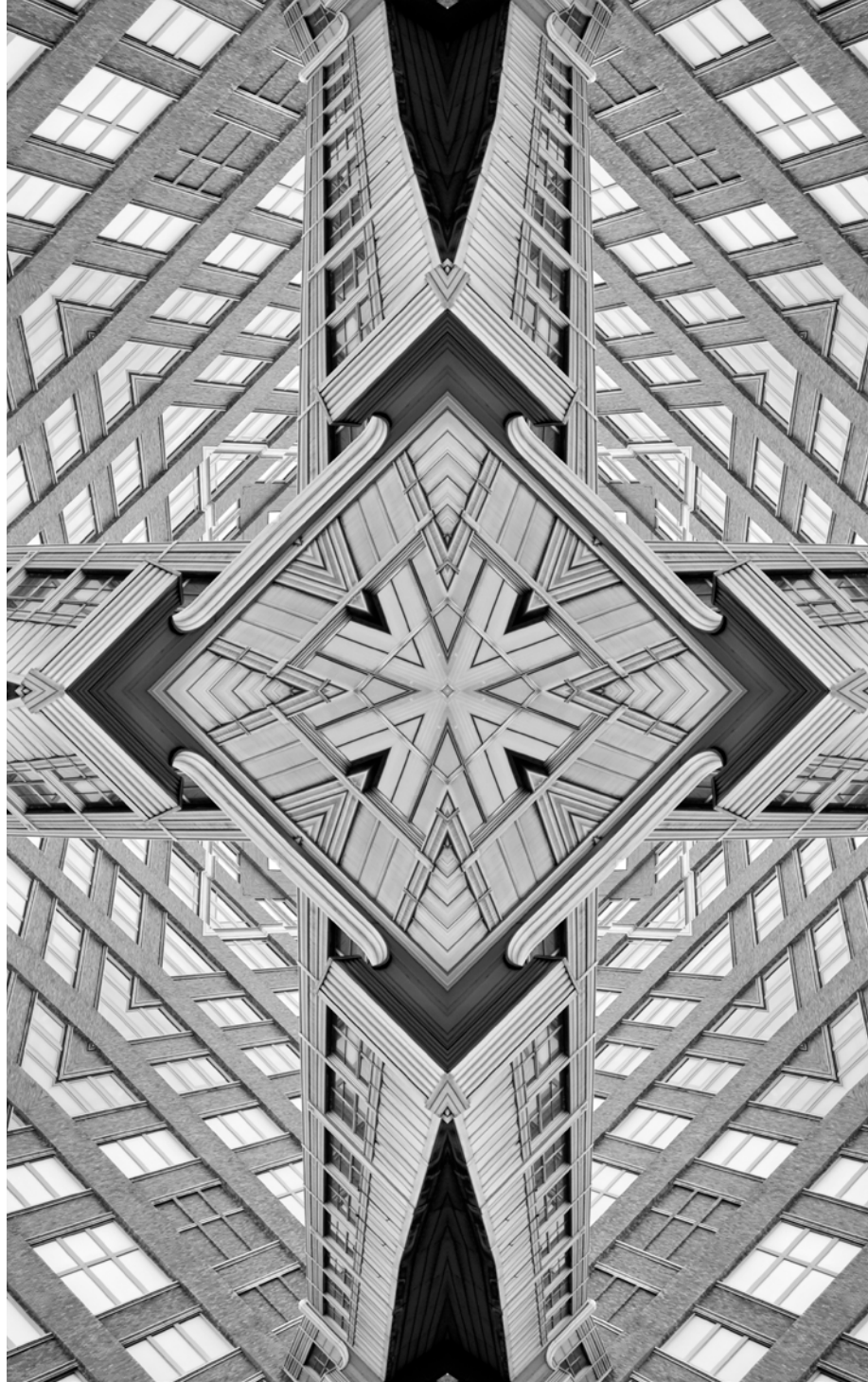


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Brief

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Competition Law in the Digital Space: A Study of Exclusionary Conduct by Tech Conglomerates

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Abstract

The last few decades have witnessed a rise in the use and accumulation of data, often called the oil of the 21st century. Meanwhile, existing laws and regulations are inadequate in dealing with these changing data consumption patterns; this is true for India. Wrongdoings by tech companies can often go unpunished, including predatory pricing, abuse of dominance, and exclusionary conduct. This brief discusses India's antitrust laws in the digital space, focusing on the Competition Commission of India (CCI) and the Indian Competition Act, 2002. It examines the scope of "exclusionary conduct" in competition law, using the actions of Google and Microsoft as case studies.

