing its dominant position like the decisions of the CCI. Dominant position, though not illegal was challenged by the courts. Google required the Android device manufacturers and mobile network operators to pre-install Google search engine which restrained other firms to compete because of the exclusivity rights. The obstruction created by google to hampered Android forks resulted in potential traffic loss to the rival search engines (Figure 2).

Figure 2 –Obstruction of Android Manufacturers and Mobile Network Operators



Source : <http://competitionlawblog.kluwercompetitionlaw.com/2019/10/15/competition...>

Google practices was also found to be harming competition and harming the innovation possibilities in mobile technology through pre-installation of chrome browser and refrained development of Android Forks. Realising the gravity and duration of the EU Commission imposed fines and penalties and instructed google to refrain from these practices. A study by Marginean (2017) highlights that imposition of large fines on firms like of Microsoft and CFR Marfã resulted in decline of cases of dominance. Also, the EU commissions progression in defining the terminology of dominance and other domains of the competitive policy. It is seen that in spite of such legal consequences, large companies and continually abusing the dominant position and distorting the markets. It appears that losses by way of penalties and fined are relatively smaller than the competitive advantage gained. In case of EU the realisation of abuse of dominant position hinges around the market share (Damme *et al.*, 2016). The case of google entails the following responsibilities on the regulators.

First, the abuse of dominant position must not be confined to the narrow definition of regulation existing in the nation and region. The macro analysis of the cases with varying perspective is

absolutely essential to extend the boundaries and realise the essence of legislation. This requires experimentation and dynamic cross region analysis of the regulations prevailing in those regions.

Second, the outcome of the legal process must not be confined to a decision rather the impact has to be seen in longer period, which would provide new insights to the issue and can better serve the interest of markets and society.

V. CONCLUSION

We find that large multinational enterprises have been continually practicing the abuse of dominant position which is not only being exercised in Indian market but also in European markets that results in lot of restrictions on the growth of enterprises and markets. The older legislations like MRTP Act, 1969 and its definition and application are not sufficient to capture the market distortions in the best interests of economy and society. The competition Act, 2002 is a superior legislation that comprehensively defined the ambit of dominant position. Still, there are frequent instances of circumventing the various provisions of the Competition Act, 2002 thereby defeating the very aim of prevention of anti-competitive practices being practices by the firms and to maintain a fair competition and to regulate market control.

The Competition law in India has inherently utilised the international experiences and jurisprudence in defining the abuse of dominant position. It includes the product and geographic facets of relevant market. However, the arbitrary practices in law to the application of concept of ‘abuse of that dominance’ like in case of Google is a matter of concern. Yüksel *et al.* (2019) have highlighted that digitalisation of economy has changed the nature of business activities and the way the markets operate. This does not imply that competition law should change drastically, rather fine tuning is required on a dynamic basis.

Various market constituents are affected by the abuse of dominant position. The first is the consumers who are deprived various possible offerings and unjustified prices of products and services. For the competitors, it runs into competitive disadvantages and other market distortions that eventually can lead to lower activity levels. In many instances e.g. Microsoft we find that penalties and fines are comparatively smaller than the invisible gains realised from abuses. None the less these cases help the regulators to better define the abuses or market distortions and frame anti-competitive policies.

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