NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No.01 of 2023

[Arising out of Order dated 20.10.2022 passed by the Competition Commission of India in Case No.39 of 2018]

IN THE MATTER OF:

1. Google LLC
Having its Office at:
251 Little Falls Drive,
Wilmington,
DE 19808
USA

2. Google India Pvt. Ltd.
Having its Office at:
Google India Pvt. Ltd.
Unitech Signature Tower-II Tower-B,
Sector-15, Part-II, Village Silokhera
Gurgaon 122001
India **...Appellant**

Vs.

1. Competition Commission of India
Through its Secretary
Having its Office at:
1Oth Floor, Office Block- 1,
East Kidwai Nagar
New Delhi - 110023

2. Mr. Umar Javeed

3. Ms. Sukarma Thapar
R-7, Extension, 14/A, Safdarjung Enclave

4. Mr. Aaqib Javeed

...Respondents

Cont'd.../

Present:

For Appellants: **Mr. Maninder Singh & Mr. Arun Kathpalia, Sr. Advocates, Mr. Vijayendra Pratap Singh, Mr. Ravisekhar Nair, Ms. Hemangini Dadwal, Mr. Parthsarathi Jha, Mr. Toshit Shandilya, Mr. Mohith Gauri, Ms. Sayobani Basu, Ms. Arunima Chatterjee, Ms. Vanya Chhabra, Mr. Atish Ghoshal, Mr. Deepanshu Poddar, Ms. Ketki Agrawal, Ms. Bhaavi Agarwal, Mr. Abhisar Vidyarthi, Ms. Bani Brar, Mr. Kshitij Wadhwa, Mr. Aditya Dhupar, Mr. Prabhas Bajaj, Mr. Ajay Sabharwal, Advocates.**

For Respondent: **Mr. N. Venkataraman, ASG, Mr. Samar Bansal, Mr. Manu Chaturvedi, Ms. Aakriti Singh, Mr. Vedant Kapur, Ms. Shruti Shivkumar, Mr. V. Chandrashekhara Bharathi, Ms. Amritha Chandramouli, Mr. Rahul Vijay Kumar, Mr. Ram Narayan, Mr. Madhav Gupta, Advocates for CCI/R-1.**

Ms. Shama Nargis, DD/CCI, Mr. Davander Prasad, DD/CCI, Ms. Shweta Gupta, YP/CCI.

Mr. Abir Roy, Mr. Vivek Pandey, Mr. Aman Shankar, Ms. Sukanya Viswanathan, Mr. T. Sundar Ramanathan, Advocates for Impleader in I.A Nos. 327 & 336 of 2023.

Mr. Amit Sibal, Sr. Advocate with Mr. Naval Chopra, Mr. Yaman Verma, Mr. Aman Singh Sethi, Ms. Shally Bhasin, Ms. Raveena Lalit, Ms. Prerna Parashar, Ms. Parinita Kare, Mr. Shivek Endlaw, Mr. Rohan Bhargava, Mr. Prateek Yadav, Mr. Rishabh Sharma, Mr. Saksham Dhingra, Mr. Darpan Sachdeva, Advocates in I.A. No. 630 of 2023.

Mr. Rajshekhar Rao, Sr. Advocate, Mr. Naval Chopra, Mr. Yaman Verma, Mr. Aman Singh Sethi, Mr. Ajit Warrier, Ms. Raveena Lalit, Ms. Prerna Parashar, Ms. Parinita Kare, Mr. Prateek Yadav, Mr. Prateek Gupta, Mr. Shivek Endlaw, Ms. Shally Bhasin, Mr. Darpan, Mr. Rohan Bhargava, Mr. Harshil Wason, Mr. Yashraj Samant, Ms. Chandini Anand, Advocates in I.A. No. 232 of 2023.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by two Appellants - Google LLC and Google India Pvt. Ltd. (hereinafter referred to as 'Google') has been filed challenging the order dated 20.10.2022 passed by the Competition Commission of India in Case No.39 of 2018, Mr. Umar Javeed and Others vs. Google LLC & Anr. The Competition Commission of India by the impugned order found Google to have abused its dominant position in contravention of the provisions of Section 4(2)(a)(i), Section 4(2)(b)(ii), Section 4(2)(c), Section 4(2)(d) and Section 4(2)(e) of the Competition Act, 2002 (hereinafter referred to as 'Act, 2002'). In terms of the provision of Section 27 of the Act, 2002, Commission has directed Google to cease and desist from indulging in anti-competitive practices that have been found to be in contravention of the provisions of Section 4 of the Act and directed certain measures to be taken by Google and further in exercise of power under Section 27 Sub-clause (b), Competition Commission of India has imposed penalty to the tune of INR 1337.76 Crore. Aggrieved by the order dated 20.10.2022, this Appeal has been filed by Google.

2. This Tribunal in this Appeal passed an order on 04.01.2023 admitting the Appeal subject to deposit of 10% of the penalty amount. Notices were issued and 03.04.2023 was fixed for final hearing. Google aggrieved by the order dated 04.01.2023, filed an appeal being Civil Appeal No. 229 of 2023 before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court

disposed of the Appeal vide its judgment and order dated 19.01.2023 refusing to interfere with the order dated 04.01.2023 but requested the NCLAT to dispose of the Appeal by 31.03.2023. In pursuance of the order of Hon'ble Supreme Court dated 19.01.2023, the Appeal has been finally heard and orders reserved on 20.03.2023.

3. The brief facts of the case giving rise to this Appeal are:

i. In the year 2008, Google's Android was featured as an open-source licensable operating system for a smartphone. In the year 2009-10, Google signed Mobile Applications Distribution Agreement (MADA) with Original Equipment Manufacturers (OEMs) under which the OEMs get a suite of Google's apps. The OEMs also have to sign Anti-Fragmentation Agreement (AFA) which required OEMs to observe baseline compatibility standards. Google also signed Revenue Sharing Agreement (RSA) with OEMs.

ii. In the year 2015, European Commission (EC) initiated proceeding against Google's Android licensing practices in Europe and before which authority, proceedings were initiated for infringement of Article 102 of the Treaty of the Functioning of the European Union. The EC took a decision on 18.07.2018 which found Google having abused its dominant position in the relevant market in the European Union. European Commission imposed penalty and fine on Google.

iii. On 28.08.2018, Respondent Nos. 2 to 4 to this Appeal viz. Umar Javeed, Sukarma Thapar and Aaqib Javeed filed information under Section

19(1)(a) of the Act, 2002 before the Competition Commission of India. Informants claimed to be users of android based smartphones. The Informants stated that the majority of the smartphones and tablet manufacturers in India use Google Android System. Informants stated in their information that Google is dominant in India. The Informants delineated four distinct relevant markets i.e., (i) Licensable Smart Mobile OS; (ii) App Stores for Android Mobile OS; (iii) Online Video Hosting Platform (OVHP); and (iv) Online General Web Search Service. India was stated to be relevant geographical market in the application. Informants alleged that Google is engaged in different kinds of anti-competitive practices. Allegations alleging violation of Section 4 r/w Section 32 of the Act, 2002 were made to in the information.

iv. The Competition Commission of India taking into consideration the information submitted by Respondent Nos. 2 to 4 registered Case No.39 of 2018. The Commission held preliminary conference on 08.01.2019, in terms of the provisions contained in Regulation 17 of the Competition Commission of India (General) Regulations, 2009. The Commission after perusing the materials on record passed an order dated 16.04.2019 under Section 26(1) of the Act, 2002 directing the Director General (DG) to conduct investigation under provisions of Section 26(1). In the order dated 16.04.2019, the Commission has noted the allegations of the Informants in Para 9 of the order, which is to the following effect:

"9. Adverting to the abusive conduct, the Informants have alleged that Google has engaged in different kinds of anti-competitive practices, either in the market in which they are dominant or in separate markets, with the aim of cementing Google's dominant position in Online General Web Search Services and Online Video Hosting Platform (through YouTube). In this regard, the Informants essentially made the following allegations:

(i) Google mandates smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services in order to get any part of GMS in smartphones manufactured in/ sold in/ exported to/ marketed in India. This conduct has hindered the development and market access of rival mobile applications or services thereby violating Section 4 read with Section 32 of the Act.

(ii) Google ties or bundles certain Google applications and services (Such as Google Chrome, YouTube, Google Search etc.) distributed on Android devices in India with other Google applications, services and/ or Application Programming Interfaces of Google. This conduct illegally prevented the development and market access of rival applications and services in violation of Section 4 read with Section 32 of the Act.

(iii) Google prevents smartphone and tablet manufacturers in India from developing and marketing modified and potentially competing

versions of Android (so-called "Android forks") on other devices. This conduct restricted access to innovative smart mobile devices based on alternative, potentially superior versions of the Android operating system in contravention of Section 4 read with Section 32 of the Act."

v. The Commission expressed its prima facie opinion in the order that mandatory pre-installation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and is thereby contravention of Section 4(2)(a)(i) of the Act.

vi. After order dated 16.04.2019 passed by the Commission under Section 26(1) of the Act, the Director General commenced inquiry under Section 19 of the Act.

vii. Director General issued several notices to Google requesting for information. Google responded to various notices and submitted its comprehensive response.

viii. Notices were also issued to the Informants by the Director General. The Director General also sought information from third parties including mobile handset manufacturers (both Indian & foreign brands) who install Android OS and Google apps & services in their handsets for Indian market. Third parties who are active in the Indian market relating to app stores for Android OS, online general web search service and web browser were also approached by the Director General for seeking information and data clarification. Information was also

gathered by the Director General from key app developers in India and key players in the online video hosting platform.

ix. Director General after collecting the information and responses from Google submitted its report dated 29.06.2021 to the Commission. The Director General in its report framed following issues for the purpose of investigation as captured in Para 3.2 of the Report:

> *"Issue 1: Whether mandatory pre-installation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and thereby infract provisions of Section 4(2)(a)(i) and Section 4(2)(d) of the Act?*
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> *Issue 2: Whether, Google by making pre-installation of Google's proprietary apps (particularly Google Play Store) conditional upon signing of AFA/ ACC for all android devices manufactured/ distributed/ marketed by device manufacturers, 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 to the prejudice of the consumers, in violation of the provisions of Section 4(2)(b)(ii) of the Act?*
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> *Issue 3: Whether Google has perpetuated its dominant position in the online search market resulting in denial of market access for competing search apps in contravention of Section 4(2)(c) of the Act?*

Issue 4: 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) of the Act?

Issue 5: Whether Google has abused its dominant position by tying up of Google Chrome App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act?

Issue 6: Whether Google has abused its dominant position by tying up of YouTube App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act?

Issue 7: Whether Google has abused its dominant position in Play Store by imposing unfair and discriminatory terms and conditions on App developers in violation of the provisions of Section 4 of the Act?"

x. The Director General in his report recorded the conclusion in Para 9.519 to the following effect:

9.519 Thus, on the basis of the aforesaid factors such as Google's Play store policies being one-sided, ambiguous, vague, biased, and arbitrary; unilateral decision to modify Developer Terms i.e. OPP and DOA by Google; suspension from the Play store without any cogent reason; losses suffered by third parties app developers due to the arbitrary conduct on part of OPs etc., it appears that Google's aforesaid behaviour, including the terms and conditions discussed above, amounts to the

imposition of an unfair or discriminatory condition, limiting and restricting the technical and scientific development of apps to the prejudice of users, and in the denial of market access by Google in violation of Sections 4(2)(a)(i), 4(2)(b), and 4(2)(c) of the Act."

xi. In Chapter 10, conclusion of the Director General was separately recorded and Director General in Para 10.18 stated:

"10.18 To sum up, Google is found to be contravening the provisions of Section 4(2)(a)(i); Section 4(2)(b); Section 4(2)(c); Section 4(2)(d) and Section 4(2)(e) of the Act."

xii. The Report of the Director General dated 29.06.2021 was considered by the Commission on 06.10.2021. On 06.10.2021, the Commission directed for forwarding an electronic copy of the non-confidential version of the investigation report to the parties i.e. the Informant and Google, for filing their respective objections/ suggestions. An electronic copy of the confidential version of the investigation report was also forwarded to Google through its authorised representative. Parties were asked to file their objections/suggestions by 05.11.2021. Commission further directed the Opposite Parties to furnish their audited balance sheets and profit & loss accounts/turnover for financial years 2018-19, 2019-20 and 2020-21 by 05.11.2021. Parties were directed to appear for final hearing on 24.11.2021.

xiii. Certain issues were raised by Google regarding confidentiality. Confidentiality claim was raised by Google with regard to orders issued by the Director General. Google also initiated certain proceeding with that regard which needs no detailed.

xiv. On 17.11.2021, the Commission directed Google to file its financial information by 26.11.2021.

xv. On 26.11.2021, Google submitted Audited Financial Statement of Google India Private Limited and Annual Reports of Alphabet Inc. and requested for 3 weeks' extension to file the remaining financial information. On 17.12.2021, Google submitted some more financial information as requested by the Commission. There has been certain extensions granted by the Commission of the time to file, on the request of Google as well as the Director General.

xvi. The Commission vide order dated 17.06.2022 fixed 04.08.2022 for hearing on the Director General's Report. Google submitted its response and objections to the DG Report. The arguments were heard by the Commission on several dates. On 02.09.2022, the Commission reserved its final order. The Commission allowed Google to file written submission on the aspect of quantum of penalty.

xvii. Google submitted its post hearing written submission on 16.09.2022. On 19.09.2022, the Commission directed Google to file further financial information in relation to its relevant turnover within seven days. On 22.09.2022, Google requested the Commission for two weeks' extension

to submit revised financial information. On 11.10.2022, Google provided the financial information requested by the Commission. On 20.10.2022, the Commission passed final order in Case No.39 of 2018.

xviii. The Commission after hearing the parties and perusing the materials on record came to the conclusion that Google has contravened various provisions of Section 4(2) of the Act. Conclusion of the Commission has been recorded in Para 614, which are to the following effect:

> *"614. The Commission concludes that,*
>
> *614.1. mandatory pre-installation of entire GMS suite under MADA (with no option to un-install the same) and their prominent placement amounts to imposition of unfair condition on the device manufacturers and thereby in contravention of the provisions of Section 4(2)(a)(i) of the Act. These obligations are also found to be in the nature of supplementary obligations imposed by Google on OEMs and thus, in contravention of Section 4(2)(d) of the Act.*
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> *614.2. Google has perpetuated its dominant position in the online search market resulting in denial of market access for competing search apps in contravention of Section 4(2)(c) of the Act.*
>
> *614.3. Google has leveraged its dominant position in the app store market for Android OS to protect its position in online general search in contravention of Section 4(2)(e) of the Act.*

614.4. Google has leveraged its dominant position in the app store market for Android OS to enter as well as protect its position in non-OS specific web browser market through Google Chrome App and thereby contravened the provisions of Section 4(2)(e) of the Act.

614.5. Google has leveraged its dominant position in the app store market for Android OS to enter as well as protect its position in OVHPs market through YouTube and thereby contravened provisions of Section 4(2)(e) of the Act.

614.6. Google, by making pre-installation of Google's proprietary apps(particularly Google Play Store) conditional upon signing of AFA/ ACC for all android devices manufactured/ distributed/ marketed by device manufacturers, 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 to the prejudice of the consumers, in violation of the provisions of Section 4(2)(b)(ii) of the Act."

xix. The Commission has also delineated five relevant markets in the impugned order in Para 615, which is to the following effect:

"615. In view of the foregoing analysis, the Commission delineates the following relevant market(s) in the present matter:

a. Market for licensable OS for smart mobile devices in India

b. Market for app stores for Android smart mobile OS in India

c. Market for general web search services in India

d. Market for non-OS specific mobile web browsers in India

e. Market for online video hosting platform (OVHP) in India"

xx. The Commission held Google to be dominant in all relevant markets and was held to have abused its dominant position in contravention of provisions of Sections 4(2)(a)(i), Section 4(2)(b)(ii), Section 4(2)(c), Section 4(2)(d) and Section 4(2)(e) of the Act.

xxi. Under the heading 'Remedies' certain measures were directed by the Commission. Para 617 is as follows:

"617. Accordingly, in terms of the provisions of Section 27 of the Act, the Commission hereby directs Google to cease and desist from indulging in anti - competitive practices that have been found to be in contravention of the provisions of Section 4 of the Act, as detailed in this order. Some of the measures, in this regard, are indicated below:

617.1. OEMs shall not be restrained from (a) choosing from amongst Google s proprietary applications to be pre-installed and should not be forced to pre¬ install a bouquet of

applications, and (b) deciding the placement of pre-installed apps, on their smart devices.

617.2. Licensing of Play Store (including Google Play Services) to OEMs shall not be linked with the requirement of pre-installing Google search services, Chrome browser, YouTube, Google Maps, Gmail or any other application of Google.

617.3. Google shall not deny access to its Play Services APIs to disadvantage OEMs, app developers and its existing or potential competitors. This would ensure interoperability of apps between Android OS which complies with compatibility requirements of Google and Android Forks. By virtue of this remedy, the app developers would be able to port their apps easily onto Android forks.

617.4. Google shall not offer any monetary/ other incentives to, or enter into any arrangement with, OEMs for ensuring exclusivity for its search services.

617.5. Google shall not impose anti-fragmentation obligations on OEMs, as presently being done under AFA/ ACC. For devices that do not have Google s proprietary applications pre-installed, OEMs should be permitted to manufacture/ develop Android forks based smart devices for themselves.

617.6. Google shall not incentivise or otherwise obligate OEMs for not selling smart devices based on Android forks.

617.7. Google shall not restrict un-installing of its pre-installed apps by the users.

617.8. Google shall allow the users, during the initial device setup, to choose their default search engine for all search entry points. Users should have the flexibility to easily set as well as easily change the default settings in their devices, in minimum steps possible.

617.9. Google shall allow the developers of app stores to distribute their app stores through Play Store.

617.10. Google shall not restrict the ability of app developers, in any manner, to distribute their apps through side-loading."

xxii. The Commission also imposed penalty on Google. A penalty of Rs.1337.76 Crore was imposed for violation of Section 4 of the Act. Google was directed to deposit the penalty within 60 days of the receipt of the order. In para 639, the Commission directed following:

*"**639.** Consequently, the Commission imposes a penalty of Rs. One Thousand Three Hundred Thirty-Seven crore and Seventy-Six lakhs only upon Google for violating Section 4 of the Act. Google is directed to deposit the penalty amount within 60 days of the receipt of this order."*

4. We have heard Shri Arun Kathpalia, learned Senior Counsel and Shri Maninder Singh, learned Senior Counsel appearing for the Appellant. Shri N. Venkataraman, learned Additional Solicitor General for India alongwith Shri Samar Bansal for Competition Commission of India, Shri Amit Sibal, learned

senior advocate, Shri Rajshekhar Rao, learned senior advocate and Shri Abir Roy, learned advocate have been heard for the Intervenors. The Respondent Nos.2 to 4 despite service of notice has not appeared.

5. Shri Arun Kathpalia, learned Senior Counsel for the Appellant in support of the Appeal raised various submissions. It is submitted that for holding any abuse of a dominant position, effect of conduct, i.e., effect being anti-competitive has to be proved. In the Scheme of Section 4 of the Competition Act, 2002, the effect of anti-competitive conduct has to be proved for coming to any conclusion that there is any abuse of dominant position. Non-use of expression "appreciable adverse effect" in Section 4 is inconsequential. In all sub-clauses of Section 4, sub-section (2), harm to competition is inherent, which needs to be analysed before holding any violation of Section 4. The Commission decisional practice, as is proved from various decisions taken by the Commission, in respect of abuse of dominant position under Section 4, indicate that the Commission has always entered in to analyses of anti-competitive effect. It is submitted that as per the Scheme of Section 4, dominant position itself is not prohibited. What is prohibited is abuse of dominant position and for establishing abuse, the Commission must prove the same. The Commission has not undertaken any analyses as required by Section 4 in the impugned order. It is submitted that what is prohibited under Section 4, sub-section (2) (a) is imposition of unfair or discriminatory conditions in purchase or sale of goods or services. A conduct shall be unfair or discriminatory only when it is anti-competitive. The Commission has come to the conclusion that MADA contains unfair

conditions, which is incorrect conclusion. MADA is not imposed on OEM. The concept of imposition contains a compulsion, there is no compulsion on OEM to enter into any MADA Agreement with Google. The MADA is an optional and per device Agreement. The MADA is voluntary and once signed, OEMs can choose whether to preinstall the GMS suite on any given device. The terms of the MADA are not imposed on device manufacturers. The Commission's finding that pre-installation of the entire GMS suite, prominent placement of Apps and inability to uninstall are unfair conditions under the MADA are incorrect. The MADA clearly states that manufacturers can preinstall these Apps on their compatible Android Phones for free. Google license these Apps non-exclusively. Google does not prohibit manufacturers from preinstalling other non-Google Apps, including Apps that compete with Google's Apps. In reality, several OEMs have installed competing Apps in their devices. OEMs themselves want to sign the MADA, because they wanted to access useful Apps. OEMs, who did not want Google's Apps, choose not to sign the MADA. Under MADA, OEMs can have several non-Google Apps on the devices. Google's preinstallation and placement requirements do not give rise to unfairness since MADA does not curtail manufacturers' freedom to preinstall alternative Apps and place them prominently. A bare look on popular android devices demonstrates that vast amount of screen space is open to Google's rivals. As per placement requirement only three spaces are required, i.e., search widget, Play Store icon and Google folder, which does not occupy large amount of space. MADA requirement to placement in no manner can be said to be unfair. The Commission's view that OEM's have no

choice and they have to preinstall all Google Apps covered under GMS on the default home screen of Android is incorrect. The MADA is standard form contract and entering into standard form contract cannot be held to be putting any imposition of unfair conditions. Device manufacturers' willingness to sign the MADA is explained by their desire to access Google's proprietary Apps and services on their devices. None of the OEMs have submitted before the Director General that they do not want to enter into MADA Agreement or there is any compulsion on them to enter into MADA Agreement. The Commission has not correctly appreciated the evidence given by OEMs, which clearly proves that there was no compulsion for entering into MADA. The relevant evidence being on record, the Commission ignored the evidence of the OEMs, which clearly proves that there was no compulsion in entering into MADA by any OEM. No OEM has filed any complaint before the Commission alleging any unfair conditions imposed by Google. Bundling *per se* cannot be said to be unfair imposition on the OEM. By giving a suite of Apps, OEM get high quality and desirable Apps for free with negligible storage and screen space being consumed. There is no foreclosure effect of the MADA. MADA's terms are fair on OEMs because they do not restrict non-Google Apps from being preinstalled on OEM's devices. In evidence, the Commission, itself noted that Stores like Galaxy, Xiaomi, Huawei, Oppo are preinstalled by OEM along with play store of Google. Competing browsers are also preinstalled by OEM. Various competing browsers preinstalled in devices of different manufacturers. The users are free to disable a preinstalled App in their device. Inability to uninstall Apps does not constitute an unfair term on OEMs

nor does it impact competition. To answer the question that was asked to OEMs that if they face possible dilemma in terms of allowing installation of competing Apps with apprehension of causing duplication of Apps and filling up precious ROM space (in addition of Google's), several OEMs have given a response that they do not have any dilemma. The Commission also erred in holding that GMS Apps are "must have" Apps. The expression "must have" has been coined by the Commission without there being any basis or material. The Commission has found that Play store is a "must have" app because it is significant from the point of view of a common mobile user, who considers this as a "must have" app. Google does not use expression "must have" in MADA Agreement. Commission has not given any logical definition of "must have". No user survey was conducted by the Commission. There is no evidence on record that OEM wanted to install only few Apps, whereas, evidence is that OEMs wanted to install all 11 Apps due to their quality and usefulness. The bundling of Apps by Commission has been held to be unfair. Giving of suite of 11 Apps is with the object that user has fruitful device and ecosystem of Google becomes a success. OEM in their evidence stated that they want all the Apps of Google which are essential. The 11 Apps of Google are free and their icons take minimal space. The preinstallation of suite of all 11 Apps is only promotional. Any consumer who wants any other app can freely download them. Twenty-six billion Apps have been downloaded in the year 2021. Users are also free to change home screen and disable any preinstalled Apps. The preinstallation can neither be said to be anti-competitive nor can be said to be unfair. It is not explained by the

Commission that how Google has foreclosed rivals by preinstallation. Section 4(2)(a) does not preclude promotion by a dominant enterprise. Downloading of Apps, browsers and search engine is not foreclosed. There is evidence that downloading is 80%, which clearly demonstrates no impact of pre-installation. With respect to sideloading, there are no restrictions. Giving necessary warning by Google when Apps are sideloaded are statutory warning and cannot amount to any restriction on sideloading. The warning are in the interest of user to warn about possible malware.