At the heart of any competition law regime is the *promotion of free markets* and the *elimination of anti-competitive practices*. India, for example, established the Competition Commission of India under the Indian Competition Act (2002), to protect and promote competition in markets, prevent practices that hinder competition, and protect the rights and interests of consumers.¹ In the United States (US), two key antitrust laws are in place—i.e., the Sherman Act and the Clayton Act—to curb anti-competitive activities.² Similarly, the Treaty for the Functioning of the European Union (TFEU) is aimed at penalising offenders that disrupt healthy competition in the local markets. Articles 101 to 106, which form the basis of the antitrust regime of the European Union (EU), outlaw agreements that lead to cartelisation, monopolistic practices, and abuse of dominance.

To fulfil their mandate, antitrust agencies in different parts of the world investigate industry giants and issue litigations against them when required. In the US, for example, between the late 1980s and the 1990s, the Federal Trade Commission (FTC) found cause to investigate the actions of companies such as AT&T, Kodak Eastman Co., Standard Oil, and American Tobacco Co.³ The European counterpart litigated against United Brands, Consten & Grunding, and Michelin. In more recent years, the technological revolution has led to a shift in the nature of investigations and litigations, and today, they are covering more companies operating in the digital realm.

The Big Five in tech—Google, Amazon, Apple, Facebook, and Microsoft—operate more than half of the global internet market.⁴ The growth of these conglomerates and their acquisition of an increasing number of companies has allowed them to engage in anti-competitive activities, such as deep and pervasive control of markets, abuse of dominance, and signing of horizontal and vertical agreements. Such activities have put these enterprises on the radar of antitrust regulators in various jurisdictions. Google, in particular, has frequently been at the centre of controversy in different parts of the world, in relation to antitrust issues, including search manipulation, Android dominance, and online advertising monopoly.⁵ The EU has been investigating the company since 2010 and has fined it approximately USD10 billion so far.

Google began as a search engine in 1998, and has since become one of the biggest names in the smartphone OS industry, followed closely by Apple.^a As of June 2021, Google's Android holds 72.84 percent of the global market share.⁶ Google gained dominance in the worldwide OS market through a series of systematic and planned acquisitions over a dozen or so years: it acquired Android in 2005, YouTube in 2006, reCAPTCHA in 2009, Motorola in 2011, and Fitbit in 2019.⁷ The latest acquisition did not have the approval of antitrust authorities in different jurisdictions, and therefore investigations are ongoing.⁸ Indeed, many of Google's acquisitions—which have allowed it to enter different markets—have escaped the scrutiny of antitrust regulators, due largely to the inadequacies of current statutes on merger control.

Google's 'Tying' Practice

Google entered the smartphone arena in 2005 for USD50 million. Almost 16 years later, in FY2021, it was set to earn a revenue of almost USD256.74 billion.⁹ While there is no official breakdown, analysts suggest that of the total revenue, USD18.8 billion is from Android,¹⁰ the acquisition of which has been one of Google's most profitable ventures since its inception. In India, Google has captured almost 98 percent of the smartphone market, or 520 million units, as of 2021.¹¹

As the dominant entity and the driving factor for innovation in the sector, Google has the power to impose conditions on developers that use its Operating System User Interface. While it offers free licence to the developers on the Android Source Code website, for basing their OS on the Android template, the tech giant maintains strict control over the Open-Source Licence—regulated by Apache 2.0, the preferred licence type for Android's open-source code. By providing open-source licences, Google has allowed different versions of Android to enter the market, known as "Android Forks," developed by Original Equipment Manufacturers (OEMs) with their own specifications.¹² However, to maintain control over the Android OS and all its variations, Google has OEMs enter into restrictive agreements.¹³ Any smartphone operating on an Android Fork must have Google Play Store^b pre-installed. This gives Google control over all future forked versions of Android.

a Together, the operating systems (OS) of the two companies make up almost 99 percent of the entire global OS industry.

b A virtual store where the user downloads/buys various applications to run on the smartphone.

Further, Google offers a bundle of its own applications under the name of Google Mobile Services (GMS) licence, consisting of its most popular applications. Once licensed, these applications are required to be placed on the smartphone's home screen, under the Anti-Fragmentation Agreement (AFA) and the Mobile Application Distribution Agreement (MADA). Although the agreement remains confidential, it reportedly contains restrictive clauses that prohibit the OEMs from changing the Android code to create forked versions of Android.¹⁴ Certain clauses in the AFA agreement include retaining Google as the default search engine for Android-powered devices and pre-installing the software that would be required in the next generation of smart devices (including speakers, televisions, and watches, amongst others).¹⁵ Once a third-party developer enters into an AFA or MADA with Google, they must install and place Google-backed applications in a folder named "Google" on the home screen—for ease of access to consumers.¹⁶

An argument can be made that Google's conduct in this regard is based on its view of forked versions of Android as a competitive threat. Nonetheless, its restrictive clauses qualify as a "tie-in arrangement," as defined under competition laws across the world, which includes any agreement where a buyer of a specific product is obligated to buy another, less popular product as a necessary condition for the initial purchase.¹⁷ Thus, Google's agreements are essentially tying contracts, forcing independent developers to install non-essential applications on their own versions of Android. Recently, the South Korean Antitrust Agency (Korea Fair Trade Commission) imposed a USD177-million fine on Google due to its AFA, which disallows developers to build their own customisable versions of Androids.¹⁸

In the case of *Sonam Sharma v. Apple* in India,¹⁹ the CCI characterised "tying" as anti-competitive. It laid down the conditions that amount to anti-competitive tying.

