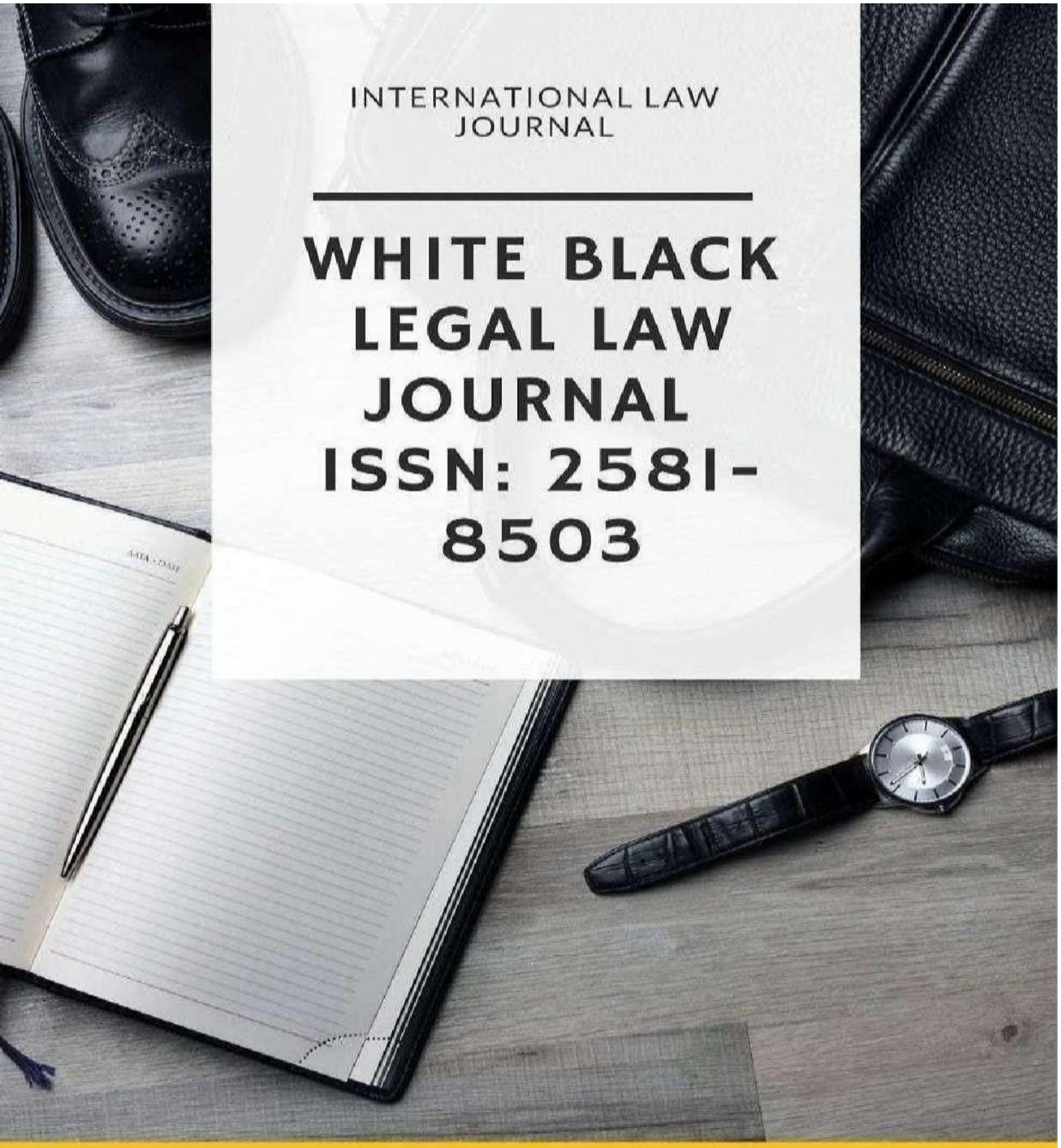

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With this thought, we hereby present to you

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COMPETITION LAW IN THE DIGITAL ECONOMY: ADDRESSING ANTI-COMPETITIVE PRACTICES BY TECH GIANTS

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ABSTRACT

The use and accumulation of data, sometimes referred to as the 21st century's oil, has increased during the past few decades. In the meantime, India's current rules and regulations are insufficient to address these evolving data usage trends. Tech corporations' predatory pricing, power abuse, and exclusionary behaviour are just a few of the wrongdoings that frequently go unpunished. With an emphasis on the Competition Commission of India (CCI) and the Indian Competition Act, 2002, this brief examines India's antitrust rules in the digital sphere. Using Google and Microsoft's acts as case studies, it investigates the boundaries of "exclusionary conduct" under competition law.