6. Shri Arun Kathpalia, learned Senior Counsel for the Appellant submits that AFA/ ACC only requires Android device to be compatible with certain baseline requirement of the Android ecosystem. Even the Competition Commission of India has observed that AFA/ ACC are valid. The device has to be compatible, so that all Apps developed for the device can run properly. AFA were introduced when Android ecosystem was introduced, there was no question of any dominance by the AFA. AFA/ ACC set out the minimum baseline, which an OEM has to follow. In Android, there are 15,000 models and 1100 OEMs. There is no restriction on OEM to innovate. AFA/ ACC cannot be said to be anti-competitive. There is no stoppage of invocation by any OEM. In the impugned order, the Commission has observed that AFA/ ACC obligations result in reduced incentives for OEMs to distribute "Forked Android" version. The Commission's observation regarding AFA/ACC is unfounded. Google being aware of the risk of the fragmentation inherent in open business model, it adopted the AFA before the launch of the Android device to address this threat. The Commission also failed to appreciate the

evidence, which proves failure of Symbian OS, an open-source platform, which did not implement any minimum compatibility standards. The objective of minimum compatibility is that any app writer can write an app, once and it would run on every device within the ecosystem. An "Android Fork" is a device, which uses the Android OS, but does not meet the compatibility requirements as laid down in CDD (Compatibility Definition Document). The compatibility requirement under the CDD is minimal and narrow. The AFA/ACC signatories are free to differentiate and innovate on top of these minimal baseline requirements and have in fact done so. The innovation has been done by Samsung and Oppo releasing devices which has foldable screen and pop-up cameras. There is no embargo whatsoever on innovation and customisation by OEMs. There are certain permitted exceptions within the AFA that allow OEMs to manufacture devices that are not Android Compatible Devices. The evidences which were brought before the Director General have not been correctly appreciated by Commission with regard to Fork. The Commission in its judgment has observed "*The expansive coverage of the anti-fragmentation obligations includes not only smart mobile devices but a wide gamut of other smart devices. By virtue of these obligations, Google inhibited the development of alternative Android based OSs for smart TVs, smart watches, smart speakers, etc*". It is submitted that the above observations are completely without jurisdiction, since observations were made with respect to the market that are not the subject of the investigation in the present case. The Commission's examination of other smart devices is inconsistent with the scope of relevant market. The DG has specifically asked

OEMs whether the AFA/ACC has impaired their ability to offer differentiated product, the answer was in negative. Attributing the failure of Fire OS to the AFA obligations is factually inaccurate because Amazon was not a signatory to the MADA or the AFA.

7. Coming to the Revenue Share Agreement ("**RSA**") Shri Kathpalia submits that RSA is a voluntary Agreement and it is device wise. A MADA signatory is not obliged to enter into RSA. The DG as well as Commission relied on the decision of the European Commission, which was examining the portfolio based RSA. After 2014, the OEMs are free to enter into RSA for one device only. Xiaomi is RSA signatory, whereas Microsoft has RSA with Xiaomi. The DG in its report verbatim quoted the European Commission's findings, which was on different regime, i.e. portfolio. No RSA pre 2014 was before the DG. The DG's findings are based on portfolio basis, whereas RSAs were device-based RSAs. The DG has not entered into coverage analysis as to what universe of MADA is covered by RSA. No user survey was conducted by the DG. The Competition Commission has recognised that there is large universe beyond RSA, but no analysis has been undertaken. The Competition Commission has conjectured of several conclusions, which are not based on any evidence. There is no denial of market access by RSA. The RSA covers only qualified devices. There is no imposition of any unfair terms on OEM by MADA and RSA. The MADA and RSA has to be separately looked into, both being different Agreements. Only there are six RSAs, wherein OEMs entered into Agreement with Google. OEMs have other Agreement with other service providers. Xiaomi entered into RSA with Bing in 2018. The MADA is complete

agreement with the matters it deals with. The RSA is optional. Two contracts can be read together only when they are part of the same transaction.

8. Coming to Android Fork, Shri Kathpalia submits that Commission has found violation of Section 4(2)(b) (ii) of the Act by observing that Google, by preinstallation of proprietary Apps and conditional upon signing of AFA/ACC for all Android devices, has reduced the incentive of device manufacturers to develop and sell devices operating on alternative versions of Android, i.e., Android Forks. Google has legitimate interest in licensing its Apps only for those devices which meet the minimum requirement set by it, which is also an observation made by the Commission. The Commission has in its order observed that the technical and scientific development has been limited by Google. The Commission has relied on the evidence of the Amazon whereas Amazon has said that it does not want any Google Apps. There is no evidence that OEMs are precluded from manufacturing Forks. One of the OEMs said before the DG that they are blocked and precluded from evolving Android Forks. The DG did not conduct inquiry in the above regard. Under AOSP Google is giving free license, which can be utilized by any OEM for development of Android Fork. The Commission's findings that Google has violated Section 4(2)(b) are unsustainable. Shri Katphpalia reiterates his submission, which we have noted with regard to effect of AFA/ ACC.

9. The evidence which has come before the DG clearly demonstrates that OEM value the objective of AFA/ACC and they do not wish to develop any Fork or distribute Fork devices. The Commission has selectively relied on

evidence procured from some OEMs whereas ignoring the material evidence by other OEMs. The statement of Xiaomi and Lava, which have been relied upon by the Commission for coming to the conclusion for proving that AFA/ACC puts development restriction on alternative operation system has not been completely read. The Commission has also disproportionately relied on Amazon's statement, which are not accurate. Attributing the failure of Fire OS to AFA is factually incorrect because Amazon was not a signatory of the MADA or AFA. Amazon Fire OS was less competitive and technically inferior to compatible Android devices. The Commission has also made observations regarding Google proprietary Apps, i.e., API (Application Programming Interface), while APIs were not the subject matter of the investigation. Although, the Competition Commission recognised that Google has no obligation to give API, but ultimate direction has been issued to Google to share its API. Google APIs are its intellectual property right and Google is fully entitled to take a decision as to when the API's can be shared. APIs are the technical innovation of Google and sharing the APIs have no relevance with Android Forks.

10. Shri Kathpalia submits that Google Chrome, which is a search engine of Google is not required to be made as default search under the MADA. The OEMs are entitled to preinstall as many search engines as they may desire and ultimately it is the user, who can disable any preinstalled search and install any other search engine. The Commission ignored the fact that despite Chrome being preinstalled, UC browser was downloaded on 79% Android devices in 2018. On Desktop, Chrome is not preinstalled, but 86% of users

downloads Chrome. Ninety percent users prefer using Chrome because of its better quality. The commission ignored that from 2018 to 2020 more than 90% of top 25 selling devices in India preinstall rival browsers. Default setting does not deny market access to competitors and users are free to switch away from the default settings, if they so choose.

11. Shri Kathpalia submits that Commission has erred in concluding that Google had leveraged Play Store in the App Store market for Android to strengthen Google Search position in the online search market. He submits that MADA does not restrict OEMs from preinstalling competing search services on their devices. The Commission's conclusion that competing search services are foreclosed due to MADA and preinstallation of Google search is incorrect. Both OEMs and users had submitted that they prefer Google search over other search engines due to its superior quality. The Commission's observation that Google had significant market share, which it secured through preinstallation of Google Search, giving it an unassailable position in the general web search market, cannot be accepted. Google Search had a market share of 97.82% across devices in 2011 and 97.69% across devices in 2019. Google Search market share has been consistently high regardless of the device on which search query is generated and irrespective of whether it has been preinstalled or set as default. The success of search cannot be attributed to its preinstallation under the MADA. The Commission is also not correct in observing that due to Google's dominance in Play Store and Google Search, Google has continued its dominance in Google Search, resulting in anti-competitive effect.

12. Shri Arun Kathpalia, learned Senior Counsel also submits that order of the Commission is replete with confirmation bias. The Commission proceeded to confirm the order passed by European Commission and there has been no independent consideration of evidence on record, hence, confirmation bias shown by Commission vitiates the order.

13. Shri Kathpalia further submits that Commission, without any inquiry, has concluded status quo bias in favour of Google. The status quo bias is a matter for users to confirm, whereas, no survey with users was conducted. Eighty percent of devices download UC browser, then how can there be status quo bias. Finding of status quo bias is without any basis. No study has been conducted to come to the conclusion of status quo bias.

14. Shri Kathpalia has lastly made submission on the remedies, which has been allowed by the Commission in the impugned order. It is submitted that direction issued by Commission under Section 27 of the Act, apart from imposition of penalty are drastic and unjustified. Shri Kathpalia has referred to paragraph 617 of the Commission's order where various measures have been directed by the Commission. Coming to the direction contained in paragraph 617.9, Shri Kathpalia submits that Commission has directed that Google shall allow the developers of App Stores to distribute their App Stores through Play Store. It is submitted that the above direction was issued without any discussion or finding. Without there being any discussion or finding, no such direction could be issued. The direction is in breach of Section 27 and is *ultra vires*. No finding of abuse on this count has been

reported by the Commission. There is no finding of abusive conduct regarding Play Store market. Coming to direction contained in paragraph 617.10, it is submitted that there is no finding of abuse of dominance. It is submitted that Google does not prohibit sideloading. It only issues warnings. Warnings are issued by Google to save the user from malware and harm. Coming to the direction issued under paragraph 617.3, Shri Kathpalia submits that Google cannot be asked to share APIs which are intellectual property of Google. Directing sharing of the API by Google shall stop all innovation and discourage technical advancement. The direction was to share the API with Android Forks. Coming to direction in paragraph 617.5, it is submitted that the obligation imposed on OEM, AFA/ACC is to make the device compatible. There is no restriction on the OEM to develop Android Forks for themselves. There is no basis for issuing direction under 617.7 regarding restriction on un-installing of its pre-installed Apps as the same can be disabled by the user and on doing so, it will disappear from the screen. Directions issued in paragraph 617.8 was also unnecessary. Several other remedies allowed by the Commission in paragraph 617 are not covered by any finding. With regard to direction under paragraph 617.1, it is submitted that Google has been following a free licensing module, which make the Android devices extremely affordable so that OEMs are able to access highly desirable and functional Apps free of cost. By requiring Google to modify the royalty-free mode, and instead to charge separately for these Apps and services will increase manufacturers' cost and in turn likely to result in higher prices for Indian

consumers. Shri Kathpalia submit that remedies allowed by the Commission are far in excess of the infringement findings and deserve to be set-aside.

15. Shri Maninder Singh, learned Senior Counsel for the Appellant made submission in support of the Appeal, questioning the procedure adopted by the DG as well as the Commission. Shri Maninder Singh has also raised submission challenging the penalty imposed on the Appellant, including the fine. Shri Maninder Singh submits that Appellant being a business entity is entitled to generate revenue. The Appellant did not violate any provisions of the Competition Act, 2002. It is submitted that under the Scheme of the Competition Act, 2022, the DG has to assist the Commission. The DG is required to follow the principle of natural justice. The information was filed by persons, who were working in the office of the Commission, immediately after European Commission released its order in press conference. Shri Maninder Singh referring to Preamble of the Act and Section 18 of the Competition Act, submits that it is the duty of the Commission to prevent practices having adverse effect on the competition by any conduct as referred to in Section 4. There can be no assumptions and fact analysis is must. The function of the Commission is judicial and quasi-judicial. The DG's entire investigation was conducted with a confirmation bias, which is evident from all actions of the DG, including framing of questionnaires and ignoring of evidence in favour of the Appellant. The DG carried out the investigation with a pre-judged disposition. The Report was prepared and submitted simply to confirm the European Commission's android decision. The DG has framed leading questions to third parties in order to reach pre-decided conclusion.

The learned Senior Counsel referred to several examples of leading questions put by the DG to third parties during his submissions. Detailed list of many questions has also been placed by learned Senior Counsel before the Court. It is submitted that framing of these questions clearly demonstrate that investigation was conducted not in an objective manner and DG wanted to elicit the answer, which was indicated by the question itself. The Commission also in its order has ignored the aforesaid aspects. The DG's conduct is in violation of the principles of natural justice. The Commission by condoning such leading questions to elicit adverse statements against Google for reaching the pre-decided conclusion has also erred. The DG as well as the Commission were independently duty bound to base their findings after due consideration of all the evidence on record, including various statements made by OEMs in support of Google's business model. The DG failed to consider such evidence, which was supportive of Google business. The Commission in the impugned order, has also not independently and objectively considered the evidence on record. The DG in the present case has mechanically relied upon the proceedings before the European Commission, which is demonstrated from the fact that even the submissions/ contentions of various parties before the European Commission have been replicated by the DG, verbatim as his findings. The learned Senior Counsel submits that there are over 50 instances when DG has merely replicated the contents of the proceedings before the European Commission. The Commission erroneously ignored the DG's failure to conduct an empirical analysis in its order under Section 26 of the Competition Act. The DG failed

to conduct any empirical analysis and the Commission also disregarded the empirical studies and survey submitted by Google without any reason.

16. It is submitted by Shri Maninder Singh, learned Senior Counsel that the Commission has failed to compute relevant turnover and comply with doctrine of proportionality as laid down by the Hon'ble Supreme Court. It is submitted that Hon'ble Supreme Court in ***Excel Corp Care Limited vs. Competition Commission of India and Anr. – (2017) 8 SCC 47*** had analysed the Scheme of the Competition Act and has dealt with the relevant turnover and laid down two steps process for imposition of penalty under Section 27 of the Act. The learned Senior Counsel submits that the Commission did not follow the dictum of law laid down by the Hon'ble Supreme Court, while imposing penalty under Section 27. It is submitted that hearing by the Commission was conducted for about 9 months from December 2021 to September 2022 and no concern was expressed by the Commission regarding the financial information and data submitted by the Appellant. After final argument was concluded on 02.09.2022, thereafter on 19.09.2022, the Commission directed Google to resubmit financial data within seven days. On 11.10.2022, Google resubmitted app wise revenue-based data. Google was not given any opportunity of hearing on the revised submission. The observation of the Commission that Google has not presented the relevant data is erroneous. Google has explained its computation in its submission dated 11.10.2022. Google has neither suppressed nor evaded any information. It is submitted that the provisions of Commission do not contemplate any provisional penalty as has been

imposed by the impugned order. The statutes where provisional penalty can be imposed, expressly provides for imposition of provisional penalty. The learned Senior Counsel has referred to the provisions of Customs Act. The learned Senior Counsel submits that for imposing penalty, the entire turnover of Google has been taken, whereas only relevant turnover with respect to which allegation of violations were made could have been taken, if at all. It is submitted that revenue of the Appellant regarding Desktop and PC cannot be taken into consideration, since the said revenue is beyond the market which were under consideration before the DG and the Commission. Shri Maninder Singh submits that penalty and fine imposed are disproportionate and deserve to be interfered with. It is submitted that whole exercise indicates that both the DG and the Commission had considered the issues with pre-determined mind and entire proceeding is replete with confirmation bias.

17. Shri Maninder Singh, learned Senior Counsel submitted that impugned order has been passed in absence of a Judicial Member, which is a mandatory requirement under the law, where adjudicatory functions are being carried out. It is submitted that Hon'ble Supreme Court has emphasised the requirement of a Judicial Member in the Commission, which discharges judicial/ quasi-judicial functions.

18. Shri N. Vankataraman, learned Additional Solicitor General of India, assisted by Shri Samar Bansal has advanced arguments on behalf of Competition Commission of India. Replying to the submission of learned Counsel for the Appellant that effect analysis is required to be done for proving

breach of Section 4, the learned ASG submits that the test of "Appreciable Adverse Effect on Competition" (AAEC) is not attracted in Section 4. The AAEC test is prescribed specifically for Sections 3 and 6 and not for Section 4. When statute has clearly prescribed distinct tests for Sections 3 and 6, any re-reading of the provision to substitute or add a test is impermissible. As a principle of law, effect analysis is not contemplated in Section 4. The Appellant's arguments that Competition Commission should have recorded finding on AAEC is incorrect and inapplicable. Shri Vanketaraman, however submits that Commission has inquired and recorded findings of abuse of dominance. He submits that under the Scheme of Section 4(2), effect of abuse does not have to be proved. Shri Vanketaraman, however, submits that Commission has in fact returned finding that conduct of the Appellant was anti-competitive. The Appellant is not only dominant, but is super dominant in the relevant market. The mandatory pre-installation/ bundling of 11 core applications and premium placement of the same is clear violation of Section 4(2)(a)(i) and Section 4(2)(d) of the Act. The Appellant by perpetuating its dominance in market for online search, has violated Section 4(2)(c). Tying of Play Store with Google Search violates Section 4(2)(e). Further tying of Play Store with Google Chrome is violative of Section 4(2)(e). Similarly, tying of Play Store with YouTube, violates Section 4(2)(e). Reducing ability and incentive of OEM to develop devices operating on Android Forks violates Section 4(2)(b)(ii) of the Act. The Commission in impugned order elaborately considered the Report submitted by the DG and all relevant materials on the record and has recorded specific findings that Google has abused its

dominance leading to violations of Section 4, sub-section (2) of the Act. The Competition Commission of India has proved that MADA obligation amounts to unfair conditions under Section 4(2)(a)(i). The threshold requirement for OEMs executing MADA is that such OEMs should have already executed ACC/AFA. The MADA contains condition that Google shall offer all 11 Apps bundled together, but not independently or selectively on non-exclusive or royalty free basis. Non-exclusive basis means that only those OEMs, who have signed the ACC will get Google bundle of Apps. The MADA provides for tying of bundling arrangement. Anyone who has taken Apache open license cannot produce a device with Android Fork, since it will be a handicap in denying access to Google 11 Apps either bundled or as independent Apps. By signing AFC/ACC by OEM, AOSP becomes closed license. Eleven core Applications are re-bundled together and pre-installed by Google on OEM devices. All eleven Google core Applications are placed at the default home screen. The MADA provides that MADA devices are those, which can run only Android OS and are approved by Google. The learned ASG has referred to various clauses of the MADA to support his submission. The clauses in MADA provides that OEM Companies need no obligation to install Google Application on any of its Android device is an empty concession that has no bearing on the abusive conduct of Google. The MADA clauses make Google's 11 bundled core Applications as must have Apps by every OEM using Google Android OS. The above clauses operate as behavioural bias in the form of status quo bias. The clauses in MADA provide no "exclusivity" is a misnomer.

19. Coming to the Revenue Sharing Agreement (RSA) Shri Venkataraman submits that all Agreements, i.e., MADA, AFA/ACC and RSA have to be read together to find out cumulative effect of the Agreements on an OEM. Shri Venkataraman submits that argument of Appellant that all the above Agreements are different Agreements and have to be read differently cannot be accepted. It is submitted that they are part of the same transaction and have to be conjointly read. Every OEM, which is RSA signatory is required to first sign MADA, but for an OEM to sign MADA, it must also sign the AFA/ACC. The above clearly indicates interdependence and interconnection between all the three Agreements. The AFA/ACC and MADA allow Google to take complete control of OEM devices. Google Search is the principal revenue generating App. Google Search is a must have App, which is bundled with 10 other Google Apps and pre-installed on devices. The OEM tend to sign RSA. The said Agreement permits OEMs to share the revenue. When any Agreement mandates pre-installation, it would defy both common and business sense of not encashing the fruits of RSA. The submission of Google that RSA is not obligatory or mandatory is false. The OEMs are prohibited from presenting, introducing or suggesting in any manner any alternative search service other than Google Search. The entire purpose of RSA is to protect Google Search. The learned ASG has referred to various clauses of RSA in support of this submissions. It is submitted that entire revenue generating source is the consumer base and theory of 'free lunch' is illusory and myth. Default and exclusive status of Google Search is ensured through combined application of MADA and RSA. In MADA executed till 2014, OEMs

were obliged to set Google Search as the default search service for all web search access point. Even in MADAs executed after 2014, Google mandated that the OEMs take steps to set Google Search engine as default on some search access point. Clauses of MADA sets out obligation on OEMs that Google search is set as the default search or engine for other remaining search access point available on Android devices. RSA further mandates that OEM take steps to ensure that Google once set as default on all search access points on a device – also endures as the exclusive search service on that device. The obligation imposed by Google on OEM through a combination of MADA and RSA converge to ensure that Google Search is both the default and exclusive search service on Android devices. The submission of the learned Senior Counsel that RSA is an optional Agreement is contrary to the factual scenario. Google sets out the monetary incentives offered to OEMs to promote Google Search as a default and exclusive search service. The impugned order has correctly pointed that vast amount of monetary incentives offered by Google to OEMs to enter into RSAs ensures that Google Search is set as the default and exclusive search service on all MADA Android devices.

20. Shri Venkataraman submits that Clause 2.4.3 of RSA read with Exhibit D grants certain exemptions to certain jurisdictions like the European Economic Area, Russia, Turkey and Korea from the rigours of exclusivity, which is otherwise imposed on the rest of countries where the Agreement extends.

21. Shri Venkataraman elaborating on ACC submits that by Clauses in the ACC, Google prohibits OEMs, who sign ACC to produce Android Forks on any and all of its devices based on Android. The ACC also requires that any Android-based software developed OEM's hardware should be compatible. The Clauses of ACC makes the Apache open license effectively defunct and inoperable since there are virtually no OEMs to manufacture Android forks under their own brand name. The ACC is not an option but an Agreement, which the OEMs are forced to sign by Google. There is no scope for the OEMs to negotiate the terms of the AFA as they are forced to sign a standard Agreement. Once an OEM signs the AFA, the OEM is prohibited from developing, manufacturing and selling Android Fork devices and software. OEMs thus are trapped by Google to only produce devices that will run Google's Apps. Google, therefore, has abused its dominant position in a particular relevant market to enter into other relevant markets through obligations under the MADA and AFA/ACC. The Commission has returned finding that Google licensing framework gives no option to OEMs but to sign AFA. The OEMs must sign MADA, if they want access to Play Store and GMS suite of Apps. The scope of AFA/ACC extends beyond smart mobile devices and covers all android devices manufactured/ distributed by the signatories. In India, Google has entered into AFAs with almost all OEMs manufacturing/ distributing Android OS based smart mobile devices. The prohibition on OEMs to develop or install an Android Forked OS under AFA completely forecloses the option to enter the market and provide competitive constraint to Google in the OS market. The Amazon faced difficulty in finding a

manufacturing partner for its Fire OS. Anti-fragmentation obligations prevent OEMs from independently developing their own competing Forked OS. Violation of AFA/ACC would result in termination of not only GMS license for other mobile devices, but also termination of Android License for non-mobile devices across the portfolio, losing revenue from the RSAs. This gives total control over the Android ecosystem to Google.

22. The learned ASG has referred to the submission of Amazon, which stated that Fork developers will have to develop a fresh set of APIs and services to run the Apps, which is a significant barrier to entry. The whole ecosystem developed by Google has relegated Forks to an inferior position. The submission of Google that Google granted waivers is also meaningless since seeking waivers cannot be equated with commercial freedom of OEMs to decide their partners. The obligations under ACC continued, which cemented the dominant position of Google. By making scope of AFA all pervasive, Google has created significant disincentives and entry barriers for any enterprise, considering distributing a Fork. AFA is a supplementary obligation imposed to further Google's tying objective under the MADA. Google has maintained and strengthened its dominant position through the AFA/ACC, which restricts competition within the larger Android ecosystem. Google is a virtual monopolist in the licensable smart device OS. The Commission has, after detailed analyses, found that Google has reduced ability and incentive of OEMs to develop and sell devices operating on Forks and thereby limited technical or scientific development to the prejudice of the consumers, in contravention of Section 4(2)(b)(ii).

23. Shri Venkataraman further submits that a special responsibility is cast by the statute on a dominant player. The competition law is a law enacted in public interest to protect the consumers and other stakeholders. The dominant player has onerous duties and anything anti-competitive is bad. The learned ASG submits that Google is not only dominant, but super dominant and a dominant player is supposed to do self-policing and failure to discharge special responsibilities leads to abuse. As soon as an entity becomes dominant, its freedom gets circumscribed with the heightened responsibility and it should be aware of its effect and its action. The Preamble as well as Section 18, cast an obligation on the Commission to prevent practices, which are anti-competitive. The argument of Google that under Section 4(2)(c) total denial/ total access has to be proved, is incorrect. The legislative threshold is limited. The denial of market access is sufficient to attract Section 4(2)(c). The learned ASG, replying to the submission made on behalf of the Appellant regarding procedural infirmities in the conduct of investigation by the DG, submits that compliance of the natural justice at the time of investigation is uncalled for. The DG cannot be equated with the Investigating Officer under the criminal law procedure. It is submitted by learned ASG that DG is duty bound to elicit information relevant for the investigation. The DG performs purely inquisitorial functions, culminating in non-binding report, which is ultimately considered and adjudicated by the Commission after giving due opportunity to the parties to have their say.

24. Relying to submission made on behalf of the Appellant that Commission does not have a Judicial Member and the impugned order needs to be set-

aside for want of proper quorum, the learned ASG submits that Section 15 of the Competition Act clearly provides that any defect in the constitution of the Commission shall not vitiate any proceedings. The learned ASG submits that quorum of the Commission is as per the Act and no infirmity can be read in the functioning of the Commission. The argument of the Appellant needs to be rejected.

25. Replying to the submission advanced by the learned Senior Counsel for the Appellant on the measures directed by the Commission in paragraph 617, the learned ASG submits that Commission is sufficiently empowered to pass such remedial directions. It is submitted that when Section 27(a) empowers the CCI to impose the remedy by directing the enterprise to discontinue abuse of dominant position, appropriate measures can be taken to achieve the object. It is submitted that not sharing APIs by Google was done with the anti-competitive objective of discouraging Forks. Appropriate direction was therefore issued to share the APIs. The impugned order contains sufficient analysis regarding APIs. The learned ASG further submits that Google must permit side-loading. Google imposes excessive restriction, which have severely impacted Google's competitors, who side-load competitive Apps on Android OS. Direction to Google to allow listing of third party Apps in its Play Store is also in consonance with the findings returned by the Commission.