- i. The presence of two separate products or services capable of being tied;
- ii. The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and
- iii. The tying arrangement must affect a "not insubstantial" amount of commerce.²⁰

Google's licensing agreements satisfy all three conditions. First, it ties its Play Store and GMS folder to the Android OS. Second, it has more than enough economic power and presence in the smartphone industry to restrain free

competition in the relevant market and can force the buyer/consumer to purchase the product with the tied product. Third, according to a *Reuters* report,²¹ Android-based smartphones comprise around 98 percent of the relevant smartphone OS market, and any action taken by Google (in terms of mandating the installation/non-installation of a service in the relevant product market) will affect a substantial amount of commerce.

Here, a parallel may be drawn between the actions of Google and those of Microsoft. Microsoft is the largest producer of Personal Computer Operating Software (PC-OS), under the name of Windows, and has been the dominant entity in the PC-OS market for nearly 20 years. In 1999, the company tied its Windows Media Player (a multimedia playback application) along with its PC-OS, and any OEM using Windows had to mandatorily install the Media Player. In 1998, a case was filed against Microsoft in the EC. The judgement declared that the merging of separate products—without giving consumers an opportunity to acquire the product in isolation—was a tying practice,²² and held Microsoft liable. Google, also involved in the production of operating systems, is currently using a similar strategy of tying its OS with other services—a bouquet of applications in the case of Google. Just as with Microsoft, Google’s conduct has been regulated by the EC, and the fine levied by the authority in both cases has been the highest in the relevant time period.

Abuse of Dominance

After buying Android in 2005, Google expanded its operations quickly, and by 2014, almost 1.6 billion smartphones ran on the Android OS—compared to the 46 million smartphones being run on Windows OS.²³

In the case of *Umar Javeed v. Google LLC* 2019, the informants filed a suit against Google regarding the contravention of Section 4 of the Competition Act, with respect to Google abusing its dominant position in the mobile operating system-related markets. While filing the complaint with the CCI regarding Google’s abuse of dominance, the informants relied on the findings of the EU’s ruling on the Android case, wherein Google’s actions were found to be abusive. As part of the case, the CCI investigated the various markets where Google had dominance and consequently categorised “smartphone OS” as a relevant market. Thereafter, the CCI declared as *prima facie* opinion, by the powers vested in it under Section 26 of the Act, that Google was dominant in the smartphone OS market. Thus, Google’s use of MADA to make it compulsory for developers of smartphones and tablets to install pre-determined Google-based applications^{c,24} was held to

The Case of Google

be in violation of Section 4 read with Section 32 of the Indian Competition Act (2002). Further, restricting Android Forking for developers was also declared illegal under Section 4 and Section 32 of the Act.²⁵

In a separate case filed with the CCI regarding Google's alleged contravention of various provisions of Section 4 of the Indian Competition Act, the Commission declared the Google Play Store (for buying and installing applications) as a dominant entity in the App Store market based on the data available. Additionally, the CCI noted a user preference for Play Store, observing that consumers would not prefer side-loading^d due to security reasons.²⁶ On Android-run mobile phones, the user has the option to install applications on their device from sources other than the pre-loaded Play Store. However, such side-loading involves a certain degree of risk and exposure to various viruses and malware. Thus, the CCI found Google to be guilty of abuse of dominance under Section 4 of the Competition Act (2002)—denying market access, leveraging its dominant position, and restricting technology to the prejudice of consumers²⁷—and ordered the Director General (DG) to further investigate the matter.

Here, too, Google's conduct has been similar to that of Microsoft. Both entities are dominant in their respective markets, and both abused their dominance to leverage their products and enter a different market. Google used the Android OS to penetrate the smartphone application market, while Microsoft used the Windows OS to enter the multimedia playback market.

“Google has been found guilty of abuse of dominance to the prejudice of consumers.”

c Already declared illegal in other jurisdictions such as the EU, the US, and South Korea.

d Side-loading refers to the act of downloading different applications from sources not considered as official sources.

Exclusionary Conduct in Competition Law

‘**E**xclusionary conduct’ is a kind of anti-competitive behaviour employed by an enterprise to thwart potential and future competition. The Indian Competition Act defines ‘exclusionary conduct’ as one of the forms that can be taken by so-called ‘Abuse of Dominance’; the other one is ‘exploitative conduct’. While *exploitative conduct* covers excessive pricing or using dominance to exploit other competitors in the market, *exclusionary conduct* includes those actions that attempt to exclude competitors from the competitive landscape.