INTRODUCTION

The elimination of anti-competitive behaviours and the advancement of free markets are the cornerstones of any competition law system. Under the Indian Competition Act (2002), for instance, India created the Competition Commission of India to safeguard and encourage market competition, stop anti-competitive behaviour, and defend the rights and interests of consumers. The Sherman Act and the Clayton Act are two important antitrust laws that are in effect in the United States (US) to prevent anti-competitive behaviour. Similarly, the Treaty for the Functioning of the European Union (TFEU) aims to punish those who interfere with local markets' healthy competition. The European Union's (EU) antitrust regime is based on Articles 101 to 106, which prohibit agreements that result in cartelisation, monopolistic conduct, and abuse of dominance.

To fulfil their mandate, antitrust agencies in different parts of the world investigate industry giants and issue litigations against them when required. In the US, for example, between the late 1980s and the 1990s, the Federal Trade Commission (FTC) found cause to investigate the

actions of companies such as AT&T, Kodak Eastman Co., Standard Oil, and American Tobacco Co.[1] The European counterpart filed a lawsuit against Michelin, Consten & Grunding, and United Brands. The nature of investigations and lawsuits has changed in recent years due to the technological revolution, and more businesses now operate in the digital sphere. More than half of the worldwide internet market is controlled by the Big Five in technology: Google, Amazon, Apple, Facebook, and Microsoft. These conglomerates' expansion and the acquisition of more businesses have given them the opportunity to carry out anti-competitive practices such negotiating horizontal and vertical agreements, abusing their dominance, and controlling markets deeply and widely. Antitrust authorities in a number of places are now keeping an eye on these businesses as a result of their actions. Particularly in relation to antitrust issues like search manipulation, Android dominance, and online advertising monopoly, Google has often been at the heart of controversy in various regions of the world. Since 2010, the EU has been looking into the corporation and has already fined it almost USD 10 billion. Since its launch as a search engine in 1998, Google has grown to become one of the most well-known brands in the smartphone operating system market, closely followed by Apple.

As of June 2021, 72.84 percent of the global market is occupied by Google's Android. 6. Over the course of a dozen or so years, Google made a number of well-thought-out acquisitions that helped it take control of the global operating system market: Fitbit in 2019, Motorola in 2011, reCAPTCHA in 2009, YouTube in 2006, and Android in 2005. Investigations are still underway because the most recent transaction was not approved by antitrust authorities in many nations. Due in large part to the shortcomings of the existing merger control laws, Google has been able to avoid the scrutiny of antitrust authorities in a number of its purchases that have enabled it to penetrate new markets.

GOOGLE'S 'TYING' PRACTICE

Google entered the smartphone arena in 2005 for USD50 million. Almost 16 years later, in FY2021, it was set to earn a revenue of almost USD256.74 billion.[2] Although there is no formal breakdown, analysts estimate that Android accounts for USD 18.8 billion of total income, making its acquisition one of Google's most lucrative business decisions since its founding. As

[1] Infamous Antitrust Cases, HG.org Legal Resources, https://www.hg.org/legal-articles/infamous-antitrust-cases-6025.
[2] Joseph Johnson, "Annual Revenue of Google from 2002 to 2021," Statista, March 26, 2025. https://www.statista.com/statistics/266206/googles-annualglobal-revenue/.

of 2021, Google owned 520 million smartphones, or over 98 percent of the Indian smartphone market. Google can place restrictions on developers that use its operating system user interface because it is the industry leader and the main force behind innovation. The tech giant retains tight control over the Open-Source Licence governed by Apache 2.0, the preferred license type for Android's open-source code, even if it provides developers on the Android Source Code website with a free license for building their operating system on the Android template. By providing open-source licences, Google has allowed different versions of Android to enter the market, known as "Android Forks," developed by Original Equipment Manufacturers (OEMs) with their own specifications.[3]

However, Google requires OEMs to sign restrictive agreements in order to keep control over the Android OS and all of its variants. Pre-installed on any Android Fork smartphone is the Google Play Store. Google now has authority over all upcoming Android forks. Additionally, Google provides a collection of its most well-known apps together with a license for Google Mobile Services (GMS). According to the Mobile Application Distribution Agreement (MADA) and the Anti-Fragmentation Agreement (AFA), these apps must be displayed on the home screen of the smartphone after they have been licensed. Restrictive provisions that forbid the OEMs from altering the Android code to produce forked versions of the operating system are purportedly included in the deal, despite the fact that it is still confidential. Keeping Google as the default search engine for Android-powered devices and pre-installing the software needed for the upcoming generation of smart devices (such as speakers, televisions, and watches, among others) are two of the AFA agreement's provisions. Once a third-party developer enters into an AFA or MADA with Google, they must install and place Google-backed applications in a folder named "Google" on the home screen for ease of access to consumers.[4]