26. Replying to submission of learned Counsel for the Appellant on imposition of penalty by the Commission on the ground that Commission has not taken into consideration the relevant turnover, the learned ASG submits

that all relevant facts have been taken into consideration by the Commission while imposing fine. It is submitted that relevant turnover as laid down by the Hon'ble Supreme Court has been noticed by the Commission. Thereafter, the Commission proceeded to analyse relevant turnover in the light of the principles laid down. The Commission rightly rejected Google's argument that only the revenue generated from the usage of Googles Search or YouTube through access points should be considered for relevant turnover for calculation penalty. The Commission has directed Google to submit financial data duly certified by Chartered Accountant, whereas no data certified by the Chartered Accountant was submitted by Google. Google submitted financial information and document with certificate of its own Officers. The financial information submitted on 11.10.2022 was subject to multiple caveats and disclaimers. The order dated 19.09.2022 was passed by the Commission to resubmit data after addressing the various shortcomings in the first submission. The Commission gave more than one opportunity to Google, but if failed to give clear financial data with regard to its relevant turnover duly supported by Chartered Accountant's certificate. The Commission then proceeded with the best possible alternative to compute the amount of penalty after failure of Google to provide relevant data with an intent of ensuring necessary market correction at the earliest. The learned ASG further submits that the Commission has considered the lower of the two conflicting figures given by Google with regard to total turnover for the financial years in question. The Commission's decision to impose penalty @ 10% of Google's turnover is clearly justified. The learned ASG submits that Google's business

model is akin to a "*castle and moat*" model. The learned ASG submits that implementation of the remedies mentioned in the order of the Commission would go a long way towards achieving the national mission of fair competition at digital market place. The learned ASG submits that the Commission after considering relevant evidence on record and Report of the DG has passed the impugned order, which contains elaborate consideration and all relevant findings, which need no interference by this Tribunal in exercise of its Appellate jurisdiction. The Commission as a Regulator has to discharge its duty and function as entrusted by the Competition Act, 2002.

27. We have also heard the learned Counsels for the Intervenors, who had sought intervention in this Appeal.

28. We have heard Shri Amit Sibal, learned Senior Counsel appearing in I.A. No.630 of 2023 on behalf of Epic Games Inc. Shri Sibal submits that Google excludes all App Store from Google Play Store. There are severe impediments for downloading and side-loading. The Epic Games also operates its own App Store. In sideloading, there are warnings issued by Google, which are deterrent and result in inability to download. The Applicant is compatible with Android. The remedial measures directed by the Commission flows from the conclusion of the Commission. Shri Amit Sibal has also referred to Section 27, sub-clause (g), which empowers the Commission to pass such orders as it may deem fit. It is submitted that Section 27 (g) gives ample powers to the Commission to pass any order as measure of penalty. Google's policy of exclusion of third parties Apps is

without any basis. There is Google Play Store on 98.4% mobile devices. Referring to the obstacles of sideloading, Shri Sibal submits that sideloading is confronted with 13 steps. In PC, there are no restrictions in downloading the Apps. The only reason to do this is to cement the dominance of Google.

29. Shri Abir Roy, learned Counsel appearing for the Applicant in I.A. No.327 and 336 of 2023 on behalf of C.E. Info Systems Ltd. and Alliance of Digital India Foundation respectively, submits that the Applicant has appeared before the DG. It is submitted that Applicant had developed it App Store in 12 Indian languages. The Applicant is an Indian App developer.

30. Shri Rajshekhar Rao, learned Senior Advocate has appeared for OSlabs Technology (India) Pvt. Ltd., IA No.232 of 2023. It is submitted that the applicant is an Indian homebred, system apps Company, galvanised by the mission of Hon'ble Prime Minister of "Digital India". The Applicant has built India's only indigenous mobile app store for Indian users to discover mobile applications, in the regional Indian languages of their choice. Referring to Section 4, Shri Rao, learned Senior Counsel for another Intervenor submits that Section 4 contains a theme that the bigger you are, the greater is the responsibility. Referring to Section 19 sub-section (4), Rao submits that each aspect has been evaluated by the Competition Commission of India. The learned Counsel further submits that the argument of Google that there is technical necessity to take the entire suite of Apps, is incorrect. There is no technical necessity in taking bundle of Apps, which is offered by Google. The complaint that Google had made against Microsoft is now being made against

Google in the present proceedings. The learned Counsel submits that tying is bad and supplementary obligations, which are thrusted upon the OEMs are violative of provisions of Section 4. The learned Counsel for the Applicant supports the order of the Commission.

31. We have considered the arguments of the learned Counsel for the parties and perused the records.

32. The learned Counsel for the parties have relied on various decisions of the Hon'ble Supreme Court, High Court, Competition Appellate Tribunal and Competition Commission of India, which we shall refer while considering the submissions in detail.

33. From the submissions advanced by learned Counsels for the parties and from perusal of the records, following are the ISSUES, which arise for consideration in this Appeal:

1. Whether for proving abuse of dominant position under Section 4 of the Competition Act, 2002 any 'effect analysis' of anti-competitive conduct is required to be done? And if yes; what is the test to be employed?

2. Whether the order of the Commission can be said to be replete with confirmation bias?

3. Whether pre-installation of entire GMS Suite amounts to imposing of unfair condition on OEMs which is an abuse of

dominant position by the Appellant resulting in breach of Section 4(2)(a)(i) and 4(2)(d)?

3a. Whether the Commission, while returning its finding on breach of Section 4(2)(a)(i) and 4(2)(d), has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

4. Whether the Appellants by making pre-installation of GMS Suite conditioned upon signing of AFA/ACC for all Android Device Manufacturers (OEMs) has reduced the ability and incentive of the OEMs to develop and sell devices operating on alternative versions of Android i.e., Android Fork and thereby limited technical and scientific development which is breach of the provisions of Section 4(2)(b)(ii) of the Act?

4a. Whether the Commission while returning its finding on breach of Section 4(2)(b)(ii) has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

5. Whether the Appellant has perpetuated its dominant position in the Online Search Market resulting in denial of market access for competing Search Apps in breach of Section 4(2)(c) of the Act?

5a. Whether the Commission while returning its finding on breach of Section 4(2)(c) has not considered the evidence on record and has

not returned any finding regarding the Appellant's conduct being anti-competitive?

6. Whether Appellant has leveraged its dominant position in Play Store to protect its dominant position in Online General Search in breach of Section 4(2)(e) of the Act?

6a. Whether the Commission while returning its finding on breach of Section 4(2)(e) in reference of above has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

7. Whether Appellant has abused its dominant position by tying up of Google Chrome App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act?

7a. Whether the Commission while returning its finding on breach of Section 4(2)(e) in reference to tying of Google Chrome with Play Store has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

8. Whether Appellant has abused its dominant position by tying up of YouTube App with Play Store and hereby violated provisions of Section 4(2)(e) of the Act?

8a. Whether the Commission while returning its finding on breach of Section 4(2)(e) in reference to tying of YouTube with Play Store has not considered the evidence on record and has not returned any finding regarding the Appellants conduct being anti-competitive?

9. Whether the investigation conducted by the Director General was in violation of Principles of Natural Justice?

10. Whether the investigation conducted by the Director General is vitiated due to DG framing leading questions to elicit information?

11. Whether order of Commission is vitiated since the Commission did not have any Judicial Member?

12. Whether the order passed by the Commission in exercise of its power under Section 27(a) is beyond the findings recorded by the Commission and is not in accordance with law?

13. Whether the penalty imposed on the Appellants by the Commission in exercise of its power under Section 27(b) was not based on relevant turnover of the Appellants, disproportionate and excessive?

14. Relief if any to which the Appellants are entitled?

34. Before we proceed to examine various issues as noted above, we may have a brief overview of jurisprudence of competition law.

35. The competition law is about the economic analysis of markets within a legal process. The competition law has to be effective in accompanying its primary functions of promoting competitive growth and enhancing consumer welfare needs. The thrust now is to build an active competition environment in which business can thrive and innovate keeping pace with new age development in digital market. The Indian economy has transformed into one of the largest and fastest growing economies in the world. Competition is now mainstream in Indian political economic philosophy. The Commission performs diverse functions, involving investigation, inquiry and adjudication, which requires a complex and sensitive approach, compatible with principles of natural justice. The scheme of the Competition Act, 2002 indicates that Commission has positive duty to eliminate all practices which have an adverse effect on competition. The Commission should promote and sustain competition and also protect the interest of the consumers.

Issue No.1

36. We may first notice statutory scheme under the Competition Act, 2022. The Competition Bill 2001 was introduced in the Lok Sabha. The Competition Bill sought to ensure fair competition in India by prohibiting trade practices, which cause Appreciable Adverse Effect on Competition ("**AAEC**") in India. The Statement of Objects and Reasons reads:

> "***Statement of Objects and Reasons.***—*In the pursuit of globalisation, India has responded by opening up its economy, removing controls and resorting to*

liberalisation. The natural corollary of this is that the Indian market should be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to promoting competition.

2. The Central Government constituted a High Level Committee on Competition Policy and Law. The Committee submitted its report on the 22nd May, 2000 to the Central Government. The Central Government consulted all concerned including the trade and industry associations and the general public. The Central Government after considering the suggestions of the trade and industry and the general public decided to enact a Law on Competition.

3. The Competition Bill, 2001 seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India and, for this purpose, provides for establishment of a quasi-judicial body to be called the Competition Commission of India (hereinafter referred to as CCI) which shall also undertake competition advocacy for creating awareness and imparting training on competition issues."

37. The Competition Act, 2002 includes the Preamble, which is as hereunder:

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a

Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

38. Section 2 of the Competition Act contains 'definition'. Section 3 deals with 'anti-competitive agreements' and Section 4 deals with 'abuse of dominant position'. Sections 3 and 4 are as follows:

*"**3. Anti-competitive agreements.**--(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation - For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation - For the purposes of this sub-section,-

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict-

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

***4. Abuse of dominant position**.—(1) No enterprise or group shall abuse its dominant position.*

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group] –

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

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

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

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service 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 condition or price 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 [in any manner]; 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.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5."

39. Section 5 deals with 'combination' and Section 6 with 'Regulation of combinations'.

40. Section 18 contains 'Duties of Commission' , which is to the following effect:

> *"**18. Duties of Commission.**— Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:*
>
> *Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country."*

41. Section 19, empowers the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4. Section 19, sub-section (1), (3) and (4) are as follows:

> *"**19.** Inquiry into certain agreements and dominant position of enterprise.--(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on –*
>
> *(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or*

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely: -

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

> *(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;*
> *(i) countervailing buying power;*
> *(j) market structure and size of market;*
> *(k)social obligations and social costs;*
> *(l) relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;*
> *(m) any other factor which the Commission may consider relevant for the inquiry."*

42. We have noticed the submission of learned Senior Counsel for the Appellant that it is inherent in Section 4 that effect analysis is to be conducted before coming to the conclusion that dominant position has been abused by an enterprise or group. The learned Senior Counsel for the Appellant submitted that very object of the Act is to prevent practices having adverse effect on competition and the duties of the Commission include a duty to eliminate practices having adverse effect on competition. The adverse effect on competition has to be proved before holding any violation of provisions of Section 4. Shri Kathpalia has further submitted that Competition Commission of India has been following the practice of effect analysis, which is apparent from various decisions taken by it and the practice of the Commission is in accord with the statutory scheme. It is submitted that conducting effect analysis is thus requirement of law. The learned ASG,

refuting the submission of the Appellant, submitted that the scheme of Section 3, 4 and 6 are different. In Section 3 and 6, analysis of "an appreciable adverse effect on competition within the relevant market in India" is a statutory requirement. There is no such provision made in Section 4 of the Act. It is submitted that Section 4, sub-section (1) is echoed in an injunctive term, providing that no enterprise or group shall abuse its dominant position and sub-section (2) of Section 4 provides that there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group's conduct is found to contravene as enumerated in sub-clauses (a), (b), (c), (d) and (e). It is submitted that requirement of law is the conduct, which is covered by sub-section (2) of Section 4, *per se*, lead to violation of Section 4, sub-section (2) and no effect analysis is required to be undertaken. The learned ASG submits that even if in some cases Commission has conducted effect analysis that was not the requirement of law and this Tribunal may hold that no effect analysis is required under Section 4 of the Act.

43. The Preamble of the Act as noted above contains the statement that Competition Act has been enacted for the establishment of the Commission to prevent practices having an adverse effect on competition. It is well established rule of statutory interpretation that preamble does not control the interpretation of statutory provisions contained in the Act, but the preamble is a key to explain the object and purpose of enactment. Section 18 as noticed above contains the duties of the Commission, which provides that "*it shall be the duty of the Commission to eliminate practices having adverse effect on competition*". We have to read Sections 3, 4, 6 and Section 18 in harmonious

way to find out the intent and purpose of the Act. The learned ASG is right in his submission that although Sections 3 and 6 use the expression "*cause an appreciable adverse effect on competition*" whereas such phrase is not used in Section 4. The legislative intent is clear that the expression "an appreciable adverse effect on competition" has to be found only with respect to Section 3 and Section 6 and the AAE test, which is attracted in Sections 3 and 6 is not attracted in Section 4. The question to be answered is as to whether even if AAE test is not attracted in Section 4, whether any analysis of conduct of an enterprise or group of anti-competitive has to be looked into or not?

44. Before we proceed further, it is useful to notice the relevant case laws, which have been relied by learned Counsel for both the parties.

45. The learned Senior Counsel for the Appellant has relied on the judgment of the Competition Commission of India in ***Indian National Shipowners' Association (INSA) vs. Oil and Natural Gas Corporation Limited (ONGC) – Case No.01 of 2018*** decided on 02.08.2019. The Competition Commission in the said judgment held that the existence of an unfair condition may amount to a contravention of Section 4(2)(a)(i) of the Act, however, examination of exploitative conduct which involves imposition of an unfair conditions by a dominant enterprise in a B2B transaction is essentially to undertake a fairness or reasonability test, which requires examining both how the condition affects the trading partners of the dominant enterprise as well as whether there is any legitimate and objective necessity for the

enterprise to impose such condition. Paragraph 135 of the judgment is as follows:

> "***135.*** *Having given due regard to the aforesaid rival contentions of the parties, the Commission observes that Section 4(2)(a)(i) primarily covers exploitative conduct within its ambit. While dealing with a case involving exploitative conduct inflicted upon a consumer, the mere existence of such conduct may fulfil the criterion embedded under Section 4(2)(a)(i) of the Act. Thus, the existence of an unfair condition may amount to a contravention of the provisions of Section 4(2)(a)(i) of the Act. However, examination of exploitative conduct which involves imposition of an unfair condition by a dominant enterprise in a B2B transaction is essentially to undertake a fairness or reasonability test, which requires examining both how the condition affects the trading partners of the dominant enterprise as well as whether there is any legitimate and objective necessity for the enterprise to impose such condition. Appreciation of the context and rationale becomes all the more important in the cases of buyer power, lest it increase the risk of large industrial buyers being penalised for what may be an attempt to negotiate competitive terms with suppliers or simply a prudent business decision having pro-competitive effects in the market for the final product in terms of lower prices, larger availability, greater choice etc. Keeping this framework for determination of unfairness in view, the conduct of ONGC is analysed hereunder."*

46. The next case relied by Shri Kathpalia is judgment of the Commission in ***Case No.03 of 2017 – Bharti Airtel Limited vs. Reliance Industries Limited and Anr.***, where Commission has held that dominant enterprise has to be shown to be tainted with an anti-competitive objective of excluding competition. In paragraph 22, following has been observed:

> *"22. In the absence of any dominant position being enjoyed by OP-2 in the relevant market, the question of examining the alleged abuse does not arise. Notwithstanding this, the offers of OP-2 do not appear to raise any competition concern at this stage. All through the preliminary conference, the learned senior counsel for the Informant alleged that the impugned offers of OP-2 amount to below-cost pricing and has resulted in OP-2 gaining a huge subscriber base of around 72 million in a period of just 4 months. This, according to the Informant amounts to predatory pricing. However, the Informant has not demonstrated reduction of competition or elimination of any competitor nor has any intent to that effect is demonstrated. The Commission notes that providing free services cannot by itself raise competition concerns unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/ competitors, which does not seem to be the case in the instant matter as the relevant market is characterised by the presence of entrenched players with sustained business presence and financial strength. In a competitive market scenario, where there are already big players operating in the market,*

> *it would not be anti- competitive for an entrant to incentivise customers towards its own services by giving attractive offers and schemes. Such short-term business strategy of an entrant to penetrate the market and establish its identity cannot be considered to be anti-competitive in nature and as such cannot be a subject matter of investigation under the Act."*

47. Shri Kathpalia has further relied on judgment of Competition Appellate Tribunal ("**COMPAT**") in ***Schott Glass India Pvt. Ltd. vs. Competition Commission of India – 2014 SCC OnLine Comp AT 3***, where the Competition Appellate Tribunal set aside the decision of the Commission imposing the penalty by holding that there was no effect on the downstream market and ultimate consumer did not suffer on the account of the prices of Schott Kaisha. In paragraph 55, following has been observed:

> *"**55.** These facts should have been enough to hold that there was no effect on the downstream market and ultimate consumer did not suffer on the account of the prices of Schott Kaisha and others being similar or the same. Though different or more discount was made to Schott Kaisha by the Appellant, it did not ultimately effect the downstream market at all and in this behalf the principles involved in Article 82 of EU Treaty as also the provisions of the US Robinson Patman Act should have been adhered to."*

48. The Competition Commission of India's judgment in ***Harshita Chawla and Ors. vs. WhatsApp – 2020 SCC OnLine CCI 32*** has also been relied upon where the Competition Commission of India while examining provisions of Section 4(2)(a)(i) and 4(2)(a)(d) has held that one of the conditions is that tying is capable of restricting/ foreclosing competition in the market. It has been held in paragraphs 91, 92 and 93 as follows:

> *"**91.** As regards Section 4(2)(a)(i), the Commission does not find much merit in the allegation of the Informant as mere existence of an App on the smartphone does not necessarily convert into transaction/usage. As highlighted by WhatsApp in its written submissions, to enable WhatsApp payment, the user has to separately register for it which necessarily requires the users to accept terms of the service agreement and privacy policy. Such registration requires providing additional information and undertaking additional steps to link their bank account, as per the NPCI laid down framework for UPI digital payment apps. As such, no transaction can be completed without the user taking these necessary voluntary steps. Incorporating the payment option in the messaging app does not seem to influence a consumer's choice when it comes to exercising their preference in terms of app usage, particularly since there seems to be a strong likelihood of a status quo bias operating in favour of the incumbents, at present. WhatsApp has also categorically ensured, in its written statement, that the users will continue to have full discretion whether to use WhatsApp Pay app or not, which implies that the users will have an option to use any other payment apps which might already have been downloaded*

on their smartphones. Thus, in the absence of any explicit or implicit imposition which takes away this discretion, the mere integration does not seem to contravene Section 4(2)(a)(i) of the Act.

92. *As regards the allegation under Section 4(2)(d) of the Act, the Commission observes that though the Informant has used the word 'bundling', the nature of such allegation is more akin to 'tying' as understood in the antirust context generally. While 'tying' refers to a practice whereby the seller of a product or service ('tying product') requires the buyers to also purchase another separate product or service ('tied product'), which essentially is the allegation of the Informant; 'bundling' typically means that the two products are sold by the seller in a fixed proportion as a bundled package at a particular price.*

93. *The economic literature, as well as the decisions by other competition authorities, has laid down certain conditions which need to be fulfilled to conclude a case of tying. Such conditions are (i) the tying and tied products are two separate products; (ii) the entity concerned is dominant in the market for the tying product; (iii) the customers or consumer does not have a choice to only obtain the tying product without the tied product; and (iv) the tying is capable of restricting/foreclosing competition in the market.*

49. Another judgment relied upon is of Competition Commission of India in ***Case No.33 of 2014 in XYZ vs. REC Power Distribution Company Ltd.*** wherein dealing with Section 4, sub-section (2)(c), the following has been held in paragraphs 6.37 and 6.40:-

*"**6.37** As per Section 4(2)(c) of the Act, there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner. Any conduct under Section 4(2) (c) of the Act requires an establishment of two components--firstly, there should an indulgence in a practice (s) i.e. there should be a conduct; and secondly, that the conduct should have resulted in a denial of market access i.e. anti-competitive effect/distortion in the market in which denial has taken place.*

***6.40** The second element in the enquiry of a case under denial of market access is with regard to the anti-competitive effect/distortion in the market because of such conduct. The Commission notes that the DG has primarily relied upon the award of DPRs on nomination basis to RECPDCL. During 2013-14, RECPDCL was awarded 70 DPRs on nomination basis out of total 189 DPRs prepared by the consultants i.e. 37% of the total market. Further, the market share of RECPDCL in the second market, including all DPRs prepared by it for 2013-14, is approximately 40%. The Commission notes that although the entry of RECPDCL in the second market has led to a reduction in the market share for the other consultancy firms, the market was nevertheless contestable. The responses from the Discoms (i.e. the consumers of RECPDCL) have clearly revealed the reasons for their preference for appointing RECPDCL. Thus, in the absence of a conduct on the part of OP group, the reduction in the market share for some of the players cannot be relied upon to infer anti-competitive conduct on the part of OP group. Further, the data submitted by RECPDCL depicts that the percentage of DPRs prepared by it has*

> *decreased in the year 2015-16 to approximately 36% which further weakens the allegation regarding denial of market access. With more than 60% market shared by the other consultancy firms and in absence of any evidence regarding OP group's influence on the Discoms' decision to follow the nomination route, the Commission is of the view that contravention of Section 4(2)(c) cannot be made out in the instant case."*

50. On the other hand, learned ASG has placed reliance on judgment of Competition Commission of India in ***Case No.13/2019 – MCX Stock Exchange Ltd. vs. National Stock Exchange of India Ltd.***, wherein in paragraph 25.1, the Commission has observed that once it is established that an enterprise or group is engaged in a conduct specified in clauses (a) to (e) of Section 4, there is no statutory requirement to examine any other additional impact on competitors. In paragraph 25.1, following was stated:

> *"25.1 The contention that there is no observation on harm to consumers in the Commission's order dated 25.05.2011 and hence there is no element of abuse deserves to be dismissed because section 4 does not require it to be established. The section first and foremost requires that it be established that an enterprise or group is in dominant position in the relevant market. Thereafter, it is required to establish that it has engaged in a conduct as specified in clauses (a) to (e) of the section. Once both are established, there is no statutory requirement to examine any other additional impact on competitors or consumers or the market. The Commission, in its order has amply established the aforementioned two questions. Section 4 of*

> *the Act, unlike section 3 does not require evaluation of appreciable adverse effect on competition (AAEC) or evaluation of the factors mentioned in section 19(3), which include "accrual of benefits to consumers".*

51. It is submitted that the said judgment has also been affirmed by COMPAT vide its judgment in ***National Stock Exchange of India vs. Competition Commission of India - 2014 SCC OnLine Comp AT 37***. It is true that above judgment of the Commission was affirmed by the COMPAT, but what was said in paragraph 25.1 has not been either specifically affirmed or departed.

52. The learned ASG relied on a judgment of Court (Fifth Chamber) in Servizio Elettrico Nazionale relied on paragraphs 53, 54 and 123, which are to the following effect:

> ***"53.*** *That being said, it must be borne in mind that the characterisation of a practice of a dominant undertaking as abusive does not mean that it is necessary to show that the result of a practice of such an undertaking, intended to drive its competitors from the market concerned, has been achieved and, accordingly, to prove an actual exclusionary effect on the market. The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, irrespective of whether such practice has proved successful (see, to that effect, judgment of 30 January 2020, České dráhy v Commission, C-538/18 P and*

C-539/18 P, not published, EU:C:2020:53, paragraph 70 and the case-law cited).

54. *As stressed in point 20 of the Communication from the European Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings' (OJ 2009 C 45, p. 7), although, where the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide evidence of the exclusionary effect of the practice in question, the opposite situation that a certain course of conduct has not produced actual anti-competitive effects cannot rule out the possibility that that conduct was in fact capable of doing so when it was implemented, even if a long period of time has passed since that conduct took place. Such absence of effect could stem from other causes and be due to, inter alia, changes that occurred on the relevant market since that conduct began or to the fact that the undertaking in a dominant position was unable to complete the strategy underpinning that conduct.*

123. *Having regard to the foregoing, the answer to the fifth question is that Article 102 TFEU must be interpreted as meaning that, when a dominant position is abused by one or more subsidiaries belonging to an economic unit, the existence of that unit is sufficient for a finding that the parent company is also liable for that abuse. The existence of such a unit must be presumed if, at the material time, at least almost all of the capital of those*

subsidiaries was held, directly or indirectly, by the parent company. The competition authority is not required to adduce any additional evidence unless the parent company shows that it did not have the power to define the conduct of its subsidiaries and that those subsidiaries were acting independently."

53. It was held in the above case that when a dominant position is abused by one or more subsidiaries belonging to an economic unit, the existence of abuse by one unit is sufficient to arrive at the finding that the parent company is also liable for that abuse. In the above judgment itself in order passed in paragraph 124 clearly mentioned that the evidence adduced by the undertaking in question shows that the conduct has not produced actual restrictive effects. Paragraph 124 – 1, 2 and 3 are as follows:

124. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. Article 102 TFEU must be interpreted as meaning that, in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a competition authority to prove that that practice is capable of impairing an effective competition structure on the relevant market, unless the dominant

undertaking concerned shows that the exclusionary effects that could result from the practice at issue are counterbalanced or even outweighed by positive effects for consumers in terms of, among other things, price, choice, quality and innovation.

2. *Article 102 TFEU must be interpreted as meaning that, in order to rule out that the conduct of an undertaking in a dominant position is abusive, the fact that evidence adduced by the undertaking in question shows that that conduct has not produced actual restrictive effects is not of itself sufficient. That evidence may indicate that the conduct in question is unable to produce anti-competitive effects, although it must be supplemented by further items of evidence intended to demonstrate that inability.*

3. *Article 102 TFEU must be interpreted as meaning that the existence of an abusive exclusionary practice carried out by an undertaking in a dominant position must be assessed on the basis of whether that practice is capable of producing anti-competitive effects. A competition authority is not required to show intent on the part of the undertaking in question to exclude its competitors by means or having recourse to resources other than those governing competition on the merits. Evidence of such intent does, however, constitute a factor which may be taken into*

account in order to determine that a dominant position has been abused."

54. In the above case also, the Court (Fifth Chamber) held that dominant position must be assessed on the basis of whether that practice is capable of producing anti-competitive effect. The said judgment also does not support the submission of Counsel for the Commission rather it supports the submission of Appellants.