That Google is a dominant entity in its product market, i.e. the smartphone OS industry, has been established repeatedly by the CCI, as well as other antitrust agencies across the world. A dominant entity has access to the highest quality of resources for research and development of its services, and usually sits at the helm of innovation. This has certainly been the case for Google. Both the EC and the CCI^{28,29} have found Google’s conduct abusive of its position, in enforcing AFAs and MADAs. While these agreements are voluntary, the CCI has held that since the Google Play Store is a must-have application for Android, if OEMs do not adhere to the terms of the agreement, the agreement becomes *de facto* compulsory. In the case of *Umar Javeed v. Google LLC* 2019, the CCI noted that Google’s approach to Android Forking—i.e. allowing OEMs to develop their own versions of Android OS, but making the pre-installation of Google Play Store conditional upon signing of ACC and MADA—acts as a barrier to innovation for third-party application developers. Thus, Google has effectively reduced the competition in the market, by controlling the level of technology and innovation and limiting the options and choices available to consumers. Google’s actions further increase entry barriers in a market where the cost of entry is already high, especially for new entrants, due to steep research and development expenses. Thus, Google’s conduct is inherently discriminatory and puts undue pressure on OEMs to agree to the terms under ACC and MADA.

In *Surinder Singh Barmi v. BCCI* 2017,³⁰ BCCI was held to have foreclosed competition by granting itself the power to either allow or disallow new entrants in the market. Noting this as exclusionary conduct, the CCI observed that the organisation created “an insurmountable entry barrier in the relevant market ... [which] amounts to denial of market access for organisation of professional domestic cricket leagues/events in India, in contravention of Section 4(2)(c) read with Section 4(1) of the Act.” Extrapolating from this, it is clear that Google, too, has tried to foreclose competition by indulging in practices that lead to the denial of market access to its competitors³¹ by enforcing ACC and MADA agreements.

Exclusionary Conduct in Competition Law

In 2021, in a case filed by informant Kshitiz Arya against Google,³² the CCI held that the practices of Google in the smartphone OS market constitute offence under Section 4 (2) (c) of the Act. “In this backdrop, the Commission is of the *prima facie* opinion that by making pre-installation of Google’s proprietary apps (particularly Play Store) conditional upon signing of ACC for all android devices manufactured/distributed/marketed by device manufacturers, Google has reduced the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android *i.e.* Android forks, and thereby limited technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act. Further, ACC prevents OEMs from manufacturing/distributing/selling any other device which operate on a competing forked Android operating system. Therefore, given the dominance of Google in the relevant markets [smartphone OS] and pronounced network effects, by virtue of this restriction, developers of such forked Android operating system are denied market access resulting in violation of Section 4(2)(c) of the Act.”³³

“Network effect” is an economic phenomenon, in which the utility of the application or the device increases when more people join the network or use the service. One example of network effect is phones, since such devices are only usable when other people also use them. In the aforementioned case, the Google Play Store creates a network effect because multiple users use it to download applications, and application developers also find it convenient to design applications for Google. Thus, there exists a network effect system, which gets stronger and gains prominence with every new customer acquired, making it increasingly difficult for small developers and different application stores to compete.

“Google has effectively reduced the competition in the market by controlling the level of technology and innovation.”

The cases brought against Google and the resulting judgements make it clear that the company's conduct over the years has become progressively harmful to the spirit of competition. It has frequently violated norms that competition laws seek to protect, and has come under the scrutiny of antitrust agencies in different parts of the world for following a trajectory similar to that taken by Microsoft in the 1990s, characterised by tie-in agreements and abuse of dominance. To be sure, the Microsoft case was a key point of reference for the EC as they deliberated the 2018 Google Android case.

Revisiting past cases, such as the Microsoft litigations, can help policymakers understand and resolve the problems that arise in antitrust cases against similar tech giants. Further, Google's conduct, as the CCI's judgements establish, has also been "exclusionary" in nature, with the enterprise trying to overthrow the competition in the smartphone OS market. The conditional installation of applications and the discrimination against OEMs that develop forked versions of the Android OS indicate Google's intent to oust the competition from the market, reducing the chances of innovation and restricting the entrance of new competitors. Thus, Microsoft's and Google's actions set a precedence for foul play that is likely to be repeated by other entities aspiring to become hegemon in their market. Going forward, policymakers can refer to these patterns to identify other enterprises that may endeavour to monopolise the market, drive away competition, and disallow entry to competitors that do not agree to the terms they set. [ORF](#)

“Policymakers can refer to Microsoft's and Google's patterns of actions to identify other enterprises aspiring to become hegemon in their market.”

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