One may argue that Google's actions in this area stem from its perception of forked Android versions as a danger to its business. However, according to international competition rules, its restricted conditions constitute a "tie-in arrangement," which is any contract in which the purchase of one product requires the purchase of another, less well-liked goods as a prerequisite for the original purchase. As a result, Google's agreements are effectively binding contracts,

[3] Google Android, Case AT. 40099, OJ C 402/19 (Commission Decision of July 18, 2018).
[4] Google Android, Case AT. 40099, OJ C 402/19 (Commission Decision of July 18, 2018).

requiring independent developers to install apps that aren't necessary on their own Android versions. Google was been fined USD 177 million by the Korea Fair Trade Commission, the South Korean Antitrust Agency, for its AFA, which forbids developers from creating their own customised Android versions.

In the case of *Sonam Sharma v. Apple* in India,[5] the CCI characterised "tying" as anti-competitive. It laid down the conditions that amount to anti-competitive tying.

i. A "not insubstantial" amount of commerce must be impacted by the tying arrangement;
ii. two distinct products or services that can be tied must exist;
iii. the seller must have enough economic power over the tying product to significantly limit free competition in the market for the tied product

All three requirements are met by Google's license agreements. It connects its GMS folder and Play Store to the Android OS first. Second, it can compel the buyer or customer to buy the tied product since it has more than enough financial clout and market share in the smartphone sector to limit free competition in the relevant market. Third, a significant amount of commerce will be impacted by any action Google takes (such as requiring the installation or non-installation of a service in the relevant product market), as a Reuters report states that Android-based smartphones make up approximately 98% of the relevant smartphone OS market.

In this case, a comparison between Google's and Microsoft's activities can be made. Under the Windows brand, Microsoft is the biggest manufacturer of personal computer operating software (PC-OS) and has dominated the market for almost 20 years. The company's Windows Media Player, a multimedia playback application, was attached to their PC-OS in 1999, and it was required to be installed by any OEM using Windows. Microsoft was the target of an EC case in 1998. The ruling found Microsoft accountable for engaging in a tying activity by combining disparate items without providing customers with the option to purchase the product separately. Google, which also produces operating systems, is currently employing a similar tactic of linking its operating system to a variety of services and apps. Similar to Microsoft, the European Commission has regulated Google's actions, and in both instances, the fine imposed by the body has been the largest throughout the relevant time frame.

[5] *Sonam Sharma v. Apple* (2013) 114 CLA 255.

ABUSE OF DOMINANCE

Google rapidly grew its business after acquiring Android in 2005, and by 2014, about 1.6 billion devices were running Android OS, compared to 46 million running Windows OS. In the 2019 case of Umar Javeed v. Google LLC, the informants sued Google for violating Section 4 of the Competition Act by abusing its dominating market position in the markets associated to mobile operating systems. The informants based their complaint against Google's abuse of dominance with the CCI on the EU's decision in the Android case, which considered Google's conduct to be abusive. The CCI looked into the several markets where Google was dominant as part of the case, and as a result, it classified "smartphone OS" as a relevant market. The CCI then used its authority under Section 26 of the Act to determine, as a prima facie opinion, that Google dominated the market for smartphone operating systems. Therefore, it was decided that Google's use of MADA to require smartphone and tablet manufacturers to install specific Google-based apps was against Section 4 read with Section 32 of the Indian Competition Act (2002). Furthermore, Sections 4 and 32 of the Act made it unlawful to prohibit Android Forking for developers.

Based on the information provided, the Commission deemed the Google Play Store which allows users to purchase and install apps to be a dominant player in the App Store market in a different case that was submitted to the CCI about Google's alleged violations of several provisions of Section 4 of the Indian Competition Act. The CCI also observed that users preferred the Play Store, noting that side-loading would not be preferred by users for security-related reasons. Users of Android-powered smartphones can choose to install apps from sources other than the Play Store, which comes pre-installed. Such side-loading does, however, come with some danger and expose users to different infections and viruses. Therefore, the CCI determined that Google had violated Section 4 of the Competition Act (2002) by denying market access, abusing its dominant position, and limiting technology to the detriment of consumers. The CCI also directed the Director General (DG) to look into the case further. Google's actions have been comparable to Microsoft's in this instance as well. In order to leverage their products and break into new markets, both companies exploited their dominance in their respective areas. Microsoft entered the multimedia playback business with Windows OS, while Google entered the smartphone application sector with Android OS.