55. We may refer to a judgment of Hon'ble Supreme Court reported in ***(2019) 8 SCC 697 – Uber (India) Systems Pvt. Ltd. vs. Competition Commission of India,*** wherein while considering Section 4, sub-section (1), Hon'ble Supreme Court has laid down the following in paragraph 5:

> *"**5.** There are two important ingredients which Section 4(1) itself refers to if there is to be an abuse of dominant position:*
>
> *(1) the dominant position itself.*
>
> *(2) its abuse.*
>
> *"Dominant position" as defined in Explanation (a) refers to a position of strength, enjoyed by an enterprise, in the relevant market, which, in this case is the National Capital Region (NCR), which: (1) enables it to operate independently of the competitive forces prevailing; or (2) is something that would affect its competitors or the relevant market in its favour."*

56. It has been held in the above judgment that abuse of dominant position by an enterprise is something that would affect its competitors or the relevant market in its favour.

57. We may, in this connection, also refer to the Report of Competition Law Review Committee (July 2019), a Committee set up to review the Competition Act. The Committee has in its Report dealt separately under heading in paragraph 4 "Rule of Reason in Finding of Abuse". The Committee in paragraph 4 has noted the decisional practice of the Commission, where Commission in some cases followed *per se* approach, while in several other cases, entered into effects-based analysis. The Report also notices the decisional practice of EU Courts and noticed the effects-based analysis adopted in different Forums. In paragraphs 4.1 to 4.10, the Committee captured the issue in following words:

> ***"4. RULE OF REASON IN FINDING OF ABUSE***
>
> *4.1. A list of actions which amount to abuse of dominance have been provided in Section 4(2) of the Act. The text of Section 4(2) does not refer to the effect of actions committed by dominant enterprises or groups and seems to imply that the actions listed always amount to abuse. For example, while Section 3 prohibits agreements which have an AAEC, Section 4 does not refer to any effects test for establishing abuse. Therefore, it may be argued that a bare reading of Section 4 establishes a per se approach to abuse, instead of being based on the rule of reason.*
>
> *4.2. The Committee discussed if an effects-based analysis should be undertaken by the CCI to establish*

abuse in Section 4. In order to understand the aim of the provision, the discussion on abuse in the Raghavan Committee Report was perused. The Committee took note that this report indicates that an effects based approach was contemplated to establish abuse of dominance under Section 4.

4.3. The Committee then discussed jurisprudence established in India in this regard. In its decisional practice, the CCI and appellate authorities have adopted distinct approaches in different scenarios. For instance, in a case involving NSE, the CCI noted that NSE was dominant in the relevant market. It ordered NSE to modify its zero-price policy and to cease and desist from its unfair pricing, exclusionary conduct and from unfairly using its dominant position in the other market(s) to protect its own market. In coming to this conclusion, CCI followed a per se approach and did not enquire into the effect of the NSE's conduct. On appeal, CCI's decision was upheld by COMPAT.

4.4 However, the CCI has also relied on an effects-based approach to analyse abuse in many of its orders. In Dhanraj Pillay v. Hockey India, the CCI held that the Act was not violated where allegedly abusive contractual restrictions were not disproportionate to a sporting organisation's legitimate regulatory goals. It looked into the effects of the restrictive conditions imposed and noted that the conditions did not amount to abuse of dominance as they were intrinsic and proportionate to the objectives of the organisation. In the Schott Glass case, the COMPAT found that unlawful price discrimination required a showing of both "(i) dissimilar treatment to equivalent transactions; and (ii) harm to competition or likely harm to competition in the sense that the buyers suffer a competitive disadvantage

against each other leading to competitive injury in the downstream market." The COMPAT found the CCI had wrongly ignored the second limb and that the evidence showed there was no effect on the downstream market and the ultimate consumer did not suffer as a result of the alleged conduct. In this case, not only was an effects based analysis undertaken but the objective justifications raised by the parties to justify their conduct were also considered.

4.5 It was also brought to the Committee's attention that, based on a plain reading of the statute, appellate authorities have interpreted the clauses in Section 4(2) broadly in certain cases. For instance, in a recent judgment, the Supreme Court held that Section 4(2)(c) is worded broadly enough to account for restraining entry of enterprises from the market even when they're not competitors.311 However, the Committee noted that though the scope of abuse in Section 4(2)(c) was interpreted to be wide in this case, the Supreme Court also held that a penalty need not be imposed as the accused party had provided legitimate justifications.

4.6. After analysing the decisional practice on abuse of dominance in India, the Committee concluded that the CCI does in fact adopt an effects-based approach in many cases depending on the kind of abuse in question. It was noted that this approach is in line with the approach adopted by the EU competition authorities in this regard. Article 102 of the TFEU, which deals with abuse of dominance, does not define abuse but provides a list of activities which may comprise abuse. Unlike Section 4(2) of the Act in India, Article 102 does not provide an exhaustive list of abusive practices.

4.7. Historically, there was a tendency on the part of both EU Courts and the EC to apply per se rules to at least some kind of abuses. The Economic Advisory Group on Competition Policy, in 2005, criticised the per se approach taken by the EC until then to penalise abuse of dominance. In line with this, recent case laws and guidance issued by the EC have pointed out that an effects-based analysis should be undertaken to establish abuse of dominant position for certain kinds of abuses.

4.8. In 2009, the EC issued its Article 102 Guidance to clarify the position of law in relation to abuse of dominance. Within this, it was noted that for exclusionary abuses in Article 102, the EC will intervene if there is any likelihood of anticompetitive foreclosure. Even in its recent case laws, the EC has adopted an effects-based approach while analysing exclusionary abuse. However, such an effects-based approach is not mandated for exploitative abuses under Article 102. In Intel v. Commission, it was noted that there were two types of abuses in Article 102 of the TFEU- 'by nature abuses' (usually exploitative abuses, such as exclusivity rebates, excessive pricing, etc.) and 'other abuses' (usually exclusionary abuses, such as tying, product design, refusal to supply, etc.). It was held that 'by nature abuses' remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, then an assessment of all the circumstances must be undertaken to decide whether the conduct is abusive. For 'other abuses' (usually exclusionary abuses), it was noted that a proper effects analysis must be undertaken irrespective of whether such a claim is raised by the dominant firm. Therefore, an effects-based approach has been established for exclusionary

abuses in the EU. Further, an effects-based analysis may be undertaken even for exploitative abuses if it is raised by the dominant firm.

4.9. Singapore has also adopted a similar approach to analyse abuse by dominant enterprises. In its guideline, the Singapore competition authority, i.e., CCCS has noted as below:

> *"In conducting an assessment of an alleged abuse of dominance, CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition. The process of competition may be adversely impacted, for instance, by conduct which would be likely to foreclose, or has foreclosed, competitors in the market. CCCS considers that factors which would generally be relevant to its assessment include: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers."*
>
> *(emphasis supplied)*

4.10. Even in the US, having a monopoly is not per se unlawful and is always judged under the rule of reason. For establishing an allegation of monopolizing or attempting to monopolize, competition authorities are usually required to analyse if the defendant's conduct has or is likely to harm competition and consumers. Other jurisdictions like Australia, Brazil and Canada have also adopted the rule of reason to analyse the effect of activities while adjudging them to be an abuse of dominant position."

58. The Committee after stating as noted above was of the view that effect analysis by the CCI is well within the text of Section 4(2), hence, no amendment is required in Section 4, sub-section (2). It was stated that current test of Section 4(2) has not proven to be a hindrance to the CCI's

ability to assess effects in abuse of dominance disputes. In paragraph 4.11 and 4.12 the Committee stated following:

> *"4.11. Based on the above, the Committee discussed that the CCI has interpreted Section 4(2) keeping in mind that one of the key aims of the Act is to prevent practices which adversely affect competition in India.326 It has therefore, wherever appropriate, analysed the effects of alleged abusive conduct by dominant entities before passing orders regarding such conduct. The CCI has relied on the effects built into some of the clauses of Section 4(2) to support its approach, e.g. "denial of market access in any manner" in Section 4(2)(c).*
>
> *4.12. The Committee did not find any significant issues with the decisional practice of CCI discussed above, and found it to be in line with global practices. After conducting an analysis of the CCI's orders, the Committee came to the conclusion that the current text of Section 4(2) has not proven to be a hindrance to the CCI's ability to assess effects in abuse of dominance disputes. It was agreed that since it may not be necessary to undertake an effects analysis in all kinds of abuse, e.g. exploitative abuse, it may not be appropriate to mandate an effects analysis in Section 4(2). Therefore, it was concluded that no legislative amendment is required in this regard."*

59. We may also notice that Article 102 of Treaty on the Functioning of the European Union ("**TFEU**") contains provision of abuse of dominant position. Article 102 is as follows:

> *"Article 102*

> *Any abuse by one or more undertaking of a dominant position within the internal market or in a substantial part of it shall prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*
> *(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;*
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which , by their nature or according to commercial usage, have no connection with the subject of such contracts."*

60. In earlier cases, the EU Court applied *per se* rule, but there has been shift in the opinion of the EU Courts, which has been captured by **Richard Whish & David Bailey** in Tenth Edition of "Competition Law" under Section 5 dealing with Article 102. While dealing with general principles of abuse, following has been stated under the heading '(ii) Legal formalism: are there any per se rules under Article 102?' in following words:

> *"**(ii) Legal formalism: are there any per se rules under Article 102?***
> *One of the most common complaints about Article 102 has been that the Commission and the EU Courts has been that the Commission and the EU Courts apply it in too formalistic a manner. In particular, some practices appear to have*

been regarded as unlawful 'per se', that is to say, irrespective of whether they produced, or were capable of producing, adverse effects on the market. Historically thee did appear to be a tendency on the part of the EU Courts and Commission to apply per se rules, at least to some abuses. This was exemplified by the law on loyalty rebates. The Court of justice in Hoffmann-Law Roche v Commission had formulated a rule on exclusive dealing and loyalty rebates by a dominant undertaking in per se terms. In paragraph 89 of its judgment, after saying that it would be unlawful for a dominant firm to enter into exclusive dealing agreements which customers, it continued that the same would be true where that firm:

> *Applies, either under the terms of agreement concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.*

This formalistic approach was followed in several cases on rebates.

In Intel v Commission the General Court continued to adopt a strict approach to exclusivity rebates, which it said were illegal unless the dominant firm could show an objective justification for granting them. However, there was an increasing intellectual consensus against the application of per se rules to unilateral behaviour, and the judgment of the General Court in Intel attracted particular hostility because of its formalistic approach. On appeal the Court of Justice, in paragraph 137 of its judgment, cited paragraph 89 of the judgment in Hoffmann-Law Roche;

however, in paragraph 138 the Court added an important qualification to what appeared to be a per se prohibition:

> *However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that it conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects (emphasis added).*

The 'clarification' of the law means that if a dominant firm, in response to an allegation of abuse, argues that the practice in question could not have a foreclosure effect, the Commission is obliged to address that argument. It is hard to imagine that a dominant firm that is convinced that its behaviour is not anti-competitive would not submit such evidence. It follows that the Court's qualification would seem, de facto, to mean that exclusionary conduct can be abusive only where it can be shown to be capable of having anti-competitive effects on as-efficient competitors. To put the point another way, there is no per se illegality under Article 102. The Court of Justice has recently re-affirmed the position: in Paroxetine it stressed that, having regard to all relevant facts, conduct may be characterised as abusive only if it is capable of restricting competition and, in particular, producing exclusionary effects."

61. Under heading (iv) What type of effects analysis should be undertaken to find an exclusionary abuse?, following has been stated:

> ***"iv) What type of effects analysis should be undertaken to find an exclusionary abuse?***

> *Where it is not possible to say that the object of a dominant firm's conduct is to harm competition, the jurisprudence of the Court of Justice is clear that conduct should be condemned as abusively exclusionary under Article 102 only where it is demonstrated to have the actual or likely effect of restricting or distorting competition. For example, in TeliaSonera the Court said:*
>
> > *in order to establish whether [a margin squeeze] is abusive, that practice must have an anti-competitive effect on the market.*
>
> *In Post Danmark I the Court of Justice said that when determining whether a pricing practice could be abusive it was necessary to take into account 'all the circumstances' which would include the likely effects of the practice in question, a formulation repeated in Post Danmark II, The Commission's decisional practice for many years has sought to produce evidence of anti-competitive effects, as can be seen from Microsoft, Google Search (Shopping), Google Android and Qualcomm (exclusivity) payments. Paragraph 19 of the Commission's Guidance on Article 102 Enforcement Priorities says that it prioritises enforcement activity in relation to conduct that is likely to lead to an anti-competitive foreclosure of the market, thereby having an adverse effect on consumer welfare."*

62. In the judgment of Court of Justice in Case C-52/09 Konkurrensverket v Teliasonera Sverige, the Court has held "in order to establish whether [a margin squeeze] is abusive, that practice must have an anti-competitive effect on the market.

63. The decisional practice of the Commission as noted above in majority of cases is to enter into 'effect analysis' and the judgment of the COMPAT in ***Schott Glass India Pvt. Ltd.*** (supra) also endorsed the same view. We may now revert to Section 4, Explanation to Section 4, sub-section (2) provides as follows:

> *"**Explanation.—** For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service 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 condition or price 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 [in any manner]; 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.*
>
> *(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5."*

64. The explanation clearly provides that unfair or discriminatory condition in purchase of sale of goods or service shall not include such discriminatory condition or price which may be adopted to meet the competition.

65. The Section 4, thus, specifically excludes discriminatory conditions or prices, which may be adopted to meet the competition. For giving effect to statutory scheme as delineated in Explanation, analysis has to be undertaken as to whether discriminatory condition or price have been adopted to meet the condition or is anti-competitive. As noted above, the object of the Competition Act is to prevent practices which have adverse effect on the competition. For finding of abuse under Section 4 relating to the dominant position, it has to be held that the conduct is anti-competitive. We, thus,

accept the submission of the learned Counsel for the Appellant that statutory scheme of the Competition Act delineated by Section 4 and Section 18, indicate that conduct of a dominant enterprise or group, which is held to be abusive has to be anti-competitive conduct and there has to be effect analysis on the above point.

66. We, thus, answer Issue No.1 in following words:

> **For proving abuse of dominance under Section 4, effect analysis is required to be done and the test to be employed in the effect analysis is whether the abusive conduct is anti-competitive or not.**

Issue No. 2

67. The learned Senior counsel for Appellant has submitted that order of the Commission is replete with confirmation bias by relying on decision of European Commission dated 18.07.2018 in Case No. 40099, Google Android. It is contended that after the press release the judgment was issued, within a month information was submitted, on the basis of which proceedings under the Act were initiated. It is submitted that the report of the Director General indicates that the Director General proceeded to collect materials to submit Report finding abuse of dominant position by Google. It is submitted that the Commission after receipt of the report, returned finding similar to what was recorded in the European Commission judgment which indicates the existence of confirmation bias. The Commission passed an order under

Section 26(1) dated 16.04.2019 forming *prima* opinion that mandatory pre-installation of Google's proprietary apps under MADA amounts to imposition of unfair condition on the OEMs. Further, prima facie opinion regarding breach of other provisions was also formed by the Commission. When we look into the order dated 16.04.2019, it is clear that the order states *"in this regard, Commission is of the prima facie opinion……".* The proceeding was initiated after forming the aforesaid prima facie opinion directing the Director General to cause an investigation under the provisions of Section 26(1).

68. The Director General issued notice to OEMs and other third parties and after collecting evidence submitted the report on basis of which order has been passed. The order of the Commission is a detailed order which notices submissions made by the Appellant, the report of the Director General, and the other materials on record and it cannot be said to be an order relying on the decision of the European Commission dated 18.07.2018. There are findings and conclusions recorded by the Commission after considering the data and evidence collected in the inquiry. The geographical market in the investigation was India and we find no ground to accept the submission of the Appellant that order of the Commission is replete with confirmation bias. Relevant markets were determined by the DG and determination of markets has been noted in the Para 57 of the order of the Commission, which is to the following effect:

> *"57. Based on its assessment in the backdrop of the abovementioned statutory scheme, the DG in its Investigation Report has delineated five relevant markets*

i.e.,

a. *Market for licensable OS for smart mobile devices comprising of Smartphones & Tablets in India*

b. *Market for app store for Android smart mobile OS in India*

c. *Market for general web search services in India*

d. *Market for non-OS specific web browsers in India*

e. *Market for online video hosting platform (OVHP) in India."*

69. **We answer Issue No.2 as follows: The Commission proceeded to consider the materials on the record and submissions of the parties with respect to each of the market and recorded findings and conclusions after considering the evidence on record. Hence, we are unable to accept the submission of the learned Senior Counsel for the Appellant that the order of the Commission is replete with confirmation bias**.

Issue No. 3 and 3a

70. Before proceeding to consider the rival submissions of the parties we need to notice the relevant clauses of the Mobile Applications Distribution Agreement (MADA). The Appellant has brought on record sample Mobile Applications Distribution Agreement (MADA) with Karbonn in the Convenience Compilation. The Agreement dated 26.09.2018 begins with following background:

*"**BACKGROUND***

WHEREAS:

A. Google offers an integrated suite of mobile services on a non-exclusive, royalty-free basis to Android device manufacturers that have executed an Android Compatibility Commitment;

B. Company desires to license Google's suite of mobile services to provide a consistent high-quality out-of-the-box user experience on Company's Android Compatible Devices;

C. Nothing in this Agreement is intended to restrict Company or end users from installing third-party services on devices with Google's suite of mobile services, including services with similar functionality: and

D. Company is under no obligation to install Google Applications on any of its Android devices."

71. Clause 1 of the MADA contains definition of various items. Clause 1.12 defines 'Core Applications' which are:

> ***1.12 "Core Applications"** means the following Google Applications: Search, Chrome, Gmail, Maps, YouTube, Play Drive, Play Music, Play Movies, Duo, and Photos."*

72. Clause 2 deals with 'Google Applications'. Clause 2.1 License to Google Applications provides as follows:

> *"**2.1 License to the Google Applications.** Subject to the terms and conditions of this Agreement (including compliance with Section 2.3) and the GMS Requirements, and subject to Company being in compliance with a valid*

and effective Android Compatibility Commitment, Google grants to Company a non-transferable, nonexclusive, no cost license during the Term (under Google's Intellectual Property Rights) to (a) distribute the Google Applications on Devices in the Territories, and (b) reproduce the Google Applications to the extent necessary to exercise the license granted in this Section 2.1. I Company may only distribute a Device with Google Applications if it makes all Core Applications authorized for distribution in the applicable Territory available on such Device, unless otherwise approved by Google in writing. For the avoidance of doubt, Google may license such Google Applications under Intellectual Property Rights that Google owns or has the right to license without payment to or consent from a third party."

73. Clause 2.3(b) provides that company may not, and may not allow or encourage any Affiliate or third party to create derivative works from or based on Google Applications.

74. Sub-clause 2.3(i) restricts the third parties to offer, download, or install any additional products during the launch process of a Google Application.

75. Clause 4 contains various sub-clauses regrading device implementation requirements. Clause 4.4 provides for 'Placement Requirement - Device Setup'. Clause 4.8 is 'Google Approval and Launch'. Clause 4.4 (a) and (b) are as follows:

"(a) distribute all Core Applications approved in the

applicable Territory or Territories in accordance with the Google Product Geo Availability Chart;

(b) distribute on the Default Home Screen (but excluding the lockscreen and notification tray):

(i) a Google-provided widget;
(ii) the Google Play Store icon; and
(iii) an icon clearly labeled or branded "Google" that provides direct access to the Core Applications (using the icons and text Google provides or approves in writing).”

76. The submission advanced by learned Senior Counsel for Appellant is that MADA is an optional and per-device agreement which is voluntary and not unfair and the terms of MADA are not imposed on OEMs. The expression ‘imposes’ contains an element of compulsion which is not present in any of the Clauses of MADA. MADA is not unfair and does not restrict competition. The learned Senior Counsel for the Appellant has further submitted the OEMs do not find MADA’s conditions unfair. It is submitted the Oppo told the Director General that GMS Apps are basic tools which are necessary for better user experience and despite pre-installed apps, Oppo has competing apps. Evidence given by Intex, Sony and Samsung have also been referred by the learned Senior Counsel for the Appellant. The Director General has asked Xiaomi and Samsung as to whether they have requested Google for exemption from pre-installation of Google Chrome. Xiaomi informed that it had sought exemption from Google Chrome and web browser. Samsung informed that with user perspective they provided users both, the Samsung internet and

Chrome. To the Director General's question to Xiaomi and Samsung that whether they face any possible dilemma for avoidance of pre-installation of those applications which carry duplicate services and fill up space in addition of Google, the learned Senior Counsel for the Appellant submitted that both replied that they do not face any such dilemma.

77. Before proceeding further, we need to notice certain clauses of another agreement i.e. Android Compatibility Commitment (ACC) (Earlier in Form of AFA- Android Fragmentation Agreement). Copy of sample ACC with Micromax Informatics Ltd. has been brought on record by the Appellant in the Convenience Compilation. Clause 1.2 – 'Android Compatible Device(s)' means, for each applicable version of Android, devices that comply with the Android Compatibility Definition Document (CDD). Clause 2.2 provides for 'Permitted Exceptions'. Clause 2.1 – 'Android Compatibility' provides:

> *"**2.1 Android Compatibility.***
>
> *A. **Android Compatible Hardware.** All devices based on Android that Company manufactures, distributes, or markets will be Android Compatible Devices.*
>
> *B. **Android Compatible Software.** All Android-based software that Company develops, distributes, or markets will be designed to run on Android Compatible Devices.*
>
> *C. **Android-based SDKs.** Company may not distribute or market an SDK based on Android to third parties or participate in the development of such an SDK. Company remains free to develop an SDK based on Android for its own internal use."*

78. The Commission in its order has after noticing the evidence which was collected by the Director General from different OEMs has come to the conclusion that OEMs are not in a position to bargain with Google on basis of non-existent alternatives. The Commission has observed that the relevant market has not seen any new entry but rather, encountered exits by the rivals of Google. This has left OEMs much more dependent on Google. The Commission has also assessed the dominance of Google and held Google is dominant in all the identified five markets. Commission in Para 329 has determined five relevant markets i.e. (a) Market for licensable OS for smart mobile devices in India; (b) Market for app store for Android smart mobile OS in India; (c) Market for general web search services in India; (d) Market for non-OS specific mobile web browsers in India; (e) Market for online video hosting platform (OVHP) in India. In para 330, Commission held Google to be dominant in all these markets. No submission has been advanced before us questioning the finding of dominance recorded by the Commission. The Commission has examined in-depth the bargaining power of Google vis-à-vis OEMs in finalizing terms and conditions of the MADA. The Commission considered reply submitted by Google in the investigation as well as the response submitted by Xiaomi, Oppo, Huawei, Karbonn and Vivo. In Para 350 of the judgment, the Commission rejected the argument of Google that OEMs can negotiate the terms with Google. Commission, also after considering the relevant materials, has come to the conclusion that there is weak countervailing buyer power with OEMs. In para 354 following has been observed:

> *"354. It is further noted that Google's apps covered in GMS have attained a status that without them, the customers would not be find a smart device attractive. Accordingly, the OEMs would not be in a position to offer devices with 'bare Android' and the same has been evidenced by the submissions of OEMs, where they prefer to offer devices with Google's GMS apps. The investigation also revealed that if a device manufacturer is prepared to offer a 'bare' Android device, it need only pass technical tests and accept the Android License Agreement. This approach reduces the contractual restrictions the OEM must accept, potentially increasing flexibility to configure a device as the manufacturer sees fit. However, this approach foregoes several key benefits that most device manufacturers seek, e.g., bare Android devices are not permitted to include any Google apps (the distribution of which is conditioned on other contracts such as MADA and AFA). For some Google apps, the device manufacturer may substitute an alternative, perhaps Mapmylndia Maps instead of Google Maps. But for other Google apps which are considered must have such as Play Store, the alternative is less clear. Without Google Play, from bare Android devices, users cannot easily obtain the apps both of Google and of independent app developers which they typically expect to obtain."*

79. After analyzing the materials on record and arguments advanced by the Appellant, the Commission held that Google does not negotiate the key terms of the MADA which is anti-competitive conduct by foreclosing the market for rivals and MADA has also reduced potential choice for the users. In Para 373 of the judgment commission has held:

> *"373. Based on the foregoing analysis, the Commission is of the view that various covenants of MADA are in the*

nature of imposition of unfair conditions on OEMs who have no choice but to accept the same. As already stated, Google does not negotiate on key terms of the MADA which are found to be resulting in anti-competitive conduct viz. pre-installation of entire suit of GMS as well as prominent placement thereof. By foreclosing the market for rivals, these covenants have also reduced the potential choice for users. Further, the pre-installation requirement for the entire bouquet of apps of Google is in the nature of supplementary obligation imposed on the OEMs, if they wish to pre-install even a single app of Google. The Commission is of the view that these practices of Google, especially when seen along with AFA7 ACC and RSAs, harms competition as the restrictions prohibits alternative vendors from outcompeting Google s apps on the merits."

80. The Commission also concluded that the claim made by Google that MADA is optional and voluntary, does not reflect the commercial reality in terms of the real choice available to a device manufacturer. In para 468, the following has been observed:

"468. The claims made by Google that MADA is optional and voluntary, do not reflect the commercial reality in terms of the real choice available to a device manufacturer. While an OEM is not obligated to pre-install any Google app on its Android devices, what cannot be lost sight of is that lack of essential Google apps, e.g., Play Store, erodes marketability of the devices. Majority of users expect these apps on an Android device, which unless pre-installed, cannot be accessed as they are not distributed through other Android app marketplaces. Google's policy of withholding its own apps from non-Google Android app marketplaces reinforces the compulsion for OEMs to pre-install these apps on their

Android devices. Access to Play Store is particularly critical as Google is including more functionality and API calls under the closed licensing of Google Play. This makes Google Play Services a critical input for Android OEMs. However, to pre-load even a single essential Google app, such as Play Store that provides users access to the Android app universe, a device manufacturer must sign MADA and AFA, committing to pre-install the full GMS suite."

81. One of the submissions which was also raised by the Appellant was that no complaint was made by any OEM regarding abuse of dominant position by Google and in evidence, which was led by several OEMs before the Director General, no complaint was made.

82. The competition law is a public law which obliges the Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. The Regulator which is statutorily obliged to discharge its statutory function cannot confine its analysis and decision only on the basis of evidence of countervailing parties and competitors. Any conduct or arrangement concerning the interests of consumers and OEMs is clearly amenable to examination by the Commission to protect the interest of consumers and preserve competition in the market.

83. Learned ASG, in support of his submission relied on the judgment of Hon'ble Supreme Court in ***"L.I.C. of India & Anr. vs Consumer Education***

& Research Centre, (1995) 5 SCC 482". In Para 23 to 27 following was laid down:

> ***"23.*** *Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons. The Administrative Law by Wade, 5th Edn. at p. 513 in Chapter 16, Part IV dealing with remedies and liabilities, stated thus:*
>
> > *"Until a short time ago anomalies used to be caused by the fact that the remedies employed in administrative law belong to two different families. There is the family of ordinary private law remedies such as damages, injunction and declaration; and there is a special family of public law remedies particularly certiorari, prohibition and mandamus, collectively known as the prerogative remedies. Within each family the various remedies can be sought separately or*

> *together or in the alternative. But each family had its own distinct procedure."*

At p. 514 it was elaborated that "this difficulty was removed in 1977 by the provision of a comprehensive, 'application for judicial review', under which remedies in both facilities became interchangeable". At p. 573 with the heading "Application for Judicial Review" in Chapter 17, it is stated thus:

> *"All the remedies mentioned are then made interchangeable by being made available 'as an alternative or in addition' to any of them. In addition, the court may award damages if they are claimed at the outset and if they could have been awarded in an ordinary action."*

The distinction between private law and public law remedy is now settled by this Court in LIC v. Escorts Ltd. [(1986) 1 SCC 264: 1985 Supp (3) SCR 909] by a Constitution Bench thus: (SCC p. 344, para 102)

> *"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be*

decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances."

24. *In Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 293 : (1989) 2 SCR 751] it was held that the Corporation must act in accordance with certain constitutional conscience and whether they have so acted must be discernible from the conduct of such Corporations. Every activity of public authority must be informed by reasons and guided by the public interest. All exercises of discretion or power by public authority must be judged by that standard. In that case when the building owned by the port trust was exempted from the Rent Act, on terminating the tenancy for development when possession was sought to be taken, it was challenged under Article 226 that the action of the port trust was arbitrary and no public interest would be served by terminating the tenancy. In that context, this Court held that even in contractual relations the Court cannot ignore that the public authority must have constitutional conscience so that any interpretation put up must be to avoid arbitrary action, lest the authority would be permitted to flourish as imperium in imperio. Whatever be the activity of the public authority, it must meet the test of Article 14 and judicial review strikes an arbitrary action.*

25. *In Mahabir Auto Stores v. India Oil Corpn. [(1990) 3 SCC 752: AIR 1990 SC 1031] it was held that the State when acting in its executive power, enters into contractual relations with the individual, Article 14 would be applicable*

to the exercise of the power. The action of the State or its instrumentality can be checked under Article 14. Their action must be subject to rule of law. If the governmental action even in the matter of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play, natural justice are part of the rule of law applicable in situation or action by State/instrumentality in dealing with citizens. Even though the rights of the citizens, therefore, are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play and natural justice, equality and non-discrimination. It is well settled that there can be "malice in law". It was also further held that whatever be the act of the public authority in such monopoly or semi-monopoly, it must be subject to rule of law and must be supported by reasons and it should meet the test of Article 14.

26. *This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any strait-jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on*

its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.

27. *In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."*

84. Learned ASG has also made elaborate submission that OEMs have entered in Revenue Sharing Agreement (RSA) with Google under which they receive substantial revenue from search services from Google Search. The Revenue Sharing Agreement between the OEMs and Google also puts various conditions on the OEMs including condition of not installing the competing search app in the device. The OEM which received substantial revenue from Google is always apprehensive to lose the revenue if it goes against the business model of Google. The learned ASG has referred to judgment of Commission in ***"Tata Power Delhi Distribution Ltd. vs. NHPC Ltd., Case No. 20 of 2017"***, where the Commission has held that in terms of competition

law, in cases of abuse of dominant position, the seminal issue is what harm is caused to the end consumer due to the behaviour of the dominant player. We, thus, conclude that what is said by OEMs who have Revenue Sharing Agreement with Google is not the final word on the dominant abuse by Appellant. There were other statements by various competitors showing the harm caused to them. OEM's statement thus has to be viewed in context of their total dependency on Google. The Commission has noted the submission of Amazon, Mozilla and Micromax, where they have stated that they could not enter into commercial relationship with OEMs due to restrictions imposed by Google on such OEMs through pre-existing commercial arrangement which may stand breached. In Para 447.3, the Commission has extracted the reply of Mozilla. Para 447.3 is to the following effect:

> *"447.3 Relevant extract from the reply of Mozilla is reproduced as under:*
>
> *'...The web browser represents the front line between the consumer and the web. Common barriers to entry and expansion for web browser developers include: (1) the high cost of technological development (2) Pre-installed bundling of dominant digital platforms' products and services; (3) limitations on consumers to easily replace fixed default pre¬ installed settings with alternatives; and (4) commercial terms and policies imposed by gatekeeper digital platforms. In addition, in order to expand, organizations must develop products across platforms which can be expensive and time consuming. For example, although the Google Android Operating System (Google Android OSI Android OS) is dominant in India, Mozilla must still develop for the iOS platform. This is because Mozilla cannot have a competitive web browser in the global mobile market without developing*

for both the iOS and Android OS...'

' ...Firefox was initially very successful, achieving close to 30% global market share in 2010 as the second most popular browser after Internet Explorer (See: http://gs.statcounte r.com/browser- market-share/ desktop/ worldwide/Umonthly-200901 -20 LO 12- bar). ***After that, Mozilla's market share took a downturn, impacted by companies connecting their browsers to their operating systems: on desktop this was Microsoft connecting Windows to Internet Explorer (and later Edge) and on mobile this was Google connecting Chrome to Android mobile devices. This made default placement on devices a challenge. Without business opportunities for default placement of Firefox, the overwhelming majority of Firefox use was through dedicated fans who took several steps to find Firefox on the web or in an app store, install it on their device, change it to be default, and in many cases, re-change system settings that attempted to override their default choice.***

Mozilla also struggled on mobile without any major distribution opportunities for Firefox on Android in global markets. This included India, where Mozilla was engaged in discussions with OEMs but was unable to get placement as the default browser or in the home dock because of restrictions they faced. Meanwhile, while Mozilla has an iOS product as well, the mobile iOS market has been limited as Apple mandates Safari to be the default browser.

(Emphasis supplied)"

85. The learned Senior Counsel for the Appellant has also contended that Commission has used the expression 'must have apps' without there being any definition of 'must have apps'. It is submitted that MADA does not define

'must have apps' in any manner. Commission in its order at various places has referred to 'must have apps' as to the Play Store and has also referred 'must have apps' as Core Applications i.e. eleven applications of Google.

86. The Commission has used expression 'must have apps' in reference to Play Store and Play Services. Play services is the only place where essential Google APIs are housed without which phone does not become functional or interact with applications and the OS. Due to the significance and importance of Play Services which houses essential services, the Commission mentioned the said app as 'must have app'. Use of the expression 'must have apps' has been done by the Commission in the process of giving emphasis. At other places 'must have apps' has been referred to as eleven Core Applications of Google which are pre-installed by virtue of MADA. For a MADA signatory, eleven applications of Google are 'must have apps'. Use of expression 'must have apps' thus in no manner diminishes the emphasis which is sought to be laid by the Commission on the significance and relevance on the one hand of eleven Core Applications and on the other hand of Play Store.

87. While considering Issue No.1, we have accepted the submission of learned Senior Counsel for the Appellant that Commission is obliged to carry out effect analysis to the extent as to whether the abuse of dominant position is anti-competitive or harms the competitor. As noted above, learned ASG has submitted that the Commission has carried out effect analysis and found that the contract of the Appellant is anti-competitive and harmful to the competitors and such requirement is also complete.

88. The learned ASG has contended that abuse of dominance of the Appellant has been reflected in the proceeding both by quantitative as well as qualitative data on basis of extremely high market share of Android OS. In 2018, its market share was 98.47% whereas iOS was 1.46% and others were only 0.07%, this indicate the effect of abusive conduct. Learned ASG has referred to data collected by the Director General and has been taken note by the Commission in Paras 96, 97, 100 and 101.

89. The facts brought on the record indicate that effect of abuse of dominant position by the Appellant was taken note of which was reflected on extensive data which was on the record. The Commission has also noticed that OEM's lack of bargaining power and lack of negotiating space with Google clearly proves harm to competition and weak countervailing buyer power restricting to bundled apps, pre-installation and premium placement are also anti-competitive. Various conditions in the MADA which include the condition under which Google retains sole discretion to change list/bundle of GMS Apps; condition that OEMs must seek approval of Google for launching devices, all this clearly prove anti-competitive practices. We may only notice para 373 of the order of the Commission, where the Commission has expressly held that the practices of Google harm competition. Para 373 is extracted for ready reference:

> *"373. Based on the foregoing analysis, the Commission is of the view that various covenants of MADA are in the nature of imposition of unfair conditions on OEMs who have no choice but to accept the same. As already stated, Google*

does not negotiate on key terms of the MADA which are found to be resulting in anti-competitive conduct viz. pre-installation of entire suit of GMS as well as prominent placement thereof. By foreclosing the market for rivals, these covenants have also reduced the potential choice for users. Further, the pre-installation requirement for the entire bouquet of apps of Google is in the nature of supplementary obligation imposed on the OEMs, if they wish to pre-install even a single app of Google. The Commission is of the view that these practices of Google, especially when seen along with AFA/ ACC and RSAs, harms competition as the restrictions prohibits alternative vendors from outcompeting Google's apps on the merits."

90. We need to also notice judgment relied upon by learned Senior Counsel for the Appellant. The learned Senior Counsel for the Appellant has placed reliance on judgment of the Competition Appellate Tribunal (COMPAT) in ***"DLF vs. Competition Commission of India, 2014 SCC OnLine Comp AT 17"***, where Competition Appellate Tribunal has held that *"an imposition has an element of compulsion"* for it to be anti-competitive. There can be no quarrel to the proposition laid down by the Appellate Tribunal in the above case. In the present case, the Commission after considering all facts and circumstances has come to the conclusion that OEMs have no negotiation power and they have to accept the terms and conditions offered by the Appellant and business compulsions oblige it to enter into MADA and other agreements.

91. The next judgment relied upon by the Appellant is judgment of Hon'ble Supreme Court in ***"K. C. Cinema vs. State of Jammu and Kashmir, 2023 SCC OnLine SC 22".*** The appeal before the Hon'ble Supreme Court arose out of an order passed by the Hon'ble High Court in public interest litigation filed challenging certain conditions imposed by the multiplexes prohibiting cinema goers from carrying their own food items and water bottle in the cinema hall. The Hon'ble High Court has set aside the condition in exercise of its jurisdiction under Article 226. The Hon'ble Supreme Court allowed the Appeal. In para 30 of the judgment following was observed:

> *30. The test in* ***Central Inland Water Transport Corpn.*** *(supra) is not only to assess whether the parties have unequal bargaining power relative to one another but also to ascertain whether a contractual term or a contract is unfair, unreasonable or unconscionable. A contract (or a term in a contract) can be said to be unfair or unreasonable if it is one-sided or devoid of any commercial logic. In the present case, although theatre owners may unilaterally determine the conditions of entry into cinema hall, the condition imposed in this instance is not unfair, unreasonable or unconscionable.*

92. In the facts of the said case, the Hon'ble Supreme Court held that conditions imposed by multiplexes were not unfair, unreasonable or unconscionable. Judgment of Hon'ble Supreme Court was in the facts and circumstances of that case and cannot be pressed in the present matter.

93. The next case relied by learned counsel for the Appellant is ***"Saurabh Tripathy vs. Competition Commission of India, 2019 SCC OnLine Del 10498"***, where in para 46, the Delhi High Court laid down following:

> *"46. It is important to note that neither the DG nor CCI were required to substitute the commercial wisdom of the contracting parties and evaluate clauses in the manner as suggested by the petitioner. In order for any term or condition of a contract to be considered as unfair, as contemplated under Section 4(2)(a)(i) of the Act, it must be established to be patently unfair and one that no party, who has any negotiating ability, would accept the same. Thus, plainly, clauses which are commonly used and are found in various commercial contracts, would not fall within the scope of Section 4(2)(a)(i) of the Act. There is no material on record to indicate that Clause 4.4 is, in any manner, commercially unconscionable and had found its place in the GSPA on account of unilateral imposition by GEECL by virtue of its dominant position."*

94. There can be no quarrel to the proposition as laid down by the Hon'ble Delhi High Court in the above judgment. The manner in which the Appellant has abused its dominant position in the present case has been examined in detail by the Commission. The conditions imposed by Google for reasons noted in order of the Commission have been held to be unfair resulting in violation of Section 4(2)(a)(i). The judgment which has been cited by learned Senior Counsel for the Appellant were on the facts of the said cases and so far as proposition of law is concerned there can be no quarrel but present is

a case where all facts have been considered and examined by the Commission, as noted above.

95. We note that MADA, which is primarily about licensing Google's suite of Mobile Services as is stated in Recital 'A' and 'B' of MADA, obligates the OEMs to distribute "Core Applications" upon the OEM being granted license to distribute Google Applications. It is evident from Clause 2.1 of MADA that Google puts obligation on the OEM to first accept "bundling" of apps as "Core Applications" and places obligation on the OEM, to distribute "Core Applications" in a "Tying" Arrangement with Google Applications.

96. We also note that Clause 4.4 of MADA enjoins upon the OEM to – (i) distribute all Core Applications, (ii) distribute on the Default Home Screen a Google – provided widget, Google Play Store icon; and an icon that provides direct access to Core Applications which is labelled as 'Google', and among other conditions also stipulates that any Google Application that is not a Core Application is placed no more than one level below the Default Home Screen. There is also a condition that the OEM shall implement the "Home button animation" as per Google's guidelines if Google Assistant is enable on the Android device and also implement Google Hotword, if it is supported by the device. Thus, the conditions which are applied on OEMs through MADA which is essentially to provide Google Applications, are in the form of "supplementary obligations" attracting Section 4(2)(d) of the Act whose contravention is evident.

97. The Commission has noted in para 373 of the impugned order, the unfair conditions imposed by Google on OEMs, holding that the OEMs have no choice but to accept them. Para 373 is as follows:

> *"373. Based on the foregoing analysis, the Commission is of the view that various covenants of MADA are in the nature of imposition of unfair conditions on OEMs who have no choice but to accept the same. As already stated, Google does not negotiate on key terms of the MADA which are found to be resulting in anti ¬ competitive conduct viz. pre-installation of entire suit of GMS as well as prominent placement thereof. By foreclosing the market for rivals, these covenants have also reduced the potential choice for users. Further, the pre¬ installation requirement for the entire bouquet of apps of Google is in the nature of supplementary obligation imposed on the OEMs, if they wish to pre-install even a single app of Google. The Commission is of the view that these practices of Google, especially when seen along with AFA7 ACC and RSAs, harms competition as the restrictions prohibits alternative vendors from outcompeting Google's apps on the merits."*

98. In view of the foregoing discussion, we concur with the findings and conclusion of the Commission as returned in Para 614.1. Issue No.3 and 3a are answered in following manner:

(i) Issue No.3: Pre-installation of entire GMS Suite amounts to imposing of unfair condition on OEMs which is an abuse of

dominant position by the Appellants resulting in breach of Section 4(2)(a)(i) and 4(2)(d).

(ii) Issue No.3a: The Commission while returning its finding on breach of Section 4(2)(a)(i) and 4(2)(d) has considered the evidence on record and has returned finding that the conduct of the Appellant harms the competition.

Issue No.4 and 4a.

99. The issues relate to Android Fork. A Fork is an operating system that is a modified, competing version of Android OS based on the Android source code. The issue in consideration is that whether making pre-installation of GMS Apps conditional upon signing of AFA/ACC, reduces ability of developers to make Fork version of Android thereby violating Section 4(2)(b)(ii). Anti-Fragmentation Agreement was introduced in India in 2011. AFA was succeeded by Android Compatibility Commitment (ACC). From 2017 onwards signing of ACC is a pre-condition for signing MADA. Signing of AFA is not an option, but it is an Agreement that OEMs have to sign to be MADA signatory. Once an OEM signs the AFA/ACC, it is prohibited from developing, manufacturing and selling Android Fork devices and software.

100. The learned Counsel for the Appellant questioning the conclusion and finding of Commission contended that the Commission recorded its conclusion that the restriction imposed by various clauses of AFA/ACC are unreasonable, disproportionate in scope and has resulted in foreclosure of Appellant's competitors in OS market, without properly appreciating the

evidence, which was before the Commission. The learned Senior Counsel submits that AFA was introduced in the background when Symbian OS, an open source platform, which did not implement any minimum compatibility standard failed. The learned Senior Counsel submits that AFA/ACC does not restrict innovation. The AFA/ACC signatories are free to differentiate and innovate on top of these minimal baseline requirements and some OEMs have actually done so. The learned Senior Counsel has referred to Samsung and Oppo, which had released devices, some of which have foldable screens and pop-up cameras. The intention of the Appellant is that securing minimal compatibility was to avoid the fate of fragmentation. We have noticed certain relevant clauses of ACC in preceding paragraphs of this judgment. Clause 2.1(B) of ACC provides that any Android based software company developed/ distributed or marketed will be designed to run on android compatible devices. Clause 2.3 enumerates certain permitted exceptions. The Commission after analysing the material on record including the evidence given by the OEMs, recorded following findings in paragraph 583:

> *"**583.** In view of the foregoing analysis, the Commission concurs with the finding of the DG that Google, by making pre-installation of Google's proprietary apps (particularly Google Play Store) conditional upon signing of AFA/ ACC for all android devices manufactured/ distributed/ marketed by device manufacturers, 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 to the prejudice of the consumers, in violation of the provisions of Section 4(2)(b)(ii) of the Act."

101. The learned Senior Counsel for the Appellant has relied on paragraph 555 of the Commission's decision, where it was observed that Google has a legitimate interest in licensing its Apps only for those devices which meet the requirements set by it. Paragraph 555 of the Commission's order is as follows:

*"**555.** The Commission notes that there are three aspects of the anti-fragmentation obligations. At first level, the OEMs can pre-install Google's proprietary apps i.e., GMS only on those Android devices which meet the compatibility requirements of Google. Google has a legitimate interest in licensing its apps only for those devices which meet the minimum requirements set by it. Thus, these anti-fragmentation obligations would allow Google to prevent OEMs from making any such changes in the OS which would interfere with the proper functioning of its proprietary apps. The Commission notes that some standardization may be required in order to ensure consistent and expected user experience from Google's proprietary applications. Thus, to some extent such restrictions, can be said to be justifiable to the extent these are applicable on devices with Google's applications. However, the restrictions have to be reasonable, proportionate and not in the nature of blanket prohibitions. Also from Competition Law perspective, the issue for consideration is whether the restrictions under AFA/ACC, adversely affect the incentives of OEMs, app developers and, users to experiment with innovative products using Android forks. The reply to the same is in affirmative and is discussed in subsequent paras."*

102. The Commission, in the above paragraph noted that some standardization may be required in order to ensure consistent and expected user experience from Google's proprietary applications. However, the Commission, in the said paragraph, also returned a finding that restrictions under AFA/ACC adversely affect the incentives of OEMs, App developers and users to experiment with innovative products using Android Forks. Further in paragraph 558, the Commission has observed:

> *"**558.** The Commission finds that the restrictions imposed vide various clauses of AFA/ ACC are unreasonable and disproportionate in scope and has resulted in foreclosure of its competitors in OS market. Google, in its submissions also claims that a branding solution would be ineffective and lead to consumer confusion as firms would be allowed to market incompatible devices as based on Android or using Android". Though the Commission does not find this assertion convincing, but in that case too, Google could have suitably amended its branding guidelines to make this distinction more prominent."*

103. With regard to complaint of the Appellant that Commission while returning its finding, holding AFA/ACC limiting scientific development, has not considered the evidence on record. We have perused the part of the order passed by the Commission in the above regard. In paragraphs 504 to 583, the Commission has dealt with this issue. In paragraph 564.1, the Commission has noted the evidence given by Xiaomi, where Xiaomi has stated about the restrictions in the development of alternative operating system. In paragraph 564.1, the Commission noticed:

> *"**564.1.** Xiaomi has submitted that,*
>
> *"...From a general perspective, if there are any AFA/ACC restrictions on fragmentation which result in the creation of one OS which then becomes the monolithic must have' OS for apps, this may restrict the development of alternative operating systems..."*

104. Similarly, in paragraph 564.2, the evidence of Lava was noticed, which again stated about restricting the ability of developers to develop a holistic alternative of Google's App ecosystem. Paragraph 564.2 is to the following effect:

> *"**564.2.** Lava has submitted that,*
>
> *...AFA/ACC obligations restrict the developer/OEM's ability to modify and/or create a forked version as an alternative OS in any other combination or to develop upon it. This definitely affects the entry of new developers/OEMs and ability of existing developers to innovate, create and further develop an OS which is a true alternate to Android. However, since Lava has not yet attempted any such modifications to the android system, we are not in a position to comment on the actual impact of the same on future scientific development of an alternative OS. As per our current understanding, android fork developers are able to utilize the Google API's to a limited extent. This restricts their ability to develop a holistic alternate app eco system..."*

105. The obligation imposed by AFA/ACC has been noticed by the Commission in paragraph 510, which is to the following effect:

> *"**510.** Further, at the cost of repetition, it is apposite to reiterate the obligations imposed by these agreements on the OEMs for a better understanding and examination of the allegation. The Commission notes that an AFA, places following obligations on a signatory OEM:*
>
> *(d) Company will not take any actions that may cause or result in the fragmentation of Android.*
>
> *(e) Company will only distribute Products that are either: (i) in the case of hardware, Android Compatible Devices; or (ii) in the case of software distributed solely on Android Compatible Devices.*
>
> *(f) Company may not distribute a software development kit (SDK) derived from Android or derived from Android Compatible Devices and Company may not participate in the creation of, or promote in any way, any third party software development kit (SDK) derived from Android, or derived from Android Compatible Devices."*

106. In paragraphs 518, 522 and 523, the Commission has noticed the evidence led by Amazon. After noticing the evidence of Amazon, following has been stated in paragraph 524 by the Commission:

> *"**524.** Amazon has also pointed out other hindrances in the path of developing a forked version of Android OS owing to terms and condition of AFA/ ACC. Achieving a viable scale would have allowed Amazon and other similarly interested developers to invest in developing*

> *an alternative Android OS which would have offered more features and services. Thus, the obligations imposed pursuant to AFA/ ACC, have huge impact on innovation and research and development by competitors."*

107. The Commission has in its order, elaborately dealt with evidence led by the OEMs, and, therefore, the complaint of the Appellant that evidence has not been considered in the right perspective, cannot be accepted. We have noticed that not only Amazon but eight other OEMs have made their submissions on various non-negotiable constraints contained in AFA/ACC, which ensure that Fork developers cannot succeed.

108. The learned Senior Counsel for the Appellant has emphasised that the Commission has selectively relied on the responses provided by Xiaomi and Lava, whereas Xiaomi in the statement has stated that "*However, given that Xiaomi has not attempted to develop an independent OS, it is not aware of and has not considered the negative impact of AFA/ACC on the future development of an alternative OS, if any*". The response given by the Xiaomi has to be considered in its entirety. The statement noted by the Commission in paragraph 564.1 was the response given by Xiaomi as a general perspective. The general perspective, which is perceived by OEMs is relevant material to be considered and we do not find any error in the Commission's finding considering the aforesaid response of the Xiaomi.

109. Similarly, the learned Senior Counsel has referred to the statement of Lava. According to the Appellant, Lava has also stated that "*However, since*

Lava has not yet attempted any such modifications to the android system, we are not in a position to comment on the actual impact of the same on future scientific development of an alternative OS". The OEM Lava's statement as quoted in paragraph 564.2 by the Commission was a clear statement that AFA/ACC obligations restrict the developers to modify or create a Fork version as an alternative OS in any other combination or to develop upon it. The value of the statement cannot be said to be diminished on the basis of the statement that Lava has not yet attempted any such modification. The perception of OEM on the limitation of development has correctly been relied by Commission, with which no fault can be found.