One form of anti-competitive action used by businesses to stifle present and future competitors

is known as "exclusionary conduct." According to the Indian Competition Act, "exclusionary conduct" is one of the ways that "Abuse of Dominance" can manifest itself; "exploitative conduct" is another. Exclusionary conduct comprises acts that aim to keep competitors out of the competitive environment, whereas exploitative conduct involves charging exorbitant prices or abusing market supremacy to take advantage of other rivals. The CCI and other antitrust authorities throughout the world have repeatedly confirmed that Google is a dominant player in its product market, which is the smartphone operating system business. Dominant entities typically sit at the forefront of innovation and have access to the best resources for research and development of their services. This has certainly been the case for Google. Both the EC and the CCI,[6] have found Google's conduct abusive of its position, in enforcing AFAs and MADAs. Although these agreements are optional, the CCI has ruled that, because the Google Play Store is an essential Android app, they become de facto mandatory if OEMs violate the conditions. The CCI observed in the 2019 case of Umar Javeed v. Google LLC that Google's strategy of permitting OEMs to create their own versions of Android OS while requiring the pre-installation of Google Play Store to be signed by ACC and MADA acts as a deterrent to innovation for developers of third-party applications. As a result, by limiting consumer alternatives and choices and regulating the degree of innovation and technology, Google has successfully decreased market competition. In a market where entry barriers are already high, particularly for new entrants due to expensive research and development costs, Google's activities further raise them. As a result, Google's actions are fundamentally discriminatory and unduly compel OEMs to accept the terms set forth by MADA and ACC. In the 201730 case of Surinder Singh Barmi v. BCCI, it was decided that the BCCI had eliminated competition by giving itself the authority to admit or reject new competitors. The CCI noted this as exclusionary conduct and noted that the organisation violated Section 4(2)(c) read with Section 4(1) of the Act by creating "an insurmountable entry barrier in the relevant market … [which] amounts to denial of market access for organisation of professional domestic cricket leagues/events in India." Based on this, it is evident that Google has also attempted to prevent competition by engaging in actions that result in its rivals being denied entry to the market through the enforcement of ACC and MADA agreements.

In 2021, in a case filed by informant Kshitiz Arya against Google,[7] the CCI held that the

[6] *Umar Javeed v. Google LLC* (2019) SCC OnLine CCI 42.
[7] *Kshitiz Arya v. Google LLC* (2021) SCC OnLine CCI 33.

practices of Google in the smartphone OS market constitute offence under Section 4 (2) (c) of the Act. In light of this, the Commission believes that Google has violated Section 4(2)(b) of the Act by limiting the ability and incentive of device manufacturers to develop and sell devices running alternative versions of Android, or Android forks, and thereby limiting technical or scientific development related to goods or services to the detriment of consumers by making the pre-installation of Google's proprietary apps, particularly the Play Store, contingent upon the signing of an ACC for all Android devices manufactured, distributed, and marketed by device manufacturers. Additionally, OEMs are prohibited by ACC from producing, distributing, or selling any other devices that run on a rival modified version of the Android operating system. As a result, developers of such cloned Android operating systems are denied market access due to this restriction, which violates Section 4(2)(c) of the Act given Google's dominance in the relevant markets [smartphone OS] and strong network effects. The "network effect" is an economic phenomenon whereby the more users join a network or use a service, the more useful the program or gadget becomes. Phones are an example of a network effect because they can only be used when other people are using them. Because many people download apps from the Google Play Store and because it's straightforward for developers to produce apps for Google, the aforementioned scenario results in a network effect. As a result, there is a network effect system that becomes more powerful and well-known with each new client gained, making it harder for small developers and other app shops to compete.

It is evident from the cases against Google and the rulings that followed that the company's actions over the years have gotten worse and worse for the spirit of competition. It has regularly broken the rules that competition laws are meant to safeguard, and antitrust authorities throughout the globe have been looking into it since it has followed a similar path to Microsoft's in the 1990s, which was marked by abuse of dominance and tie-in agreements. Indeed, while the EC considered the 2018 Google Android case, the Microsoft decision served as a crucial point of reference.

CONCLUSION

Policymakers can better comprehend and address the issues that emerge in antitrust actions against comparable tech firms by reviewing previous cases, such as the Microsoft litigations. Additionally, as the CCI's rulings demonstrate, Google's actions have also been "exclusionary," since the company has attempted to displace rivals in the smartphone operating system market.

Google's intention to drive the competition out of the market is demonstrated by the conditional installation of apps and the discrimination against OEMs that create forked versions of the Android OS, which limits the opportunity for innovation and prevents new competitors from entering the market. As a result, Google's and Microsoft's activities established a precedent for foul behaviour that other organisations hoping to dominate their industry are likely to follow. In the future, legislators can use similar trends to spot additional businesses that might try to monopolise the market, stifle competition, and deny access to rivals who disagree with their terms.