110. The learned Senior Counsel for the Appellant emphasised that Commission has disproportionately relied on Amazon's statement. It is submitted that the Commission has wrongly attributed Amazon Fire OS's commercial launch failure due to AFA obligation, even though, Amazon was not an AFA signatory. Amazon clearly stated that as it did not sign MADA, it did not have any obligation of having GMS on its device. Amazon's submissions have been noticed by the Commission in paragraph 522, wherein the discussion has been cited with those of several smart phone OEMs, who had mentioned the risk of losing their access to GMS, if they were to work with Amazon. In paragraph 522 and 523, the relevant extract of the Amazon's reply has been noted, which is to the following effect:

> *"**522.** As identified in the Investigation Report, the example of Amazon Fire OS (a forked version of Android developed by Amazon) demonstrate that anti¬*

fragmentation obligations severely limit the number of OEMs as well as their ability to market forked Android OS based devices. Amazon, having developed fork version of Android as Fire OS, had to face considerable difficulty in commercial production and distribution of handsets installed with Fire OS. Amazon intended to license its Fire OS to OEMs who would manufacture smart phone devices operating on the Fire OS. However, this could not materialize due to the unwillingness of OEMs who were under AFA obligations. This is evident from the reply of Amazon according to which several leading OEMs cited the risk of losing their access to GMS if they were to work with Amazon, as the Fire OS would be viewed by Google as a 'fragmentation' of Android. The relevant extract from the reply of Amazon, is as follows:

> *However, Amazon's ability to distribute the Fire OS through the OEMs who are subject to Google's Mandatory Terms was and is significantly limited. Amazon discussed Project Otus with several smartphone OEMs (including Huawei, LG, HP, Sony, ZTE, Lenovo and HTC). It is submitted that these OEMs (in their negotiations with Amazon) often cited the risk of losing their access to GMS if they were to work with Amazon on Project Otus (as the Fire OS could be viewed by Google as 'fragmentation' of Android)…'*
>
> *(Emphasis supplied)*

523. *Further, the terms and conditions of AFA/ ACC made it literally impossible for the device manufacturers*

from partnering any developer of forked version of OS. The same is evident from the reply of Amazon and is reproduced as under:

> *'..as regards the Fire devices business, Amazon initially considered a variant of an LG tablet under both Amazon and LG's brands, where LG would have modified an existing tablet and installed on it the Fire OS. This product, however, was not launched and this project was, in fact, cancelled at an advanced stage when prototypes (more specifically, "Engineering Validation Test" units) were being tested. The main reason for the cancellation of this project was LG's concerns that its agreement with Google would be terminated by Google due to LG supporting a forked version of Android. This led to Amazon developing its own tablet (i.e., the Fire tablet) using a contract manufacturer ("CM") (Quanta) which would operate on the Fire OS.*
>
> *(Emphasis supplied)"*

111. The reply of Amazon, which has been noted and considered by the Commission cannot be termed irrelevant. Amazon tried to develop Android Fork and the failure of its product cannot be said to be irrelevant. Due to AFA, OEMs, who were signatory to AFA, were incapacitated in entering into any other venture or effort for development of Android Fork.

112. The Commission has correctly returned a finding that AFA/ACC results in less choice of smart mobile OS and general services by consumers. We

have also noticed that in the AFA/ACC fragmentation has not been clearly defined, which gives a long rope to Google. According to the reply of Google, AFA specifies that in order to curtail any fragmentation, Company and Google will ensure that all products distributed by Company are Android compatible devices. The Commission has noted Xiaomi's statement that fragmentation is not clearly defined. The evidence of other OEMs with regard to fragmentation has been noticed by the Commission in paragraphs 547 and 548 and the Commission has observed in paragraph 548:

> *"**548.** Based on the aforesaid replies of most of the OEMs, it is noted that by keeping the contours of the term fragmentation undefined, Google has kept the sole discretion to interpret the same as per its interest at all times. By simply stating that the OEM will not take any actions that may cause or result in the fragmentation of Android, Google left the OEMs guessing as to whether a particular action is within the ambit of the AFA. Google at its whims and fancies could consider any customization of the Android code as fragmentation as it retains the power to unilaterally change the compatibility requirements. Since, Google requires GMS licensees to submit all Android devices to Google for approval, regardless of whether the devices preload GMS or are based on the Android Open-Source Project, the OEMs are left to the dole discretion of Google w.r.t. their devices. This also restricted the ability of the OEMs to test the markets with newer features and devices."*

113. We are in agreement with the conclusions recorded by the Commission in paragraph 548. The above clearly indicates that Commission has recorded its findings on anti-competitive effects on Android Fork developers and has considered the relevant evidence on record and Google's submission and the complaint of Google, that evidence has not been considered in a right perspective, cannot be accepted.

114. We also need to consider as to whether Commission in its analysis has returned any finding that the conduct of Google is anti-competitive in imposing restrictions on OEMs, thereby also limiting scientific development. A clear finding has been recorded by the Commission in paragraph 583, as extracted above, that restriction imposed vide various clauses in AFA/ACC are unreasonable and disproportionate in scope and has resulted in foreclosure of its competitors in OS market. In paragraph 563, the Commission has again held that the anti-fragmentation obligation restrict the level of competition in the relevant market by disincentivizing the competing OS developers from developing Forked version of Android. Paragraph 563 is as follows:

> *"**563.** As regards Google's contentions that AFA/ACC have unleashed competition and expanded opportunities for rival OSs, the Commission notes that the impact of the obligations imposed by AFA/ACC need to be appreciated from the perspective of Android fork OS developers. As already explained supra, these obligations have foreclosed the market for competing Android Fork OS developers. Further, the OEMs*

> *covered by AFA/ACC have limited flexibility in modifying the Android OS, as the customizations are controlled by Google via unilaterally deciding the CTS and CDD requirements. The anti-fragmentation obligations restrict the level of competition in the relevant market by disincentivizing the competing OS developers from developing forked versions of Android. Thus, the competition between compatible forks does not produce competitive constraints on Google."*

115. From the above discussion, it is clear that the Commission has also conducted the 'effect analysis' while coming to the conclusion that by abuse of dominant position by Google, provisions of Section 4(2)(b)(ii) has been breached. We answer Issue Nos. 4 and 4a in the following manner:

(i) **Issue No.4: The Appellant by making pre-installation of GMS suite conditional to signing of AFA/ACC for all Android devices manufacturers, has reduced the ability and incentive of devices manufacturers to develop and sell self-device operating or alternative version of Android and Android Forks and thereby limited technical and scientific development, which is breach of provisions of Section 4(2)(b)(ii) of the Act.**

(ii) **Issue No. 4a: The Commission while returning its finding has considered the evidence on record in respect of Section 4(2)(b)(ii) and has also returned finding on anti-competitive conduct of the Appellant.**

Issue No. 5 and 5a

116. The Commission has held that Google has perpetuated its dominant position in the online search market in a way so as to result in the denial of market access for competing search apps violating Section 4(2)(c) of the Act. The conclusion of the Commission is recorded in Para 419, which are to the following effect:

> *"419. Based on the interplay between MADA, RSAs, and AFA/ACC, the Commission is of the view that Google used its position as the only supplier of Play Store to protect its market for general search services and it also made it difficult for the competing general search services to access the said market."*

117. The Commission has further proceeded to hold that requirement of pre-installing Google Play Store under MADA results in the pre-installation of Google Search Services, which provides a significant advantage to Google Search as compared to other competing search engines. It is further held that pre-installation is a significant distribution channel and gives rise to a status quo bias whereby users do not switch from default and pre-installed apps, virtually closing down all viable distribution channels for competitors. The Commission has also relied on the Revenue Sharing Agreements (RSAs) entered by Appellant with OEMs.

118. We have already referred to the Revenue Sharing Agreement in preceding paragraph of this judgment. We need to notice certain clauses of the Revenue Sharing Agreement. In the Convenience Compilation, Revenue

Sharing Agreement entered into by Google with Huawei Software Technologies Co., Ltd. effective w.e.f. 01.12.2017 has been brought on record. Clause 1 is the 'Definitions' clause. Clause 2 deals with 'Revenue Sharing Eligibility'. Clause 2.1 provides:

> ***"2.1. Revenue Share Requirements***
>
> ***2.1.1. Devices With Google Applications.*** *In order for an Android Compatible Device with Google Applications to qualify as a Qualified Device and for Company to receive Shared Net Ad Revenue for such Qualified Devices, Company must meet the conditions set forth below with respect to such Qualified Device, and such Qualified Device is subject to Google's approval:*
>
> *2.1.1.1. compliance with the Search Access Point requirements in accordance with Exhibit B;*
>
> *2.1.1.2. implementation of the applicable Client ID in accordance with Section 2.3;*
>
> *2.1.1.3. compliance with Section 2.2;*
>
> *2.1.1.4. compliance with the promotion restrictions set out in Section 3 and the Google Mobile Branding Guidelines;*
>
> *2.1.1.5. implementation of (x) the Search Launcher Services API, and (y) the applicable Google Search, Google Assistant, and Google Hotword set-up screens in connection with the out-of-box experience, in accordance with Google's Instructions;*

2.1.1.6. Company or its Affiliate being a MADA licensee in good standing: and 2.1.1.7. approval of such Qualified Device pursuant to the MADA.

2.1.2. ***Devices Without Google Applications.*** *In order for an Android Compatible Device without Google Applications to qualify as a Qualified Device and for Company to receive Net Ad Revenue for such Qualified Devices, Company must meet the conditions below with respect to such Qualified Device, and such Qualified Device is subject to Google's approval (which it may grant in its sole discretion):*

2.1.2.1. compliance with the Search Access Point requirements in accordance with Exhibit C;

2.1.2.2 implementation of the applicable Client ID in accordance with Section 2.3;

2.1.2.3. compliance with Section 2.2;

2.1.2.4. compliance with the promotion restrictions set out in Section 3 and the Google Mobile Branding Guidelines; and

2.1.2.5. Company or its Affiliate being a MADA licensee in good standing."

119. Clause 2.4 contains certain prohibition on the Company. Clause 2.4.1 is as follows:

"2.4.1. During the Term, Company will not and will not allow any third party to:

2.4.1.1. Implement, pre-load or otherwise install on a Qualified Device (including without limitation via the out-of-box experience or non-user initiated download)

any application, bookmark, product, service, icon, launcher, third-party Hotword or feature that is an Alternative Service or that has the primary purpose of providing access to an Alternative Service, except as specified in subsection 2.4.3 below. Notwithstanding the foregoing, Company may preload on a Qualified Device (a) a Company-owned Alternative Assistive Service, provided such Company-owned Alternative Assistive Service does not use a third party Alternative Assistive Service to obtain results or perform actions. For the sake of clarity, the Nuance voice recognition services API is not a third party Alternative Assistive Service that is prohibited from providing results or performing actions; and/or (b) a third party Alternative Assistive Service (or third party Alternative Assistive Service that is Company-branded), so long as it is not preloaded or visible on or accessible from the Default Home Screen or the Minus One Screen;

24.1.2 implement or install on any Qualified Device (including without limitation via the out-of-box experience or non-user, initiated download) (a) a Hotword in connection with any third-party assistant or third party assistant that is Company-branded; or (b) a hardware button or other physical affordance that invokes such third party assistant or third party assistant that is Company-branded;

2.4.1.3. present Introduce or suggest (including without limitation from an over-the-air prompt, or any promotional materials with respect to a Qualified Device) an Alternative Service to an End User except as specified in subsection 2.4.3 below; or

> *2.4.1.4. with respect to implemented, preloaded, or otherwise Installed applications on a Qualified Device, alter or adjust (or suggest to End Users to alter or adjust) the default search settings from initial factory settings."*

120. Under Clause 2.4.3 in the Jurisdictions listed in Exhibit D i.e. European Economic Area (including the United Kingdom), South Korea, Turkey and Russia, Company (i.e. the OEM) may preload, distribute or otherwise install in a folder on the Default Home Screen and/or may preload, distribute or otherwise install on any screen, other than the Default Home Screen or the Minus One Screen.

The above benefit is confined to only Exhibit D countries.

121. Shri Arun Kathpalia, learned senior counsel for the Appellant questioning the finding and conclusion of the Commission submits that the Commission has failed to understand the distinction between RSAs entered with OEMs prior to 2014 i.e. portfolio-wide RSAs and those entered subsequent to 2014 i.e. per device RSAs. It is submitted that impugned order lacks any independent assessment on the RSAs, which was under consideration before the Commission. It is submitted that the Commission erred in observing that if an OEM had pre-installed a competing general search service on any device within an agreed portfolio, it would have had to forego the revenue share payments not only for that particular device but also for all the other devices. It is submitted that Appellant has highlighted the distinction at multiple stages including at the time of hearing. The Appellant

has referred to Para 403 of the order of the Commission. It is submitted that the Commission had adopted the Director General's assessment by portfolio-wide RSAs and not on device-based RSA. It is submitted that the Director General replicated the European Commission's findings on RSA whereas before the European Commission the RSAs under consideration were pre-2014 RSAs i.e. only portfolio-wide RSAs, and related findings have no relevance in view of the changed nature of the RSA after 2014. The Commission has also not examined the coverage of Google's portfolio-wide RSAs. Commission's observation that OEMs are unable to preload rival General Search Service due to fear of losing RSA payment by Google, it is submitted that Xiaomi's submission which was signatory to RSA state that Xiaomi was not precluded from entering into agreement with competing search engines.

122. The learned ASG appearing for the Commission has refuted the above submission and contended that the Commission has considered all relevant evidences and correctly come to the conclusion that Appellant has abused its dominant position in the online search market resulting in denial of market access for competing search apps.

123. We have examined the above submissions raised by learned Senior Counsels for the parties. We may first take up submission of learned Senior Counsel for the Appellant that MADA and RSA need not be read together to arrive at a conclusion that RSA precludes pre-loading of competing search apps.

124. RSA can be entered by the Appellant with an OEM only when OEM is a MADA signatory. A MADA signatory necessarily has to sign an ACC. When a OEM signs all the three agreements its consequence has to be conjointly looked into. Thus, submission of the Appellant cannot be accepted that all the three agreements have to be separately looked into. Learned ASG has rightly placed reliance on judgment of the Hon'ble Supreme Court in ***"S. Chattanatha Kurayalar v. Central Bank of India, (1965) 3 SCR 318"***. In para 3 of the judgment following legal principle has been laid down:

> *"....The principle is well - established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In Manks v. Whiteley Moulton, L.3. stated:*
>
> > *"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole.""*

125. Another judgment relied upon by Respondent is judgment of Hon'ble Delhi High Court in ***"Mercury Travels (India) Ltd and Ors. v. Mahabir Prasad and Ors., R.F.A. No. 680/98",*** where Hon'ble Delhi High Court had laid down that where several deeds form part of one transaction and are contemporaneously executed they should, for all purposes, be considered as the same deed. In paras 23 to 28 following has been laid down:

"26. In CHITTY ON CONTRACTS (supra), it is observed that where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to the case as if they were one deed. Similarly, KIM LEWISON, O.C. IN THE INTERPRETATION OF CONTRACTS (supra) has observed that a document executed contemporaneously with, or shortly after the primary document to be construed may be relied upon as an aid to construction, if it forms part of the same transaction as the primary document.

27. Many transactions take place by the entry into a series of contracts, for example a sale of land involving an exchange of identical contracts, a sale and lease-back of property; an agreement of sale and a bill of sale and so on. In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect. In ***Smith v. Chadwick, Jessel M.R. said:***

> *"...when documents are actually contemporaneous, that is two deeds executed at the same moment,... or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are treated as one deed; and of course one deed between the same parties may be read to show the meaning of a sentence and may be equally read, although not contained in one deed but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose."*

28. The rationale behind this principle was explained by ***Fletcher Moulton L.3. in Manks V. Whiteley as follows****:*

> *"...where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others""*

126. We may notice the judgment of Hon'ble Supreme Court in ***"Excel Crop Care Limited v. Competition commission of India, (2017) 8 SCC 47"***, where the Hon'ble Supreme Court had occasion to examine the objectives of the Competition Act. Certain observations were made by the Hon'ble Supreme Court while considering anti-competitive agreements. Hon'ble Supreme Court has laid down that pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. It is useful to extract Para 21 and 29 of the judgment, which is to the following effect:

> ***21.*** *In the instant case, we are concerned with the first type of practices, namely, anti-competitive agreements. The Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various*

benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure "level playing field" for all market players that helps markets to be competitive. It sets "rules of the game" that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in the ASEAN Regional Guidelines on Competition Policy, in the following manner:

> *"**2.2. Main Objectives and Benefits of Competition Policy***
>
> ***
>
> *2.2.1.1. Economic efficiency: Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.*
>
> *2.2.1.2. Economic growth and development: Economic growth—the increase in the value of goods and services produced by an economy—is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates*

and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.

2.2.1.3. Consumer Welfare: Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures."

29. *One has to keep in mind the aforesaid objective which the legislation in question attempts to subserve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on CCI to "eliminate" anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in Competition Commission of India v. SAIL [CCI v. SAIL, (2010) 10 SCC 744] in the*

following manner: (SCC pp. 755-56 & 794, paras 6, 8-10 & 125)

> *"6. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.*
>
> ***
>
> *8. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, "the Competition Commission of India" (for short "the Commission") which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialised investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.*

9. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed regulations called the Competition Commission of India (General) Regulations, 2009 (for short "the Regulations").

10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

***

125. We have already noticed that the principal objects of the Act, in terms of its Preamble and the Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the

> *Indian economy to bring it on a par with the best of the economies in this era of globalisation would be jeopardised if time-bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53-B(5) and 53-T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time-bound disposal of such matters.""*

127. The judgment of Hon'ble Supreme Court in "*S. Chattanatha Kurayalar v. Central Bank of India* (supra) and judgment of Hon'ble Delhi High Court in "*Mercury Travels (India) Ltd and Ors. vs. Mahabir Prasad and Ors."* (supra), noticed above fully support the submission of learned ASG that agreements forming part of the same transaction have to be read together. The subject of all the three agreements relate to android open source and are interrelated. We, thus, are of the view that all agreements in question have to be conjointly read and their cumulative effect has to be noticed especially in reference to the competition.

128. Coming to the submission of the Appellant that the Commission lost sight of the difference in pre-2014 RSAs and post-2014 RSAs, the above argument cannot be accepted in view of categorical observations made in Para 403 of the Commission's order where the Commission has observed "*that the Commission understands that the agreements prior to 2014 covered all the Android devices of the respective OEM, whereas the coverage of RSAs for the period pertaining to post 2014, were in respect of identified portfolio of devices".*

129. The Commission has also observed that the Appellant has not brought on record any substantial pre-installation agreement between competing search service provider and an OEM which may reduce Google's dominance in the relevant market. A positive finding has been recorded that that competing general search services are not able to counter the competitive edge secured by Google for itself through pre-installation which acts as an entry barrier for the competitors. The Commission has also observed that pre-installation of Google Search Services result in status quo bias. In Paras 392 and 393, the Commission has made following observations:

> *"392. The Commission further notes that the market for general search services is characterized by presence of multiple entry barriers, which have already been discussed above in this decision. In addition, pre-installation of Google search services (i.e., Google Search App, Google Search Widget as well as Google Chrome with Google search as default search engine) which results in status quo bias, virtually closes down all the viable distribution channels for competitors. In this regard, following submission of Microsoft is important to note:*
>
> > ***"...Pre-installation as the default option on mobile devices is, in Microsoft's view, the single most important factor for a challenger like Bing to gain in scale. Without those distribution opportunities, relatively few users will take the time to download the Bing app or change the search defaults on the device. For those users who do try Bing, because there is so little usage overall, the quality of Bing's results will suffer. This leads to the situation where even from the users who find and try Bing, a high percentage will switch back to***

> ***Google. This cycle stemming from a lack of scale will continue until a large number of users can be attracted to the platform in a relatively short period of time, most likely by becoming the default search provider on a major mobile platform. In the absence of this kind of significant change in usage, Bing or other competing search providers are unlikely to be able to meaningfully compete with Google."***
>
> ***(Emphasis supplied)***

393. Based on the foregoing, the Commission is of the view that the competing general search service providers are not in a position to nullify the competitive edge that Google secured for itself through pre-installation as well as premium placement under MADA."

130. The consideration of the entire issue by the Commission from Paras 410 to 419 as well as other paras as noted above, clearly indicates that the Commission has considered the evidence on record for coming to finding that Section 4(2)(c) has been breached. The consequence of high payment by Appellant to OEMs who have signed RSA is also another factor which even acts as entry barrier for pre-installing any competing general search apps by OEMs. In Para 412, the Commission has held:

> *"412. Further, if a third-party search service provider wants to pre-install and set its search as default in Android, it will have to compensate the OEMs for the potential loss of revenue sharing. However, the total payment to OEMs by Google far exceeds the annual revenue of its key competitors Microsoft &Yahoo from search business in India. Based on the data presented by the DG, it is noted that a competing general search service could not have matched Google's*

revenue share payments to OEMs. In this regard, it is further noted that since the scope of these arrangements is generally global in nature, therefore, the competing general search service would have to offer a revenue share to OEMs sufficiently high to negate the payments made by Google at global level. This significantly impacted their ability to pay the OEMs."

131. The Commission has also returned finding that abuse of dominance by Appellant has anti-competitive effect which harms competition in the search engine market. Para 411 is referred to in this context, which is to the following effect:

"411. The Commission is of the view that these revenue sharing arrangements along with other agreements viz. MADA and AFA/ ACC, reduced the incentives of the OEMs to pre-install competing general search services. In the absence of these revenue share payments, OEMs would have had a commercial interest in pre-installing competing general search services. However, these exclusivity arrangements which forbids OEMs to pre-install competing search services harms competition in the search engine market. Thus, Google has been able to protect and strengthen its market position in the relevant market."

132. In view of the foregoing discussion, we answer Issues 5 and 5a in following manner:

(i) Issue No.5: The Appellant has perpetuated its dominant position in the Online Search Market resulting in

denial of market access for competing Search Apps in breach of Section 4(2)(c) of the Act.

(ii) Issue No.5a: The Commission while returning its finding on breach of Section 4(2)(c) has considered the evidence on record and has also recorded finding regarding Appellant's conduct being anti-competitive.

Issue Nos. 6, 6a, 7, 7a, 8 and 8a

133. All the above questions relate to abuse of dominant position in the relevant market to enter or protect or to gain in any other relevant market. The criteria for determining abuse can be summed in following manner:

(i) A dominant company leverages its dominance in one market to benefit from any secondary market. This leveraging results in foreclosure of competition in the secondary market.

(ii) The behaviour of the dominant firm is not objectively justified.

134. Article 102 of the Treaty on the Functioning of the European Union (TFEU) also contains the similar principles of Competition Law. Article 102 of TFEU also makes tie-in agreements as infringement of Article 102. Tying is the practice of a supplier of one product, the tying product, requiring a buyer also to buy a second product, the tied product. The tying may have various forms.

135. **Richard Whish and David Bailey** in the "Competition Law", Tenth Edition, while dealing with leverage theory and tying states *"Tie-in agreements*

may amount to infringement" and referring to decision in Google Android's case dated 18.07.2018 states:

> *"In **Google Android** the Commission imposed a fine of €4.34 billion on Google for, among other practices, tying its Google Search app and Chrome browser with the Play Store, which enables users to download, install and manage the apps on Android, Google's smart mobile operating system. In the Commission's view the inclusion of Google Search and Chrome in the Play Store was capable of restricting competition for two main reasons. First, it provided Google with a significant competitive advantage that competing general search engines and internet browsers could not offset, Google Search and Chrome apps were pre-installed on virtually all Android devices, which meant that they were more likely to be used than if users had to download them. Secondly, Google's tying practices were found to deter innovation, harm users of general search services and internet browsers and strengthen Google's dominant position for general search services The decision is on appeal to the General Court and much is at stake is Google entitled to pre-install its own apps in its Play Store, or should it be required to permit OEMs to choose the apps that are pre-installed on their smart mobile devices?"*

136. The Commission has examined the tying of Play Store with Google Search in Paras 410 to 419. We have noticed above in Para 419, the Commission held that Google used its position as the only supplier of Play Store to protect its market for general search services to and it also made it difficult for the competing general search services to access the said market.

137. Shri Arun Kathpalia, learned Senior Counsel for the Appellant, challenging the conclusion of the Commission, contends that the Commission's analysis is solely based on the flawed premise that pre-installation per se results in foreclosure of competing apps. It is submitted that Commissions findings based on Windows Phone OS was wholly incorrect. It has been further submitted that MADA does not restrict OEMs from pre-installing competing search service apps on their devices.

138. We have noticed that pre-installation under MADA of Google Search engine give a status quo bias and further after entering RSA the OEMs are precluded from pre-installing competing search apps in particular device.

139. The learned Senior Counsel for the Appellant has referred to reply of Xiaomi, where Xiaomi said that it is free to have different search engines for Xiaomi's browser app and on the one screen of Xiaomi's smartphone, which is also a standalone app.

140. Learned ASG has referred to various paras of the order of the Commission highlighting importance of pre-installation as a distribution channel (paras 424-432); inability of the rival web browsers to neutralize the competitive edge secured by Google in the browser market (paras 433-434); Google setting the de-facto web standards due to its dominant position in the browser market (paras 435-441); impossible to uninstall Google Chrome on GMS devices (paras 442-445); and negative impact on competition in the relevant market(s) (para 446-448).

141. The Commission has after analysing the evidence led by parties found tying of Play Store with Google Search violative of Section 4(2)(e). The Commission has also retuned its finding and conclusion regarding typing up of Play Store with YouTube. In para 465, the Commission returned following finding:

> *"465. Based on the foregoing analysis, the Commission is of the view that the abovementioned conduct of Google of tying Play Store with Google YouTube, significantly restricts competition in the relevant market by foreclosing distribution channels for rivals OVHPs and thereby, deterring their incentive to innovate and offer choice to users. Such leveraging by Google allows it not only to protect but also reinforces its dominant position in the market for OVHPs. The Commission further notes that Google by the abovementioned tying safeguarded its revenue from advertisements resulting from YouTube."*

142. The Commission has also noted that Google had a market share of more than 95% since 2009 in online general web search market. The Commission has also held that tying between Play Store and Google Search has been used to achieve and perpetuate dominance by Appellant and having anti-competitive effects. The competitive search engines have to take additional measures to compete with Google Search.

143. From the foregoing discussion, we are of the view that conclusion of the Commission, as recorded in Para 614.3, 614.4 and 614.5 regarding contravention of Section 4(2)(e) are based on relevant materials and reasons

which does not warrant any interference in exercise of our appellate jurisdiction. In result, we answer the issues in following manner:

(i) **Issue No.6 and 6a: Appellant has leveraged its dominant position in Play Store to protect its dominant position in Online General Search in breach of Section 4(2)(e) of the Act. Commission while returning its finding on breach of Section 4(2)(e) in reference of above has considered the evidence on record and has also returned finding regarding the Appellants conduct being anti-competitive.**

(ii) **Issue No.7 and 7a: Appellant has abused its dominant position by tying up of Google Chrome App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act. Commission while returning its finding on breach of Section 4(2)(e) in reference of above has considered the evidence on record and has also returned finding regarding the Appellants conduct being anti-competitive.**

(iii) **Issue No.8 and 8a: Appellant has abused its dominant position by tying up of YouTube App with Play Store and thereby violated provisions of Section 4(2)(e) of the Act. Commission while returning its finding on breach of Section 4(2)(e) in reference of above has considered the evidence on record and has also returned finding regarding the Appellants conduct being anti-competitive.**

Issue Nos.9 and 10

144. Shri Maninder Singh, learned Senior Counsel for the Appellant has attacked the Report submitted by the Director General. It is contended that the Report violates principle of natural justice and Director General has put leading questions to the third parties, which leading questions were framed to obtain the desired answers from the OEMs. Some of leading questions highlighted by learned Counsel are as follows:

> *"a. "It is gathered that Mobile Application Distribution Agreement ('MADA') obligation requires the device manufacturers to pre-install a bundle of Google Mobile Services ('GMS') before distribution. In light of the same, please furnish details about the possible dilemma faced by you. If any, in terms of avoidance to allow installation of competing app with apprehension of causing of duplication Apps and filling up precious ROM space (in addition of Google's) as it might adversely affect the user experience on their devices"*
>
> *b. "Apart from pre-installation of GMS what are methods are employed/ used by Google that result in reduced discoverability and popularity of other competing apps?"*
>
> *c. "It is stated that default setting or pre-installation exists in both desktop/ laptop and smartphone market. In light of the aforesaid, please furnish complete details about the fact that user bias to pre-installation may be more pronounced in mobile segment than PC/Laptops."*

d. *"There, admittedly was an impact of the non-availability of the prime screen placement for your browser i.e. UC Browser as compared to Google's Chrome and further pre-loading of any other apps competing with Google Browser in Android devices. Please provide a detailed response alongwith relevant documents, if any, to support your assertion."*

e. *"In light of the same, please furnish details of possible loss (not restricted to monetary loss) if any, faced by you due to inability of existing Android Handset makers to distributed your Handset (Fire OS) or make software for Fire OS on account of AFA/ACC obligations."*

f. *"Whether the restriction imposed on the device manufacturers by using AFA/ACC has any negative impact on future scientific development of alternative OS. Please submit a detailed response""*

145. The learned Senior Counsel has referred to judgment of the Hon'ble Supreme Court in ***Competition Commission of India vs. Steel Authority of India Limited (SAIL) and Ors. – (2010) 10 SCC 744***, wherein Hon'ble Supreme Court has held that Commission performs various functions including inquisitorial and adjudicatory functions. The learned ASG in response to above contention submitted that the Director General cannot be equated with an Investigation Officer, who carries investigation under the Code of Criminal Procedure. The DG carries out investigation under the Act to assist the Commission and the DG, in the investigation, has to collect relevant materials to find out as to whether any breach of provision of Section

4 has been committed or not. The Investigation Officer is not to assist the Court and has full authority to carry on investigation. The DG is simply to assist the Commission and carries on investigation when directed by the Commission. The DG's role is also unlike that of disciplinary inquiry.

146. The Hon'ble Supreme Court in CCI vs. SAIL (supra) had occasion to consider the nature of functions performed by the Director General. The Hon'ble Supreme Court has held that function of Director General is inquisitorial function. The Director General is to elicit relevant information for the purposes of discharge of functions of the Commission. In paragraph 126 of the CCI vs. SAIL judgment, Hon'ble Supreme Court has noticed one of the functions of the Commission as inquisitorial. The Director General does not perform any adjudicatory functions and its role is only inquisitorial. From the facts as noticed by the Commission in its impugned order that after passing of the order by the Commission under Section 26 for carrying out the investigation, the Director General issued notice to several OEMs and other stakeholders eliciting their response. Further, information were called from time to time. The Director General was to collect information and data for the purposes of preparing a Report. There is no occasion for violation of principles of natural justice by the Director General, when he was only to inquire and collection information.

147. The learned Senior Counsel for the Appellant elaborating on his submission stated that the Director General was acting with pre-determined mindset and hence, he having already decided to submit a Report on the lines

of the European Commission's case, the investigation suffers from bias. The learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***Oryx Fishries Pvt. Ltd. vs. Union of India and Ors. – (2010) 13 SCC 427***.

148. The Hon'ble Supreme Court in the above case had occasion to consider whether action taken by Marine Products Export Development Authority was justified. It was contended before the Hon'ble Supreme Court that show-cause notice issued by the Authority stated that it has been proved beyond doubt that you have sent sub-standard material to M/s Cascade Marine Foods, LLC, Sharjah and it was contended that Authority having already made up its mind, the show-cause notice or proceedings were empty formality. The Hon'ble Supreme Court in the above case observed following in paragraph 27, 28, 29, 32, 32, and 33 as follows:

> *"**27.** It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.*
>
> ***28.** Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi-judicial authority has to inspire confidence in the*

minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against.

29. *In the instant case from the underlined [Ed. : Herein italicised.] portion of the show-cause notice it is clear that the third respondent has demonstrated a totally closed mind at the stage of show-cause notice itself. Such a closed mind is inconsistent with the scheme of Rule 43 which is set out below. The aforesaid Rule has been framed in exercise of the power conferred under Section 33 of the Marine Products Export Development Authority Act, 1972 and as such that Rule is statutory in nature.*

31. *It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.*

32. *Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or*

otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

33. *The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it."*

149. The above observation can have no application in the facts of the present case. In the present case, the Director General was not taking any decision on any of the rights of the parties. The notices issued by the Director General were notices enlisting several questions and asking the response. The learned Senior Counsel for the Appellant may be right that certain questions, which have been framed ought not to have been framed in the manner they were framed. However, the OEMs, which have given answers to the questions, were in no manner inhibited by the framing of questions and the answers given by the OEMs, which has been noted by the Commission in its order indicate that several OEMs gave answers in the negative.

150. The learned Senior Counsel for the Appellant Shri Maninder Singh has relied on judgment of the Hon'ble Supreme Court in ***Varkey Joseph vs. State of Kerala – (1993) Supp (3) SCC 745*** wherein Hon'ble Supreme Court has held that the question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness. In paragraph 11 of the judgment, the Hon'ble Supreme Court considering the provisions of the Evidence Act, laid down following:

> *"**11.** .....The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provide the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness answer merely "yes" or "no"; but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses to what he intended that they should say on the material part of the prosecution case to prove against the appellant which is illegal and obviously unfair to the appellant offending his right to fair trial enshrined under Article 21 of the Constitution. It is not a curable irregularity."*

151. In the above case, the Hon'ble Supreme Court was considering the provisions of Evidence Act and the question, which a prosecutor is entitled to

put to witness in a criminal trial. The above analogy cannot be applied with regard to investigation which is to be carried out by the Director General under the statutory scheme of the Competition Act, 2002. The Director General as investigator is entitled to collect elicit information, which will be relevant for the purposes of Competition Act.

152. We are, thus, of the view that looking at the questions, which are termed as leading questions by the Appellant, it cannot be said that Director General has pre-decided the issue. The notices issued by the Director General were with the object of eliciting information, his function was only inquisitive in nature.

153. The learned Senior Counsel for the Appellant has also placed reliance on judgment of Competition Appellate Tribunal in the ***GlaxoSmithKline Pharmaceuticals Limited and Ors. vs. Competition Commission of India – Appeal No.85 of 2015***. The COMPAT in this judgment, in paragraph 42 laid down following:

> ***"42.*** *"In our opinion, the investigation conducted by the DG lacked objectivity and the findings recorded by him are ex facie erroneous and legally unsustainable and the Commission committed grave error by approving the conclusions of the DG that the appellants are guilty of collusive conduct in violation of Section 3(3)(d) read with Section 3(1) of the Act. It is more than evident from the record that in response to tender notice dated 25.06.2011, GSK had given bid for 1,00,000 doses of QMMV @ Rs.3000.90 per 10 doses vial and Sanofi had given bid for*

supply of 90,000 doses @Rs.2899/- per 10 doses vial. Both the appellants had given cogent explanation and produced voluminous records to show as to why they had given bids for limited quantity. Notwithstanding this, the DG observed that the appellants had quoted identical quantity at the same price. No t only this, he completely overlooked the detailed explanation given by Sanofi for giving bid for only 90,000 doses of QMMV as against the tender inquiry for 1,82,125 doses as also the explanation given by GSK for non-participation in the first and second re-tenders. Sanofi had explained that it did not give bid for the entire quantity because in the previous years. It remained unsuccessful and had to destroy vaccine by incurring huge losses. GSK had explained that it was not plausible to import vaccine from Belgium, get the same tested at Kasauli, put stickers and do packaging in a short period of 11-12 days in response to the first re-tender and 2-3 days in response to the second re-tender. The explanations given by both the appellants were quite plausible but the DG discarded them apparently because he had pre-judged the issue and was determined to record a finding that the appellants had indulged in bid-rigging….."

154. The observation of COMPAT in paragraph 42 as extracted above were observation on the facts of the above case and on consideration of the material on record, there can be no dispute to the proposition that if the investigation conducted by the DG lacked objectivity and findings recorded by him is *ex-facie* erroneous, the same ought not to have been approved by the Commission. There can be no quarrel to the proposition laid down by the COMPAT in the above case. The learned Senior Counsel has also submitted

that the judgment of the COMPAT has received approval by the Hon'ble Supreme Court, since the Civil Appeal No.3525-3526/2017 filed by Competition Commission of India was dismissed by the Hon'ble Supreme Court by judgment dated 10.08.2017. The Hon'ble Supreme Court noticed that paragraph 42 of the judgment of the COMPAT and held that the aforesaid findings were based on detailed discussion on the basis of the material that was placed on record. The judgment of the COMPAT and Hon'ble Supreme Court cannot be pressed in the facts of the present case, since the finding in the Report of the Director General were based on the evidence collected and it cannot be said to be ex-*facie* erroneous.

155. The learned Senior Counsel for the Appellant has also relied on the judgment of the Hon'ble Supreme Court in ***Ranjit Thakur vs. Union of India - (1987) 4 SCC 611***. The Hon'ble Supreme Court in the above case had occasion to consider principles of natural justice, bias and real likelihood of bias. The Hon'ble Supreme Court held that biased judgment is a nullity. The proposition laid down by the Hon'ble Supreme Court is well settled. In paragraph 16 and 17, the Hon'ble Supreme Court has laid down following:

> "***16.*** *It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice".*

(See Vassiliades v. Vassiliades [AIR 1945 PC 38 : 221 IC 603] .)

17. *As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."*

156. From the sequence of the events and the facts brought on record, we are not satisfied that either the Director General was suffering from any bias or the principle of natural justice was violated. We, thus, answer Question Nos.9 and 10 in following manner.

(i) Issue No.9: Investigation conducted by the Director General did not violate the principle of natural justice.

(ii) Issue No.10: Investigation conducted by the Director General cannot be said to be vitiated due to the Director General framing leading questions to elicit information.

Issue No.11

157. Shri Maninder Singh, learned Senior Counsel submitted that the Commission, does not consist of Judicial member and its decision deserves to be set-aside on this ground alone. It is submitted that presence of Judicial Member is mandatory requirement in law, wherever adjudicatory functions are being carried out. The learned Senior Counsel for the Appellant has relied on judgment of Delhi High Court in ***Mahindra Electric Mobility Limited***

and Anr. Vs. Competition Commission of India – (2019) SCC OnLine Del 8032, where Delhi High Court in paragraph 142, 148 and 212 laid down following:

> *"**142.** The Competition Act does not take away or supplant the jurisdiction of the pre-existing jurisdiction of any court or tribunal. The decision of the Seven Judges' in L. Chandra Kumar (supra) is authority for the proposition that in the case of service matters, the Administrative Tribunal (which had replaced the HC) is the primary adjudicatory body, then also the court did not accede to the proposition that all particulars ought to be drawn from the judicial branch or should be so qualified. Given the multiple tasks that the Act requires CCI to discharge (advisory, advocacy, investigation and adjudication), it cannot be held that the CCI must necessarily comprise of lawyers or those possessing judicial experience or those entitled to hold office as judges, to conform with the provisions of the Constitution. CCI's task as the primary regulator of marketplace and watchdog in regard to anti-competitive practices was conceived by the Parliament to be as a composite regulator and expert body which is also undoubtedly required to adjudicate at a stage. That stage, however, cannot be given such primacy as to hold that the CCI is per se or purely a judicial tribunal. As an adjudicatory body, there can be, no doubt, of course, that its orders are quasi-judicial and must be preceded by adherence to a fair procedure. As to what is a fair procedure has been elaborately dealt with by Section 26 and various regulations that mandate the kind of opportunity that various interested parties are to be given. Equally, in the*

course of such proceedings, the CCI is required to make procedural orders-which, a line of decisions require-are to be based on reasons. The final adjudicatory order, of course, has to contain elaborate reasoning. In that sense, the CCI is, no doubt, a Tribunal. But it is emphasized again that it is not purely a judicial Tribunal but discharges multifarious functions, one of which is adjudicatory.

148. *It follows, therefore, that in line with the above declaration of law, at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary.*

212. *In view of the findings of this Court, in the previous parts of this judgment, the following conclusions are recorded and directions issued:*

(i) Section 22(3) of the Competition Act (except the proviso thereto) is declared unconstitutional and void;

(ii) Section 53E (prior to the amendment in 2017) is declared unconstitutional and void: however, this is subject to the final decision of the Supreme Court in the writ petitions challenging the Finance Act, 2017;

(iii) All other provisions of the Competition Act are held to be valid subject to the following orders:

(a) The CCI shall frame guidelines with respect to the directions contained in para 179 of this judgment, i.e. to ensure that one who hears decides is embodied in letter and spirit in all cases where final hearings are undertaken and concluded. In other words, once final hearings in any complaint or batch of

complaints begin, the membership should not vary-it should preferably be heard by a substantial number of 7 or at least, 5 members.

(b) The Central Government shall take expeditious steps to fill all existing vacancies in the CCI, within 6 months;

(c) The CCI shall ensure that at all times, during the final hearing, the judicial member (in line with the declaration of law in Utility Users Welfare Association, (supra) is present and participates in the hearing;

(d) The parties should in all cases, at the final hearing stage, address arguments, taking into consideration the factors indicated in Excel Crop Care (supra) and any other relevant factors; they may also indicate in their written submissions, or separate note, of submissions, to the CCI, why penalty should not be awarded, and if awarded, what should be the mitigating factors and the quantum-without prejudice to their other submissions.

(iv) Since the petitioners had not availed the remedy of appeal (and had approached this Court) it is open to such of them who wish to do so, to approach the Appellate Tribunal, within 6 weeks; in such eventuality, the Appellate Tribunal shall entertain their appeals and decide them on their merits in accordance with law, unhindered by the question of limitation."

158. The learned ASG submitted that against the above judgment of the Delhi High Court, an Appeal filed by the Competition Commission of India before the Hon'ble Supreme Court is pending consideration.

159. The learned ASG referred to Section 15 of the Competition Act, 2002, which provides:

> *"**15. Vacancy, etc. not to invalidate proceedings of Commission**.— No act or proceeding of the Commission shall be invalid merely by reason of –*
>
> *(a) any vacancy in, or any defect in the constitution of, the Commission; or*
>
> *(b) any defect in the appointment of a person acting as a Chairperson or as a Member; or*
>
> *(c) any irregularity in the procedure of the Commission not affecting the merits of the case."*

160. Section 15, sub-clause (a) protects act or proceeding of the Commission, which suffers from any defect in the constitution of the Commission.

161. The learned ASG has referred to judgment of this Tribunal in ***Amazon.com NV Investment Holdings LLC vs. Competition Commission of India – Competition Appeal (AT) No.01 of 2022***, where the judgment of the Delhi High Court was also taken into account and it was noted that the said judgment is pending as on date before the Hon'ble Supreme Court and relying on Section 15 of the Competition Act, this Tribunal held that the absence of Judicial Member is not a fatal one.

162. In view of the foregoing discussions, we are of the view that order of the Commission cannot be set-aside on the submission of learned Counsel for the Appellant that it did not consist of a Judicial Member. We answer Issue No.11 in following manner:

(i) Issue No.11.: The impugned order by the Commission is not vitiated on the ground that the Commission did not consist of a Judicial Member.

Issue No.12

163. Section 27 empowers the Commission to pass all or any of the orders enumerated in Section 27. Section 27(a) provide that any enterprise involved in abuse of dominant position be directed to discontinue such abuse of dominant positions. Paragraph 617 of the order of the Commission has been passed in exercise of powers under Section 27(a).

164. The learned Senior Counsel for the Appellant submits that Commission has imposed ten drastic remedies by the impugned order. It is submitted that Commission has imposed ten unprecedented, drastic, intrusive and unjustified measures, which go far beyond the measures needed to bring the alleged infringements to an end. The learned Senior Counsel for the Appellant has addressed detailed submissions with regard to some of the measures as contained in paragraph 617. We proceed to consider the submission regarding measures one by one.

165. The Appellant submits that the Commission in paragraph 617.9 issued following direction:

> *"617.9 Google shall allow the developers of app stores to distribute their app stores through Play Store."*

166. It is submitted that the above order is passed without a finding of infringement, in regard of above, hence is an *ultra vires* direction.

167. The direction to carry rival app stores within Google Play Store bears no relation to the abuses alleged in the impugned order. There is no finding by the Commission suggesting any restriction of competition on competing app stores. The Commission has only considered this issue in the dominance section in the context of alleged entry barriers to establish in the market for app stores for Android. It is submitted that under the Act, the Commission can only remedy an abuse of dominance and not dominance itself. Even in the DG Report, the above issues is only considered in the factors to establish dominance and not as a finding of abuse of dominant position. It is submitted that direction heightens the risk of introduction of malware in the device.

168. The learned ASG submits that statutory scheme under Section 27(a), empowers the CCI to impose the remedy of directing the enterprise to discontinue such abuse of dominant position. It is submitted that there is ample power under Section 27(g) also to pass such other order or issue such directions as it may deem fit.

169. During the course of submission, the learned Senior Counsel for the Appellant submitted that any developer of Apps/App store can distribute their Apps and Apps Store through Play Store of Google for which Google provides an Agreement to be entered where App developer has to share a portion of revenue received from App. There is no finding in the order of the Commission that Google has abused its dominance in restricting App developers to put their Apps through Play Store. The learned Counsel for one of the Intervenors has also submitted that any developer of Apps can put his App in Google Play Store provided it enters into an Agreement, where it has to share part of its revenue from the App with Google.

170. From the submissions which have been advanced by the learned Senior Counsels for the parties, it is clear that the Appellant does not prohibit distribution of App developed by any App developer through its Play Store. If there is requirement to enter into an Agreement for distribution of Apps and App Stores by App developers through Play Store, that is a normal business practice, which can be achieved as per agreement between the parties. It is not even argued before us that percentage of revenue share, which is asked by Appellant for distributing Apps through Play Store is unfair or discriminatory, which is anti-competitive. The directions issued by the Commission in paragraph 617.9 can be explained by taking an illustration. An entity has a Mall in a market to showcase different products and from which Mall products are sold to different purchasers. Can a direction be issued to the entity to showcase goods and materials of everyone without there being any restriction in entry of the product in the Mall? It is a common

business practice that for showcasing any product in the Mall, the entity, who is running the Mall, is fully entitled to put some terms and conditions for showcasing any product in the Mall. Similarly, Google has its own terms and conditions for distributing Apps prepared by App developers through its Play Store. It is neither argued, nor found by the Commission that there is any abuse of dominance by Google in distribution of Apps by developers through its Play Store.

171. We may further notice that Issue No.VII framed by the Director General was to the following effect:

> *"**ISSUE VII:** Whether Google has abused its dominant position in Play Store by imposing unfair and discriminatory terms and conditions on App developers in violation of the provisions of Section 4 of the Act?"*

172. The Issue No.VII was answered in favour of Google in paragraph 594 of the judgment of the Commission, which is to the following effect:

> *"**594.** The Commission has examined the information available on record including the findings of the DG, third party submissions as well as response filed by Google. The Commission is of the considered view that Google has been able to justify its conduct and no case is made out against Google under Section 4 of the Act, on this count."*

173. Thus, when the Commission itself found Google has not abused its dominant position in Play Store market by imposing unfair and discriminatory

terms and conditions on App developers, there was no occasion to direct the Appellant to distribute the App Store of third party App developers, without accepting the terms and conditions of the Appellant.

174. We, thus, are of the view that direction issued in paragraph 617.9 is unsustainable and deserves to be set-aside.

175. The direction issued by Commission in paragraph 617.10 is that "*Google shall not restrict the ability of app developers, in any manner, to distribute their apps through sideloading*". This direction has also been challenged by the Appellant. The learned Senior Counsel for the Appellant submits that this direction is unnecessary, since side-loading, unlike the Apple ecosystem, is permitted on the Android Platform. A user is allowed to download any app, outside the Play Store, through the general internet. Google only displays appropriate statutory warnings to users about the risks, which risk has also been acknowledged by the Commission also. Mere warnings can in no way be equated to a restriction. The Commission has not returned any finding of infringement in relation to sideloading restricting the competitiveness of rival app stores. The DG has also recorded the issue only in the context of Play Store's alleged dominance and entry barriers in the market for app stores for Android. It is submitted that direction is contrary to the observations of the Commission in the order.

176. The learned ASG refuting the submission of the learned Counsel for the Appellant submits that the Commission power under Section 27 are of wide import and governed by its duties prescribed by Section 18 and the preamble

of the Act. In terms of these provisions, the Commission is obliged to prevent practices having adverse effect on the competition as well as to promote and sustain competition in markets. The learned ASG further submits that in September 2022, the European Parliament signed into law the Digital Market Act (Regulation 2022/1925; 'DMA'). Article 6(4) of the DMA directs sideloading to be permitted, while allowing the relevant OS developer to impose measures which are strictly necessary and proportionate to ensure that sideloaded apps do not endanger the integrity of the hardware or operating system.

177. Paragraph 179 of the judgment of the Commission have been relied by learned Senior Counsel for the Appellant, where the Commission has observed that process of sideloading of alternative app store or apps, involves risk of malware or harmful applications, which act as an entry barrier for the competitors in the market for app store for Android devices. In paragraph 179 of the order, the Commission has observed:

> *"**179.** Based on the above, it is noted that the process of side loading of alternative app store or apps, which involves risk of malware or harmful applications, acts as an entry barrier for the competitors in the market for app store for Android devices, as users that do not have technical knowledge would not like to run the risk of side loading. The cumbersome process of side loading and security threats involved further enhances the dependence of Android users on Google Play Store. Moreover, sideloading of apps does not allow automatic update functionality for the apps,*

> *which deters the users as well as app developers, in general to rely on side-loading a viable option. In other words, the ability for consumers to sideload apps (installing apps without using an app store) does not exert any constraint on Google in the Android app store market."*

178. What was observed by the Commission in the above paragraph is that the ability for consumers to sideload apps does not place any constraint on Google in the Android app store market. The order of the Commission does not contain any finding that Appellant has abused its dominant position in Play Store qua sideloading. The learned Counsel for the Appellant has relied on a judgment of the Hon'ble Delhi High Court delivered on 14.02.2023 in Winzo Games Private Limited vs. Google LLC and Ors. – CS(COMM) 176/2022. In the above case, a suit was filed by Plaintiff to restrain Google LLC from displaying any warning against the use of the gaming platform/ application 'WinZo Games' of the Plaintiff on the Android Operating System. It was contended before the Court that Google resisted the suit and contended that warning is being used on a non-discriminatory basis in respect of all third-party APK format files/ applications, which can be downloaded from the internet. The Hon'ble Delhi High Court noticed the statutory provisions under the Information Technology Rules, where defendants are required to put in place such warnings so s to guard the user against potential threat. It is useful to notice the analysis and findings of the Hon'ble Delhi High Court in paragraph 17, 18, 19, 20 and 21, which is to the following effect:

*"**17.** The warning given by the defendants is in the nature of a disclaimer and does not prohibit or block the download. The users can continue to download and install the APK files by clicking on the option of 'Download anyway'. It may be noted that APK files/applications like that of the plaintiff are not part of the 'Google Play' ecosystem and therefore, the same do not undergo the various security checks and measures. Therefore, the defendants are only cautioning the user before the user proceeds to download the application.*

***18.** The defendants have also provided details that such warnings are not unique to the Google Chrome browser of the defendant no. 1. Several other browsers also display such warning when viewers/potential users download third-party APK files/applications from their websites. On a prima facie view, this appears to be the industry practice.*

***19.** In terms of the prevailing legal regime, the defendants are required to put in place such warnings so as to guard the user against potential threats. In this regard, reference may be made to Rules 3(1)(i) and 3(1)(k) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 [hereinafter '2021 IT Rules'] as well as Rule 8 of The Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data or Information) Rules, 2011 [hereinafter '2011 Security Rules'].*

***20.** Rules 3(l)(i) and 3(l)(k) of the 2021 IT Rules are as under:*

> *"5. (1) Due diligence by an intermediary: An intermediary, including social media intermediary and significant social media intermediary, shall observe the following due diligence while discharging its duties, namely:-*
>
> *(i) the intermediary shall take all reasonable measures to secure its computer resource and*

information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011;

xxx xxx xxx

(k) the intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force:"

21. *Rule 8 of the 2011 Security Rules is set out below:*

"8. Reasonable Security Practices and Procedures.- (1) A body corporate or a person on its behalf shall be considered to have complied with reasonable security practices and procedures, if they have implemented such security practices and standards and have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business. In the event of an information security breach, the body corporate or a person on its behalf shall be required to demonstrate, as and when called upon to do so by the agency mandated under the law, that they have implemented security control measures as per their documented information security programme and information security policies.

(2) The international Standard IS/ISO/IEC 27001 on "Information Technology - Security

Techniques - Information Security Management System - Requirements" is one such standard referred to in sub-rule (1).

(3) Any industry association or an entity formed by such an association, whose members are self-regulating by following other than IS/ISO/IEC codes of best practices for data protection as per sub-rule(1), shall get its codes of best practices duly approved and notified by the Central Government for effective implementation.

(4) The body corporate or a person on its behalf who have implemented either IS/ISO/IEC 27001 standard or the codes of best practices for data protection as approved and notified under sub-rule (3) shall be deemed to have complied with reasonable security practices and procedures provided that such standard or the codes of best practices have been certified or audited on a regular basis by entities through independent auditor, duly approved by the Central Government The audit of reasonable security practices and procedures shall be carried cut by an auditor at least once a year or as and when the body corporate or a person on its behalf undertake significant upgradation of its process and computer resource."

179. The above judgment of the Hon'ble Delhi High Court although was judgment deciding only interim injunction application, but it clearly notices the statutory provisions, under which Google was required to put in place warnings, so as to guard the users against potential threats of malware. When the statute provides for issuance of warnings, the warnings issued by Google at the time of sideloading can neither be said to be disproportionate nor illegal. The consequence of the directions issued in paragraph 617.10 is

that Appellant is even prohibited to issue any warnings, which it is obliged by the statute, since that may be treated as restriction in sideloading. When the case of the Appellant is that there are no restriction in the sideloading of the App and Google only display appropriate warning to the users about the risk, the direction in paragraph 617.10 was unnecessary. Even though, user is confronted with certain warning in the process of sideloading, the said warning cannot be read as putting any restriction in sideloading. We have also noticed the submission of learned ASG relying on the Digital Markets Act (Regulation 2022/1925; 'DMA') and Article 6(4) of the DMA, which directs that sideloading be permitted, while allowing the relevant OS developer to impose measures which are "strictly necessary and proportionate" to ensure that side-loaded apps do not endanger the integrity of the hardware or operating system. Thus, the provision which is relied by learned ASG in support of its submission, itself permits imposition of measures, which are strictly necessary and proportionate and do not endanger the integrity of the hardware or the operating system. We, thus, are of the view that direction under paragraph 617.10 was unnecessary.

180. The next direction, which has been attacked by the learned Senior Counsel for the Appellant is direction issued in paragraph 617.3, which is to the following effect:

> *"**617.3.** Google shall not deny access to its Play Services APIs to disadvantage OEMs, app developers and its existing or potential competitors. This would ensure interoperability of apps between Android OS which complies with compatibility requirements of Google and Android Forks. By virtue of this remedy, the app*

> *developers would be able to port their apps easily onto Android forks."*

181. The learned Counsel for the Appellant contended that the Commission has not returned any finding that Appellant has a duty to supply Play Services APIs for OEMs. It is submitted that the Commission did not demonstrate that Play Services APIs fulfil the criteria of 'essential facility'. It is submitted that the Commission did not follow its own precedent for 'essential facilities' standard laid down in Air Works India (Engineering) Pvt. Ltd. vs. GM Hyderabad International Airport (GMR) and Anr. The Play Service APIs provide developers with an additional layer of advanced functionality they can incorporate in their Apps to improve security and other, features etc. It is submitted that APIs are proprietary and not part of open source Android and licensed as part of the GMS suite under the MADA. It is submitted that direction is inconsistent with the other directions of the Commission regarding Forked devices. The learned Counsel for the Appellant has referred to direction in paragraph 615.5, which is to the following effect:

> *"**617.5**. Google shall not impose anti-fragmentation obligations on OEMs, as presently being done under AFA/ ACC. For devices that do not have Google s proprietary applications pre-installed, OEMs should be permitted to manufacture/ develop Android forks based smart devices for themselves."*

182. It is submitted that the Commission has already, in paragraph 555, held that Google has a legitimate interest in licensing its apps only for those devices which meet the minimum requirements set by it. In paragraph 541, the Commission further held that "Google may pursue its legitimate interest

by prescribing certain reasonable compatibility requirements to the extent these are applicable on devices of Google's applications.

183. The learned ASG refuting the submission contends that Section 27(a) sufficiently empowers the Commission to pass any remedial direction. It is submitted that Commission has held that provisioning and updation of APIs is a technological necessity for the device to work properly and without APIs a mobile device will become dysfunctional. The Commission found that new APIs can be accessed by OEMs only after signing MADA, whereas AOSP licencee, who develop Android forks are either denied access to APIs or the same is given to them after considerable delay, by which time MADA signatories would have received new functionalities and updates. Most Android Apps made by App developers function on basis of Google's proprietary APIs, their unviability disincentives developers from porting Apps to forks due to higher cost and significantly decreases chances of fork's commercial success.

184. The APIs, particularly Google Play Services, is a core system software that enables key functionalities of every certified Android device. Certified Android devices are those devices, on which Google Play Protect is installed and Google certifies to ensure that these devices are secure and ready to run Apps from Google and the Play Store. It is argued by the learned Senior Counsel for Appellant that these APIs are proprietary Apps, which are made available to App developers and OEMs and are continually updated by Google.

185. The various core device features that Google Play Services provide services relating to security and reliability (through installation of Google Play Protect which provides protection from malware), facility to developers through thousands of continually updated APIs such as 'Google Cast' for streaming, Google Maps, provision of accurate location information and sending notifications through a messaging transport layer and enabling core services, such as making emergency call, autofill services, sending and receiving files etc.. Thus, it is clear that the APIs which include Google Play Services are APIs that provide essential services to the Apps which are part of Google Play Store. These are privately developed and maintained by Google and are provided by Google to App developers and OEMs.

186. Shri Kathpalia, learned Senior Counsel has also contended that the development of APIs is the result of scientific and technical innovation and development by Google and any move to provide unhindered access to APIs would disincentivize Google into going for such scientific and technical development.

187. The learned ASG has submitted these APIs are necessary for developing Apps and therefore Section 27(a) gives powers to the Commission to discontinue any abuse of dominant position by a dominant party, which is alleged to be Google in the present case and direction contained in para 617.3 should be seen in this context.

188. It is abundantly clear from the arguments submitted by the learned Senior Counsel for rival parties and the definitive information as stated above,

which is available on the website (support.google.com/android) that APIs as developed by Google and of which Google Play Services are an integral and important part, are developed and maintained by Google and continually updated through scientific and technical development by the teams of Google and these APIs are necessary for functionality of the Apps in Google Play Store. We are therefore, clear that the APIs and Google Play Services, which are proprietary items of Google cannot be given in through unhindered access to App developers, OEMs and Google's existing and potential competitors. We are also of the view that proprietary software such as APIs, which are developed through scientific and technical innovation should fetch value to Google and, therefore, remain an incentive for a technological company/ Google to further carry out such development and monetize it through its commercial use.

189. We do not find any material in the impugned order as to why access to such APIs be provided to Google's competitors, App developers and OEMs without going through necessary technical and commercial engagement with Google. Further, APIs have not been found as part of any abusive conduct by the Appellant.

190. We are thus of the view that the direction issued in paragraph 617.3 is unsustainable and is, therefore, set aside.

191. Now, we come to the direction issued in paragraph 617.7, i.e. "*Google shall not restrict un-installing of its pre-installed apps by the users*".

192. The learned Senior Counsel for the Appellant submits that the Commission has imposed the said direction on the ground that users inability to remove Google's preinstalled Apps from the devices contributes to their tendency to use the preinstalled options and not use alternatives, which causes foreclosure. The Appellant's contention is that user are fully entitled to disable preinstalled Apps in three simple steps, which can be applied only in a three seconds and after the App is disabled, it stops being visible to the users and it vanishes from the screen. The disabled Apps do not collect data and do not perform any background functions or use any device resources and can be re-enabled only by a user.

193. The Commission has already issued direction under Section 27, where Appellant has been directed that OEMs shall not be restrained from choosing from amongst Google's proprietary applications to be pre-installed and should not be forced to pre-install a bouquet of applications and in deciding the placement of pre-installed apps, on their devices. When the preinstalled Apps are at the choice of the OEMs and they are not obliged to preinstall the entire bouquet of Apps, the directions issued in paragraph 617.7 appears to be unnecessary. There is no dispute that preinstalled Apps can be disabled by the users in no time. The OEMs are also not obliged to install all 11 suite of Apps of Google, thus the OEMs are free to not preinstall any of the Apps. All the Apps, which are preinstalled can be disabled as per the users' choice, disabling all the Apps by user serve the purpose of disappearing the Apps from the screen and not performing any functions. The Apps can be enabled,

if user so decides. Uninstallation will preclude option of the user to disable and enable the particular App as per its choice.

194. We, thus, are of the view that direction in paragraph 617.7 is uncalled for and deserve to be *set aside*.

195. Apart from above four directions, i.e., directions at paragraph 617.3, 617.9 617.10 and 617.7, there are six other directions, which have been issued by Commission in paragraph 617 as noted above. In so far as, other directions issued by the Commission are concerned, we have perused the above directions apart from four directions as noted above. We find that the said directions are in accordance with the findings of the Commission as contained in the impugned order. No exception can be taken to the directions issued in paragraph 617.1, 617.2, 617.4, 617.5, 617.6 and 617.8. All the above directions are upheld.

196. In view of the foregoing discussions we direct for deletion of directions at paragraph 617.3, 617.9, 617.10 and 617.7 while upholding other directions in paragraph 617.

Issue No.13

197. We consider the issue of imposition of penalty on Google by the Competition Commission of India (CCI) and whether it has been done in accordance with "relevant turnover" and the 'doctrine of proportionality'.

198. The Learned Senior Counsel for Appellant has contended that the imposition of penalty by the CCI has not been done in accordance with the ratio

expounded by the Hon'ble Supreme Court in the case of **Excel Crop Care Limited vs. Competition Commission of India (2017 8 SCC 47)** wherein the Hon'ble Apex Court has analyzed the legislative intent of Section 27 and held that penalty should be computed under Section 27 (b) with respect to the "relevant turnover" of the corporate entity and not its "total turnover". He has further contended that the term "relevant turnover" has been interpreted to mean the corporate entity turnover pertaining to the products and services that have been found to be contravening the provision of Competition Act.

199. With regard to the calculation of "relevant turnover" in the present case, he has argued that the CCI found Google's model of providing Android Mobile OS, with signing of MADA, ACC/AFA and RSA as anti-competitive and violative of the provisions of the Competition Act, and besides this, the CCI has not rendered any finding in relation to contravention of the Competition Act and its provisions. He has further argued that the CCI has, inter alia, held that the revenue of Google pertaining to India in relation to its apps and services shall be taken into account for computing the relevant turn over and the penalty levied on Google by the Impugned Order which is not correct. He has further argued that the calculation of "relevant turnover" is not correct in the light of Hon'ble Supreme Court judgment in the matter of **Excel Crop Care Limited (supra)** and turnover relating to those Apps and services of Google that have not been found to contravene any of the provisions of the Competition Act which should not form part of "relevant turnover".

200. The Learned Senior Counsel for Appellant has also contended that the revenue from non-MADA devices are not subject of abuse of dominance and yet such revenue has also been considered in imposition of penalty on Google. He has, as illustration, clarified that revenue generated from an Apple i-Phone device, where a user may use Google Search App or YouTube App, can never be part of "relevant turnover" of Google insofar as contravention due to MADA is concerned. Similarly, the use of Google Search, Chrome, YouTube or Google apps by a desktop user should not be considered for calculating "relevant turnover" in the context of the present case.

201. The Learned Senior Counsel for Appellant has further argued that the imposition of penalty under Section 27 of the Competition Act, 2002 is to be done by the Commission in 'one go' and there is no provision to impose penalty on provisional basis with the possibility of its revision later. He has further argued that once the CCI has pronounced its final order, the Commission becomes *functus officio* and therefore, it cannot, under the garb of penalty on provisional basis, seek to revise the penalty based on any other material that may come to its notice later. In this regard, he has cited the judgment of Securities Appellate Tribunal in the matter of **Zee Telefilms Ltd. Vs. The Adjudicating and Enquiry Officer, Securities and Exchange Board of India (2003 SCC Online SAT 5)** wherein it is held that on passing the final order in adjudication, the Adjudicating Officer becomes *functus officio* and there is no scope for any further proceedings in the matter before the Adjudicating Officer of SEBI.

202. The Learned Senior Counsel for Appellant has also claimed that while Google had complied with the order of CCI for supplying information of "relevant turnover" and submitted its financial information and financial statements accurately, the same was not relied upon and while the information and statements were supplied by Google on 17.12.2021, the Commission maintained an inexplicable silence till 19.9.2022, and did not indicate any concern regarding the inadequacy of information submitted by Google. He has further submitted after final arguments were concluded on 2.9.2022, CCI invited written submission on issue of the quantum of penalty on the basis of Google submission of financial information (that was made in 2021) without informing Google that it viewed Google data as inaccurate).

203. The Learned Senior Counsel for Appellant has argued that Google was asked to provide accurate and reliable information vide order dated 6.10.2021 whereby Google was asked to submit audited Balance-Sheet and Profit & Loss Account for three years as well as details of turnover and profit generated or arising/accruing from India by Google and its group entities from all revenue streams associated with Android Apps (including advertising and revenue generated from play store and Apps which are part of GMS) for the three financial years viz. 2018-19, 2019-20 and 2020-21 by affidavits supported by certificates of Chartered Accountants by 5.11.2021. He has added that Google sought some more time for submitting the requisite financial details which was granted by CCI and thereafter Google submitted audited financial statements of GIPL and Alphabet (the global company) on 26.11.2021 and sought three weeks extra time to submit financial information regarding turnover and profit from all

revenues streams associated with Android including advertising and revenue from Play Store plus GMS Apps. He has added that this financial information was submitted by Google vide letter dated 17.12.2021.

204. The Ld. ASG appearing for CCI has pointed out that the financial information regarding turnover etc. submitted by Google was not complete and appropriate information as required by CCI's order dated 6.10.2021. He has further added that the information submitted vide letter dated 17.12.2021 by Google contained turnover details of GMS Apps, but did not contain advertising revenue generated through Play Store and the information in respect of Google Search, G-mail, YouTube, Google Maps, Workspace and Google One were incomplete with many caveats, thereby making it difficult to correctly estimate the "relevant turnover" of Google. The Learned Additional Solicitor General appearing for CCI has stated that financial information submitted by Google vide its letter dated 17.12.2021 contains certificates by financial managers looking after different verticals of Google LLC and this information was not accompanied by certificates of Chartered Accountant.

205. The Learned ASG has further submitted that after completion of hearing in the main case on 2.9.2022, the CCI asked Google to submit its written arguments on the quantum of penalties by 16.9.2022, and vide order dated 19.9.2022 CCI again asked Google to submit requisite financial information and data along with certificates of Chartered Accountant within 7 days since information submitted earlier by Google was not found in accordance with the requirement. He has submitted that some more information was submitted by

Google vide its letter dated 11.10.2022. He has argued that CCI's order dated 22.10.2022 has considered the information supplied by Google, but the financial information submitted by Google was not as required by CCI and about which Google was being repeatedly informed to submit appropriate and adequate information to help the CCI calculate the 'relevant turnover' and mention about the inadequacy of submitted information has been made in detail in the Impugned Order from paragraphs 620 onwards. The Learned ASG has thus contended that despite being repeatedly asked and given additional time to submit requisite information, the Appellant did not submit clear and unambiguous financial information alongwith certificates of Chartered Accountant. Therefore, the CCI has made the 'best estimates' based on the information submitted which has been cogently dealt with and reflected in the Impugned Order.

206. The relevant provision in Section 27 regarding imposition of penalty in the Competition Act, 2002 is as follows:-

> ***"Orders by Commission after inquiry into agreements or abuse of dominant position***
>
> *27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely: -*
>
> *Xx xx xx xx*
>
> *(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: 42[Provided that in case any agreement referred to in section 3 has been*

entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher."

207. The relevant portion from the **Excel Crop Care Limited (Supra)** judgment that relates to "relevant turnover" is extracted below:-

"Step 1: Determination of relevant turnover

112. At this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on the available information. However, the Tribunal is free to consider the facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

Step 2: Determination of appropriate percentage of penalty based on aggravating and mitigating circumstances

113. After such initial determination of relevant turnover, the Commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the

product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention, etc. These factors are only illustrative for the Tribunal to take into consideration while imposing appropriate percentage of penalty."

208. The judgment of Hon'ble Supreme Court in the matter of **Excel Crop Care Limited (supra)** regarding "relevant turnover" is considered in the impugned order as follows:-

> *'624. In this connection, it would also be apposite to refer to the decision of the Hon'ble Supreme Court of India in Excel Crop Care Limited v. Competition Commission of India & Anr, Civil Appeal No. 2480 of 2014 wherein the Hon'ble Supreme Court considered the issue as to whether penalty under Section 27(b) of the Act should be imposed on the total/ entire turnover of the offending company or only on "relevant turnover". The Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with the ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:*
>
> *"..When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the maximum penalty imposed in all cases be prescribed on the basis of 'all the products and the total turnover of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products. like rendering of services etc. It, therefore. leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'…"*

209. The Impugned Order while considering the imposition of penalty, first considers the objective behind the imposition of penalty and goes on to record that 'the quantum of penalties imposed must correspond with the gravity of offence' and 'the Commission does not find any reason to take a lenient view'.

The Impugned Order holds that Indian consumers, OEMs and apps developers have been deprived of choice in the relevant markets as identified by CCI due to anti-competitive practices of Google and therefore, there is no reason to take a lenient view in the matter. In arguments, the Learned ASG has referred to Section 4(1) to point out that dominant enterprises in a market have 'special responsibility' and in case they abuse their dominant position which is established, an offence is made out. The Impugned Order also records that every dominant entity is required to adhere to the law of land and ensure its conduct remains in compliance of the same. The Impugned Order notes the decision of Hon'ble Supreme Court of India in **Excel Crop Care Limited (supra)** of which the relevant portion with regard to the turnover is to be considered for imposition of penalty. The CCI thus adopts the criteria of 'relevant turnover' as propounded by Hon'ble Supreme Court and has proceeded to determine it to calculate appropriate penalty based on facts and circumstances of the case.

210. It is trite to mention that digital platforms such as the one operated by Google using the Android OS based Mobile devices, are very different from traditional technology platforms. The softwares that run on these digital platforms are interconnected and interact at the machine level and also at the user level through flow of traffic and data, and therefore, the business model, incentives and the revenue streams are a net result of such interplay of software and programs including various of apps and services that are integral feature of the mobile devices. In addition, the markets are multi-sided in the digital space, which is evidenced in the business model adopted by Google in the present case.

While Google purports to offer its mobile OS 'free', there are a number of apps and services on the same device which give rise to huge traffic and data which are effectively monetized through advertisements which bring revenue to Google. It would, therefore, be correct to say that what is coming out of the revenue streams coming from the mobile devices have at that very base the OS of the device. The multi-sided nature of these digital platforms is clear from the fact that on one side there are the OEMs and app developers, while on the second side are the users that generate data and traffic, and on the third side are the advertisers who use these digital platforms for advertising their goods and services.

211. The substratum of Android OS on which the mobile ecosystem is based, is therefore, the foundation of Google ecosystem, comprising of Google search driven apps and other apps that derive data from users and funnel the traffic and data from them into Google Search results which becomes one of the important bases of its advertisement revenue. The payment received from advertisers is, therefore, dependent on the data and traffic coming from the various apps, including the search apps feeding primarily in and also other strengthening and refining Google search service. Through 'network effects', Google Search gains more and more value, thus helping Google Search to gather increased advertising revenue and cementing its position in the mobile search market. It is quite clear from this business model is that there is no single app or service that can be singled out to say that the revenue of Google is derived only out of its user functionality because the user traffic and data comes from

not only Google Search and You Tube but also other apps like Google Maps, Google Cloud, Play Store and Gmail etc. In fact, the entire Android System in the mobile device, through tracking device usage, becomes an important source of data for the generic search result. Thus, the data and traffic from multiple apps and service and the entire Android eco-system is funneled into Google Search which is monetized through advertisements.

212. It is clear from earlier analysis in this judgment that the three agreements viz. MADA, AFA/ACC and RSA are not mutually exclusive agreements, but are in the nature of inter-related, inter-woven agreements that should be read together while examining the anti-competitive effects of these agreements. More importantly the multiple Google Apps and Google Search drive the business of Google based on traffic and data gathered from innumerable users. Thus, the entire ecosystem of Google sitting on Android OS in the mobile device becomes the source of revenue to Google and, therefore, the total revenue from all the apps and services in the device becomes the 'relevant turnover'.

213. On the basis of the three inter-woven agreements, namely, MADA, AFA/ACC and RSA, and Google's business model using traffic and data from the multiple apps and services, we are not convinced that the 'relevant turnover' should only be limited to Google's revenue from Google Search and You-Tube, as has been argued by Google.

214. This business model and the functioning of Android Google's eco-system on mobile devices has been captured by the CCI in the Impugned Order while

calculating the "relevant turnover" and thus the CCI has decided to take the sum total of revenue of various segments/heads of Google business operating pertaining to India while calculating the 'relevant turnover'.

215. We are, therefore, of the opinion that while calculating the "relevant turnover", the CCI has correctly considered the sum total of revenue of various segments/heads in India arising out of the entire business of Google India's operations of Android OS based mobiles.

216. We also note that Google has not provided the financial information as sought by the CCI vide its order dated 6.10.2021, and reiterated in its later order dated 17.10.2021. The inadequacy of the data supplied by Google has been mentioned in detail in paragraphs 630, 631, 632, 633 and 634, whereafter the CCI points out to significant inconsistencies and wide disclaimers in presentation of the requisite data by Google. In such a situation, CCI has carried out the "best estimation" on the basis of a financial statements and information submitted by Google. Therefore, we agree with the CCI's decision to quantify the monetary penalties on the basis of data presented by Google. In during so, also note that the CCI has considered the lower of the two figures, from between Rs.19,904 crores which is the sum total of various segments/heads of Google business in India for FY 2020-2021 and Rs. 16742 Crores, which is its total revenue from entire business from Indian operations for the FY 2020-21. Thus, in a conservation approach, the CCI has taken the lower of these two figures as turnover for the FY 2020-221 and imposed a penalty @ 10% of its average of

relevant turnover for the last three FYs 2018-19, 2019-20 and 2020-2021. We uphold the amount of penalty imposed by CCI on Google.

217. Regarding the issue of imposition of "provisional penalty" consider the argument of the Learned Senior Counsel of the Appellant that there is no provision in the Competition Act for imposing a provisional penalty, with the possibility of revising it on receipt of further information data. We are of the view that the section 27(b) of the Competition Act, 2002 provides for imposition of penalty, which shall not be more than 10% of the average turnover for the last three preceding years upon enterprises, which are parties to such agreements or abuse. Once the CCI has derived the "best estimate" of the relevant turnover for the last three preceding financial years, and imposed a penalty of 10% of the average of such turnover, we are of the opinion that further revision of this penalty on the basis of financial information or data that may come to light in future will not be in keeping with law. We thus, delete the word 'provisional' used in imposition of penalty in para 650 and elsewhere in the Impugned Order and hold that this penalty imposed is final and would not be subject to any revision upon Google furnishing any further financial details and supporting documents, as sought by CCI vide its order dated 19.9.2022.

218. Now coming to the submission advanced by Shri Amit Sibal, learned Senior Advocate, Shri Abir Roy and Shri Rajshekhar Rao, Senior Advocate on behalf of different Intervenors, suffice it to say that they have supported the impugned order advancing certain submissions which have been elaborately

advanced by learned ASG appearing for Competition Commission of India, hence submission of Intervenors need no separate considerations.

Issue No.14

219. In view of the foregoing discussion, the impugned order of the Commission is upheld except the four directions issued in paragraph 617.3, 617.9, 617.10 and 617.7. The Appellant are thus not entitled for any other relief except for setting aside the above four directions.

220. In the result of foregoing discussions, we dispose of this Appeal in following manner:

(i) The impugned order of the Commission dated 20th October, 2022 is upheld, except as indicated at direction (ii) below;

(ii) Direction issued in paragraphs 617.3, 617.9, 617.10 and 617.7 are *set aside*. Rest of the directions under paragraph 617 and fine imposed by paragraph 639 are upheld.

(iii) The Appellant is allowed to deposit the amount of penalty (after adjusting the 10% amount of penalty as deposited under order dated 04.01.2023) within a period of 30 days from today.

(iv) The Appellant is allowed 30 days' time to implement the measures as directed in paragraph 617 (to the extent upheld by this order).

221. The partis shall bear their own costs.

222. Before we close, we record out sincere appreciation to the learned Counsels, who have advanced their submissions with precision and great

ability in this Appeal, namely – Shri Arun Kathpalia, Senior Advocate, Shri Maninder Singh, Senior Advocate and Shri N. Venkataraman, learned Additional Solicitor General assisted by Shri Samar Bansal, Advocate for their valuable assistance, which enabled us to decide somewhat complicated issues in this short period.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

29th March, 2023

AK Sharma/Archana/Ashwani